

VOLUME I OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 18 2018

S.C. SUPREME COURT

Certiorari to Chesterfield County

Roger E. Henderson, Circuit Court Judge

MITCHELL RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002302

APPENDIX

TAYLOR D GILLIAM
Appellate Defender

ALAN WILSON
Attorney General

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

JOHNNY ELLIS JAMES, JR.
Assistant Attorney General
Attorney General Office
P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

PAGES 1-500

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED FEBRUARY 8, 9, 10, 15, 2011	1
SUPPLEMENTAL RECORD ON APPEAL	385
<u>ANDERS</u> BRIEF OF APPELLANT	393
SUPREME COURT ORDER DATED SEPTEMBER 5, 2013	417
BRIEF OF APPELLANT	419
BRIEF OF RESPONDENT	432
<u>STATE V. RIVERS</u> , 5296 (S.C. Ct. App. filed 2/11/15)	457
APPLICATION FOR POST-CONVICTION RELIEF	462
AMENDMENT TO APPLICATION FOR POST-CONVICTION RELIEF	471
RETURN.....	473
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JULY 17, 2017	480
MEMORANDUM OPPOSING POST-CONVICTION RELIEF	539
RESPONSE TO MEMORANDUM OPPOSING POST-CONVICTION RELIEF	545
ORDER OF DISMISSAL.....	547
INDICTMENT.....	558

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD } COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,
 PLAINTIFF,
 VS.
MITCHELL RIVERS,
 DEFENDANT }
TRANSCRIPT OF RECORD
2010-GS-13-1072

February 8th - 10th, 2011
Cheraw, South Carolina

B E F O R E :

THE HONORABLE PAUL M. BURCH, Judge, and a jury.

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

SUZANNE and ADAM FOARD, ASSISTANT SOLICITOR
Attorney for the State

MATTHEW SWILLEY and TIFFANY GIBSON
ASSISTANT PUBLIC DEFENDERS
Attorneys for the Defendant

HATTIE O. GORDON
Circuit Court Reporter

Transcribed by Pamela E. Green, Circuit Court Reporter

1	<u>I N D E X O F W I T N E S S E S</u>	
2	<u>WITNESSES</u>	<u>PAGE</u>
3		
4	Jury selection	8
5		
6	Motions	28
7	WAYNE JORDAN	
8	Direct examination by Sol. Mayes	29
9		
10	Attempted Guilty Plea	51
11		
12	WAYNE JORDAN	
13	Cross-examination by Mr. Swilley	56
14	Redirect examination by Sol. Mayes	62
15	JULIE DUFF	
16	Direct examination by Sol. Mayes	63
17	Cross-examination by Mr. Swilley	72
18	Redirect examination by Sol. Mayes	75
19	RICK CHARLES	
20	Direct examination by Sol. Mayes	77
21	Cross-examination by Mr. Swilley	80
22	Redirect examination by Sol. Mayes	83
23	Recross examination by Mr. Swilley	84
24		
25		

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	Opening by the Court	90
4	Opening by Solicitor Mayes	95
5	Opening by Mr. Swilley	99
6		
7	DENA OWEN	
8	Direct examination by Sol. Mayes	105
9	Cross-examination by Mr. Swilley	112
10	Redirect examination by Sol. Mayes	115
11	RICHARD CARNES	
12	Direct examination by Sol. Mayes	120
13	RON MARTIN	
14	Direct examination by Sol. Mayes	127
15	Cross-examination by Mr. Swilley	140
16	Redirect examination by Sol. Mayes	142
17	JANICE ROSS	
18	Direct examination by Sol. Mayes	143
19	Cross-examination by Mr. Swilley	159
20	Redirect examination by Sol. Mayes	171
21	Recross examination by Mr. Swilley	176
22	CLAY NICHOLS	
23	Direct examination by Sol. Mayes	177
24	Cross-examination by Mr. Swilley	186
25	Redirect examination by Sol. Mayes	187

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	WAYNE JORDAN	
4	Direct examination by Sol. Mayes	193
5	Cross-examination by Mr. Swilley	222
6	JULIE DUFF	
7	Direct examination by Sol. Mayes	231
8	Cross-examination by Mr. Swilley	242
9	RICK CHARLES	
10	Direct examination by Sol. Mayes	244
11	Cross-examination by Mr. Swilley	252
12	Redirect examination by Sol. Mayes	254
13		
14	Motions	255
15		
16	MITCHELL RIVERS	
17	Direct examination by Mr. Swilley	258
18	Cross-examination by Sol. Mayes	275
19	CHARLES RIVERS	
20	Direct examination by Mr. Swilley	289
21	Cross-examination by Sol. Mayes	292
22	TERRY JOHNSON	
23	Direct examination by Mr. Swilley	296
24	Cross-examination by Sol. Mayes	302
25		

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	T R	
4	Direct examination by Mr. Swilley	304
5	Cross-examination by Sol. Mayes	308
6	T C.	
7	Direct examination by Mr. Swilley	311
8	Cross-examination by Sol. Mayes	314
9	WAYNE JORDAN	
10	Direct examination by Sol. Mayes	315
11	Cross-examination by Mr. Swilley	319
12		
13	Certificate	323
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1	<u>E X H I B I T S</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
3	<u>State's Exhibits</u>			
4				
5	S-1	DVD		126
6	S-2	Photograph		136
7	S-3	Photograph		136
8	S-4	Photograph		136
9	S-5	Photograph		136
10	S-6	Photograph		136
11	S-7	Photograph		136
12	S-8	Photograph		136
13	S-9	Photograph		136
14	S-10	Photograph		136
15	S-11	Diagram		150
16	S-12	Diagram		150
17	S-13	Diagram		150
18	S-14	Voluntary Statement		198
19	S-15	Photograph		208
20	S-16	Photograph		208
21	S-17	Photograph		208
22	S-18	Photograph		208
23	S-19	Videotaped Statement		213
24	S-20	Voluntary Statement		219
25	S-21	Miranda Form		235

1	<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2		<u>Court's Exhibits</u>		
3				
4	C-1	Voluntary Statement	32	
5	C-2	Videotaped Statement	43	
6	C-3	Voluntary Statement	47	
7	C-4	Polygraph Consent Form	67	
8	C-5	Miranda Form		
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

P R O C E E D I N G S

1
2
3 THE COURT: All right. Solicitor, we got everybody
4 together?

5 SOLICITOR MAYES: Yes, Your Honor.

6 THE COURT: All right. We got all the petit jury back
7 and we ran over somewhat, but we're still in pretty good
8 shape.

9 Solicitor, if you'll call your case.

10 SOLICITOR MAYES: May it please the Court.

11 Your Honor, this is State of South Carolina versus
12 Mitchell Rivers. This indictment is for homicide by child
13 abuse.

14 THE COURT: Ladies and gentlemen of the petit jury
15 panel, if I could have your attention.

16 We're about to commence the trial of the case entitled
17 The State of South Carolina versus Mitchell Rivers charged
18 in the Bill of Indictment by the Grand Jury of Chesterfield
19 County with the offense of homicide by child abuse. The
20 defendant is present.

21 At this time, Mr. Rivers, I need you to stand and face
22 the jury cause I got to ask them some questions about
23 kinship.

24 (Defendant complies.)

25 THE COURT: Thank you, sir. You may be seated.

1 (Defendant complies.)

2 THE COURT: Now, as I go through these questions, if I
3 call any witness' name or any individual's name that the
4 jury needs to take a look at, I'm gonna ask you to stand and
5 face the jury where they can see you.

6 Are any members of the petit jury panel related by
7 blood or connected by marriage or have any business, social,
8 religious, or fraternal relationship with the defendant,
9 Mitchell Rivers, if so, we need you to stand at this time.

10 (No response.)

11 THE COURT: Are any members of the petit jury panel
12 related by blood or connected by marriage or have any
13 business, social, religious, or fraternal relationship with
14 any of the following individuals. It's going to take me a
15 while. So, please bear with me.

16 Sergeant Wayne Jordan.

17 Sergeant Michael Anderson.

18 Agent Rick Charles.

19 Sergeant Julie Duff.

20 I have the custodian of records of the Chesterfield
21 County Emergency Services.

22 Do we have the individual name of that potential
23 witness at this time?

24 I'm gonna have to leave that as a general question. If
25 you know anybody that works for the emergency services that,

1 in the records division over there, please respond to that
2 question or this question.
3 Richard Carnes.
4 (Juror responds.)
5 THE COURT: Yes, sir.
6 JUROR: I went to school with his son. I know him very
7 well.
8 THE COURT: And your name or number?
9 JUROR: Richard Gaddy.
10 THE COURT: Okay. Richard Gaddy.
11 okay. Angela Griffin.
12 THE CLERK: Just a minute, sir.
13 THE COURT: Oh, I'm sorry.
14 Yes, sir.
15 JUROR: I know Richard as a personal friend.
16 THE COURT: Dale Knight.
17 JUROR: Right.
18 THE COURT: Yes, sir.
19 JUROR: I know Richard Carnes as a fraternity brother.
20 THE COURT: And your name or number?
21 JUROR: I'm Juror Number 15, John Bodenheimer.
22 THE COURT: Thank you, Mr. Bodenheimer.
23 Mr. Knight, what was your number please?
24 JUROR: 79.
25 THE COURT: 79.

1 Toni Montgomery.

2 Doctor Janice Ross.

3 Doctor Agnes Schultz or Schultz.

4 Leslie Jackson.

5 Doctor Chris Davis.

6 Jane LaRoche.

7 Doctor Davis and Ms. LaRoche are with the general
8 hospital over in Cheraw.

9 Also Mary Fuller from over at the general hospital.

10 Doctor Paul Coward out of Hartsville.

11 Clay Nichols, Doctor Clay Nichols.

12 Registered Nurse Dan Allen from over at the hospital.

13 Walker Craig. Sorry. Got it reversed. Craig Walker
14 with the Coroner's Office.

15 Corner Kip Kizer.

16 Ronald Martin.

17 Ronald is with the EMS as well as Lee Wallace and
18 Marion Watson.

19 Renay -- I'm sorry.

20 JUROR: Lee Wallace is my cousin.

21 THE COURT: What degree?

22 JUROR: 102. Juror 102.

23 THE COURT: Okay. 102. First cousin, second, third?

24 JUROR: First cousin by marriage.

25 THE COURT: By marriage?

1 okay. Yes.

2 JUROR: Kip Kizer. I work at the Sheriff's
3 (inaudible).

4 THE COURT: And your number?

5 JUROR: I don't have a number.

6 THE COURT: Or your name.

7 JUROR: Anthony Freeman.

8 THE COURT: Yes, ma'am.

9 JUROR: Ellen Almond. I think the Number's 27. I work
10 at EMS for Richland County 9-1-1 as an accident (inaudible).

11 THE COURT: Thank you.

12 All right. I have Renay Sellers and Rob Laney with the
13 Department of Social Services commonly called DSS.

14 Also with DSS, Velman Holliman and Latisha Lee Melton.

15 Also Dena Owen.

16 Cynthia Cato and Robert Cato of Pageland.

17 Leslie Love, Anson County, North Carolina.

18 Kimberly Quick Rivers, Cheraw.

19 Willie Bell Rivers, Cheraw.

20 Charles Randall Rivers of Cheraw.

21 Twankita Rivers of Cheraw.

22 Jennifer Quick, Nancy Quick, Stephanie Ann Jackson, and
23 Tracey Chambers all of Cheraw.

24 Doctor David Harr. That's H-A-R-R.

25 Doctor Scott Wright.

1 Doctor John Murphy. All affiliated with Chesterfield
2 General.

3 Robert Josh White with the Sheriff's Department as well
4 as Brian Campbell.

5 Yes, sir.

6 JUROR: I seen them coming in and out of the county
7 shop where I work at.

8 THE COURT: And your name again?

9 JUROR: Richard Gaddy.

10 THE COURT: Thank you, Mr. Gaddy.

11 Michelle Adcock of Chesterfield and Rachel Boucom of
12 Chesterfield.

13 Yes.

14 JUROR: Yeah, I went to school with Wayne Wilkins back
15 in '93.

16 THE COURT: Your name please?

17 JUROR: Kevin Jefferies.

18 THE COURT: And you know Mr. Jordan?

19 JUROR: Yes, sir.

20 THE COURT: Okay. Thank you. You say you worked with
21 him or do you know him?

22 JUROR: I went to school with him.

23 THE COURT: You went to school with him. Okay. Thank
24 you.

25 I've got some potential expert witnesses here. I'll

1 run their names by you. If there's any relationship as to
2 what I just posed, please stand.

3 That's Toni Montgomery. That's spelled T-O-N-I.

4 Doctor Janice Ross.

5 Doctor Clay Nichols.

6 Doctor Ann, excuse me, Doctor Agnes Schultz or Schultz.
7 Leslie Jackson.

8 Doctor Chris Davis.

9 Doctor Jane LaRoche.

10 Doctor Paul Coward and/or Mary Fuller.

11 Doctor David Harr.

12 Doctor Scott Wright.

13 John Murphy, Doctor in Radiology.

14 That was repetitious to some of the others, but I think
15 there may of been some addition.

16 If so, please stand.

17 (No response.)

18 THE COURT: The indictment alleges that, in
19 Chesterfield County, on or about August the 7th, 2005, the
20 defendant did willfully and unlawfully commit the offense of
21 homicide by child abuse. The victim being Child , date
22 of birth, [REDACTED] the [REDACTED], [REDACTED].

23 Have any members of the petit jury panel formed or
24 expressed an opinion as to the guilt or innocence of the
25 defendant, if so, please stand, but don't make any comment.

1 (No response.)

2 THE COURT: Any members of the petit jury panel
3 conscious of any interest, any bias, or any prejudice for or
4 against the defendant, Mitchell Rivers, or the State of
5 South Carolina, if so, please stand, but don't make any
6 comment.

7 (No response.)

8 THE COURT: I'm gonna expand the question to all the
9 names that I have called, the defendant, Mitchell Rivers,
10 and all those potential witnesses I called, if you are a
11 close personal friend or acquaintance with any of those
12 individuals, we also need you to stand at this time.

13 JUROR: I'm close friends with Kip Kizer's wife.

14 THE COURT: All right.

15 JUROR: His wife specifically and I did graduate high
16 school with him.

17 THE COURT: Yeah, I need your name or number.

18 JUROR: I do not know my number, but my name is
19 Caroline Berry.

20 THE COURT: Thank you, Ms. Berry.

21 Yes.

22 JUROR: (Inaudible) a part time volunteer, work third,
23 just acquaintance.

24 THE COURT: All right.

25 JUROR: I know Kip Kizer, Juror Number 77, just an

1 acquaintance.

2 JUROR: 114. I'm friends with Lee Wallace. We went to
3 school together.

4 THE COURT: Went to school together.

5 Yes, sir.

6 JUROR: Juror 33, (inaudible) Kip Kizer.

7 THE COURT: All right. Thank you.

8 Mr. Gaddy.

9 JUROR: Acquaintance with Mr. (inaudible) and
10 Mr. Kizer.

11 THE COURT: Thank you, sir.

12 Yes, sir.

13 JUROR: I was a patient briefly of Doctor Nichols, 145.

14 THE COURT: 145.

15 Yes, ma'am.

16 JUROR: 102. I have been friends with Kip Kizer and
17 also know Doctor Davis.

18 THE COURT: Thank you.

19 JUROR: Doctor Davis was my doctor over in Cheraw and I
20 know the deputies.

21 THE COURT: Okay. And your number?

22 JUROR: Seven.

23 THE COURT: Number seven.

24 JUROR: Yes, sir.

25 JUROR: I'm Juror 108. I went to school with Kip

1 Kizer.

2 THE COURT: Thank you.

3 JUROR: Donald Sullivan, Number 129. Richard Barnes
4 and I, known him about all my life, and (inaudible) and done
5 some business with him.

6 THE COURT: All right. Now, that---

7 JUROR: Is that the same Richard?

8 THE COURT: That would be the Richard we have here's
9 father.

10 Now, all of you that have responded to those previous
11 questions, because of whatever that relationship may be,
12 whether it is distant cousin, cousin by marriage,
13 friendship, religious, whatever, if you are convinced or you
14 feel that you can not give both the state and the defendant
15 a fair and impartial trial because of that relationship,
16 whatever it may be, if you feel that you can not give both
17 the state and the defendant a fair and impartial trial, I
18 need you to stand at this time, but don't make any comment.

19 (No response.)

20 THE COURT: We'll move on.

21 Do I have any member of the panel that is ever been
22 investigated for or charged with an incident involving any
23 child abuse or neglect?

24 JUROR: I'm a dental hygienist and I have been in -- I
25 have talked with some people at DSS about neglect cases.

1 THE COURT: Okay. And your number again?

2 JUROR: 102.

3 THE COURT: Anybody on the panel presently represented
4 or represented in the past by the Solicitor's Office,
5 anybody at the Solicitor's Office or the Solicitor's Office,
6 or anybody with the Public Defender's Office, if so, we need
7 you to stand at this time.

8 (No response.)

9 THE COURT: Does any member of the panel have any
10 religious or moral belief which you, would cause you or
11 prevent you from passing judgment on another person as far
12 as you being a member of the jury?

13 (No response.)

14 THE COURT: Have anybody or has anybody on the jury had
15 a child to pass away or die before they reached the age of
16 ten?

17 (Juror responds.)

18 THE COURT: Yes, sir.

19 JUROR: I had a son that had passed away at three
20 months old.

21 THE COURT: Three months?

22 JUROR: Yes, sir.

23 THE COURT: And your number or name again please?

24 JUROR: Andy McKinnon.

25 THE COURT: Thank you, Mr. McKinnon.

1 Anybody on the panel a member of any organization that
2 advocates the prevention or eradication of child abuse?

3 For example, Child Abuse Prevention Organization, Child
4 Abuse Prevention Center, The Family Place, or Prevent Child
5 Abuse America, for examples.

6 (No response.)

7 THE COURT: Anybody every donated any time or money to
8 such an organization?

9 (No response.)

10 THE COURT: Have you had any family member or very
11 close personal friend that died and allegations were made
12 that the death was caused at someone else's fault?

13 (No response.)

14 THE COURT: Does anyone on the panel have any feeling
15 or beliefs against biracial marriage or people who are in a
16 biracial marriage or relationship whereby you feel like you
17 could affect your jury service?

18 (No response.)

19 THE COURT: Do I have anybody on the panel who contends
20 that they were physically abused or assaulted as, as a
21 child?

22 Now, we're not talking about just regular discipline if
23 your parents spanked you or anything. We're talking about
24 what you would consider that it was a criminal assault or a
25 physical abuse.

1 (No response.)

2 THE COURT: I ask you now, can each member of the petit
3 jury panel give the State and the defendant a fair and
4 impartial trial, if not, please stand, but don't make any
5 comment.

6 (No response.)

7 THE COURT: Any further inquiry from the State?

8 SOLICITOR MAYES: Yes, sir, Your Honor.

9 May we approach?

10 (WHEREUPON, a bench conference was held out of the
11 hearing of the jury at this time.)

12 THE COURT: I apologize. I left out a question we've
13 got to cover here.

14 (WHEREUPON, a bench conference was held out of the
15 hearing of the jury at this time.)

16 THE COURT: I'm sorry. I left off a list of names. I
17 apologize for that.

18 If these, any of these witnesses are present we need
19 them to stand up.

20 Same question that I posed a few minutes ago, if you
21 are related by blood or by marriage or have any business,
22 social, religious, or fraternal relationship with any of
23 these individuals or they're close friends of yours, we need
24 you to go ahead and stand.

25 That's Kimberly Quick Rivers.

1 Jennifer Quick.
2 I think I've already covered Doctor Scott, hadn't I?
3 Doctor Agnes Scott, in case I'm wrong.
4 Charles Rivers, Senior as well as Charles Rivers,
5 Junior.
6 Frederick Rivers.
7 Sarah Leakes.
8 Nancy Quick.
9 Johnny Campbell.
10 Bob Lyons. That's spelled L-Y-O-N-S.
11 Angela Pratt.
12 Bobby Rivers.
13 Velma Hollimon.
14 Jane Peguese.
15 Brandy Covington.
16 Fred Rivers.
17 Michelle Adcock.
18 Michelle Peguese.
19 Donna Loins.
20 Randall Watson.
21 Stephanie Jackson.
22 Tracey Chambers.
23 Is that T.R. [REDACTED]?
24 It's not spelled like the first one I had.
25 MR. SWILLEY: It's T.R. [REDACTED], Your Honor. T.R. [REDACTED].

1 THE COURT: I mispronounced that earlier.

2 T.R. [REDACTED].

3 Yes.

4 JUROR: I know his father, Charles River. She does
5 business where I work at now.

6 THE COURT: And your number?

7 JUROR: 121.

8 THE COURT: Thank you.

9 SOLICITOR MAYES: Beg the Court's indulgence, who was
10 that that she knew?

11 THE COURT: 21.

12 JUROR: 21, yes, sir.

13 THE COURT: 21.

14 SOLICITOR MAYES: Who did she know?

15 THE COURT: You said you knew Charles Rivers?

16 JUROR: Yes, sir, his father.

17 THE COURT: His father.

18 Okay. Yes.

19 JUROR: Vanessa Hancock, 112. I know several of the
20 people on the list. I know who they are. I saw it on the
21 news.

22 THE COURT: Okay. Thank you.

23 Ronald Martin.

24 Lee Wallace.

25 Marion Watson.

1 Sarah Reihl.

2 Stacy Reihl.

3 Terry Johnson.

4 Russ Reihl.

5 If I'm mispronouncing any of these names y'all correct
6 me now.

7 Terry Johnson.

8 Edmund Rodriques.

9 Keyiana, is that correct, three syllables?

10 JUROR: Lee Wallace is my cousin by marriage, 102.

11 THE COURT: 102.

12 JUROR: I know Lee Wallace from First Health.

13 SOLICITOR MAYES: What did she say?

14 THE COURT: She knows Lee Wallace from First Health.

15 JUROR: 143, and I'm friends with Lee Wallace.

16 JUROR: 137, my wife is related to the Reihl's, niece.

17 THE COURT: Which one of the Reihl's?

18 JUROR: I think you said Stacy.

19 THE COURT: Okay. And that's your wife is related to
20 them?

21 JUROR: Yes, my wife's side.

22 THE COURT: And your number?

23 JUROR: 137.

24 THE COURT: Okay.

25 JUROR: Number 15 and I know Ronald Martin. I'm a

1 member of (inaudible) as well. I know him through that.

2 THE COURT: Last name was Keyiana Rivers.

3 The same question again, the fact that some of you may
4 have relationship or know these individuals, once again, if
5 you feel that you can not be both fair to the defendant and
6 the State of South Carolina, that is you can not be a fair
7 and impartial juror in this case, you need to stand at this
8 time, but don't make any comment.

9 (No response.)

10 THE COURT: All right. What else?

11 SOLICITOR FOARD: Nothing else, Your Honor.

12 MR. SWILLEY: Nothing else, Your Honor.

13 THE COURT: All right. Let's just see. I'm assuming
14 this is five and ten.

15 SOLICITOR MAYES: Five and five, Your Honor.

16 THE COURT: Five and five.

17 Everybody on the same wave length, five and five?

18 MR. SWILLEY: I believe that's correct, Your Honor.

19 THE COURT: I don't have the statute right here in
20 front of me. If there's any question we'll look at it
21 again. But -- all right. Everybody's in agreement?

22 MR. SWILLEY: Can you double check real quick, the
23 statute?

24 THE COURT: I will.

25 (Pause.)

1 THE COURT: All right. Counsel, while we're looking
2 that up, do we -- do you agree to waive capsules and we put
3 them in the bin?

4 SOLICITOR MAYES: State waives, Your Honor.

5 MR. SWILLEY: I'm sorry. What was that, judge?

6 THE COURT: Do you waive them putting it in the
7 individual capsules, if we just put the forms in the bin?

8 MR. SWILLEY: I got no quarrel with that, Your Honor.

9 THE COURT: Oaky. Thank you.

10 (Pause.)

11 THE COURT: In 2009, there's no change in that. So,
12 it's five and five.

13 All right. As your name is called by Madam Clerk, we
14 need you to come forward right here to this microphone, turn
15 and face both tables where they can get a good look at you.
16 Please bring your personal belongings with you.

17 Everybody ready?

18 MR. SWILLEY: Very briefly, Your Honor, may we
19 approach?

20 (WHEREUPON, the following takes place out of the
21 hearing of the jury.)

22 MR. SWILLEY: I'd argue that the statute for peremptory
23 strikes enumerate specific crimes that would justify ten
24 strikes for the defense and five strikes for the State.
25 This offense being a homicide by child abuse, I would argue

1 that's akin to a manslaughter charge and would, therefore,
2 justify ten strikes by the defense.

3 THE COURT: Anything from the State?

4 SOLICITOR MAYES: We would oppose that, Your Honor.
5 The statute has not been amended.

6 THE COURT: Yeah, this is come up before and you have
7 to give it to the plain language of the statute. So,
8 therefore, I have to deny your motion.

9 MR. SWILLEY: Thank you.

10 (WHEREUPON, the following takes place within the
11 hearing of the entire jury panel.)

12 CLERK: Five and five?

13 THE COURT: Yes.

14 (WHEREUPON, a jury panel was selected at this time.)

15 THE COURT: All right. Any motions at this time
16 concerning jury selection?

17 SOLICITOR MAYES: Nothing from the State, Your Honor.

18 MR. SWILLEY: Beg the Court's indulgence.

19 (Pause.)

20 MR. SWILLEY: There is not, Your Honor.

21 THE COURT: Okay. Thank you, counsel.

22 I'm gonna need you to approach, all counsel.

23 (WHEREUPON, a bench conference was held out of the
24 hearing of the jury at this time.)

25 THE COURT: We're going to release y'all at this time,

1 but ask you to be back here -- are they going to need to
2 report here or can they report out there?

3 CLERK: They should be able to report out there. They
4 should be able to.

5 THE COURT: All right. The bailiff staff will instruct
6 you which way to go. Hopefully this room, the bigger room
7 will be available for you. Don't know if I ever got it out,
8 but we need you here at eleven o'clock in the morning.

9 okay. Don't discuss this case with anyone. Should
10 anybody try to approach you and discuss this case, don't
11 talk with them or communicate with them. Immediately notify
12 law enforcement of any such contact. Now, if it happens
13 during court hours, you let me know.

14 That communication is wide open now a days. So, it
15 could be by phone, it could be, in person, internet,
16 whatever. Should anybody try that, do not communicate with
17 them. And, as I said, notify the authorities.

18 All right. Until we get this case completed, I'm gonna
19 ask you not to watch or read any local news. Now, the press
20 here does an excellent job in coverage. But I have to
21 protect the record and to protect the law. And sometimes
22 the press may report something that would not be permissible
23 under our rules of evidence, and that can cause a conflict.
24 So, don't mind you watching the national news. But just for
25 the next few days, until we can get this case completed,

1 please avoid any local press coverage.

2 Don't even talk to your family members about this.

3 This matter's going to be decided by 12 of you, and we don't
4 need any outside influence fowling the record up. Okay. I
5 can't, I can't allow any researching going on. So, I don't
6 want you bringing any personal computers. The bailiff staff
7 knows how to take care of the telephones, to secure them so
8 we won't have any, any problems there.

9 Now, we're not telling you you can't bring a cell, but
10 during the operation of the court, you need to keep them off
11 or either on vibrate to where you can return a call later.

12 Anybody got any questions?

13 (No response.)

14 THE COURT: All right. we will see you tomorrow around
15 eleven o'clock. Everybody else remain seated while the jury
16 departs.

17 We will put you under oath in the morning. we'll take
18 care of that.

19 (WHEREUPON, the following takes place outside the
20 presence of the jury.)

21 THE COURT: What y'all want to start with?

22 SOLICITOR MAYES: Your Honor, we do have witnesses here
23 on the Jackson v. Denno.

24 THE COURT: All right.

25 SOLICITOR MAYES: One witness from Florence and the

Wayne Jordan - Direct examination
By Solicitor Mayes

1 other I believe from Horry County. We're prepared to start
2 with Investigator Wayne Jordan.

3 THE COURT: Come around and be sworn.

4 WAYNE JORDAN, after being duly sworn,
5 testified as follows:

6 DIRECT EXAMINATION

7 BY SOLICITOR MAYES:

8 Q Investigator Jordan, where are you employed?

9 A I'm currently employed with Chesterfield County
10 Sheriff's Office.

11 Q And in what capacity?

12 A I'm a sergeant -- correction. Staff sergeant in the
13 criminal investigation unit.

14 Q All right. And have you had the opportunity to be
15 involved in the investigation of the case of State versus
16 Mitchell Rivers?

17 A Yes, I'm the primary investigator.

18 Q And do have with you a copy of your file materials
19 today?

20 A Yes, I do.

21 Q All right. Can you take us back to when you were first
22 involved in this investigation and tell us what led to your
23 involvement?

24 A Yes, ma'am, back on the 7th, 7th of August, 2005,
25 around, around I'd say 6:30, seven o'clock in the morning, I

Wayne Jordan - Direct examination
By Solicitor Mayes

1 was the criminal investigator on call for the week, and I
2 was called to Chesterfield General Hospital in reference to
3 an infant that had been; had passed away.

4 Q All right. And where did you first have contact with
5 the suspect in this case, Mitchell Rivers?

6 A He was at Chesterfield General Hospital with his, with
7 his wife, which would have been Kimberly Rivers.

8 Q All right. And I'm gonna ask you if there was a child
9 involved by the name of Child ?

10 A There was, a baby boy.

11 Q All right. And approximately four months of age?

12 A Or in that ballpark, yes, ma'am.

13 Q And what was the child's physical condition when you
14 arrived at the hospital or were notified?

15 A He, he had expired.

16 Q All right. And how did this become a criminal
17 investigation?

18 A All infants are, are -- all, all children under the age
19 of 17 in the State of South Carolina that are, are, you
20 know, die in the state, there is a criminal investigation
21 take place, will take place upon the facts of why, how, and
22 that's how I was involved as an investigator on-call.

23 Q All right. And ultimately did the child receive an
24 autopsy?

25 A Yes, ma'am, he -- the child was sent to Newberry, South

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Carolina under the direction of the coroner and myself where
2 an autopsy was performed.

3 Q All right. And in terms of the autopsy, how did that
4 relate to the criminal investigation?

5 Can you tell us what was determined to be the manner of
6 death?

7 A The manner of death was asphyxiation.

8 Q All right. And in terms of the classification as to
9 whether it was determined a homicide or non-homicide?

10 A Homicide of the victim.

11 Q Now, when you first had contact with the defendant,
12 Mitchell Rivers, what, what, if anything, led to you
13 obtaining a statement or information from him?

14 A Well, it was common knowledge or, or our, our common
15 policy at the Sheriff's Office would be take a, take a
16 statement from everybody that was in the household, and, of
17 course, Mr. Rivers, along with his wife, being in the room,
18 after getting a brief synopsis from them of what went on,
19 them being in the room, I asked them if they could write me
20 a detailed statement of the facts of the case and what
21 happened during the, during the evening, how they found the
22 child, and on. And he -- Mr. Rivers did, indeed offer me,
23 give me a written statement.

24 Q All right. And what was your understanding of his
25 relationship to the child?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A My understanding is he was, he was in the or had
2 adopted the child.

3 Q Foster care plan---

4 A Yes, that's correct.

5 Q ---is that correct?

6 A Foster care partner.

7 Q All right. Now, start with your first contact with him
8 that led to obtaining a written statement on or about
9 August 7th of 2005.

10 Do you have a copy of that statement with you today?

11 A I do have the original statement.

12 Q All right. And that's from August 7th, 2005?

13 A Yes, ma'am, it is.

14 Q And how did you go about advising Mr. Rivers of his
15 rights?

16 A Well, at that, at that time he was, he was not a
17 suspect. At that time he was just a witness, a lay witness
18 at the time due to the fact that we had no knowledge of the
19 suffocation and the manner of death other than it being a,
20 other than it being a death investigation. It was after
21 the, after the autopsy came back that him and his wife
22 became suspects in this case.

23 Q All right.

24 A So, at that -- at the time of the first original
25 statement, the first statement on the 7th, he was not under

Wayne Jordan - Direct examination
By Solicitor Mayes

1 arrest. He was not under Miranda.

2 Q All right. And specifically what rights was he advised
3 of or do you, do you have a form that you use?

4 A I did have him fill out a voluntary form; yes, ma'am.

5 Q okay. And that -- when you said voluntary, are you
6 referring to a voluntary statement?

7 A Yes, ma'am.

8 Q All right. And do you have that document with you
9 today?

10 A Yes; ma'am, I do.

11 Q And you recognize that document how?

12 A As it being in my case file. Also my name being on
13 there as well as this is a standard form for the Sheriff's
14 office.

15 Q All right. And does it bear your signature?

16 A It does.

17 Q All right. And what is the date and time of the
18 voluntary statement?

19 A He gave this statement on the 7th of August 2005 at
20 10:02 in the morning.

21 SOLICITOR MAYES: All right. Your Honor, at this time
22 we would have the voluntary statement identified by
23 Investigator Jordan marked for, marked as a Court's Exhibit.

24 THE COURT: They may be marked as an exhibit.

25 (WHEREUPON, the voluntary statement was marked as

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Court's Exhibit No. 1 for identification purposes only at
2 this time.)

3 Q (Inaudible) statement of whom?

4 A They are the writings of Mr. Mitchell Rivers.

5 Q All right. And I want to ask you to start at the
6 beginning of the voluntary statement form, and, and read out
7 loud to the Court and into the record exactly what was
8 provided to law enforcement on that date, August 7th, 2005.

9 A It was -- the date, 8/7/2005, place CGER, which is
10 Chesterfield General ER. Time start was 09:50 a.m. I, the
11 undersigned, Mitchell Charles Rivers, am 29 years of age,
12 have been, have been born on [REDACTED] at South Carolina. I
13 now live at [REDACTED] [REDACTED] [REDACTED] [REDACTED], Cheraw. Has his phone
14 number [REDACTED], correction, [REDACTED]. I have been duly warned
15 and advised by Investigator A.W. Jordan, a person who has
16 identified himself as CCSO, which stands for Chesterfield
17 County Sheriff's Office, that I, I do, I do not have to make
18 a statement at all nor answer any questions or do anything
19 that might tend to go against me or incriminate me in a
20 manner, and that any statement I make can and will be used
21 against me on the trial or trials for the offense or
22 offenses concerning events of the following statements as
23 herein made.

24 I was also warned and advised of my rights to the
25 advice and presence of a lawyer of my own choosing before or

Wayne Jordan - Direct examination
By Solicitor Mayes

1 at any time during my questioning, questioning or
2 statements. I'm making a note that if I am not able to hire
3 a lawyer, I may request and have a lawyer appointed for me
4 by the proper authority without cost or charge to me.

5 I do not want to talk with a lawyer, and, hereby,
6 knowing and purposely waive my right to the advice or
7 presence of a lawyer before and during any questioning or at
8 any time before or while I voluntarily make the statement,
9 the following statement to the aforesaid person knowingly
10 that anything I say can and will be used against me in a
11 court or courts of law.

12 I declare that the following voluntary statement is
13 made to the aforesaid person of my own free will, without
14 promise of hope or reward, without fear or threat of
15 physical harm, without coercion, favor, or offer of favor,
16 without leniency or offer of leniency by any person or
17 persons whomsoever, and then a statement in his handwriting
18 is I, Mitchell Rivers, tell you what happened Saturday.

19 I got, went to Babcock and got a riding lawn mower and
20 me and my brother, Bobby, started cutting both parts of the
21 yard. Around 8:00 that night, Nancy and Jennifer came over
22 there and was talking to Kim and went to see the baby. When
23 they left, Kim said she was going to give him a bath and put
24 an outfit on him. So, he took -- so, he took his bath and
25 me and my baby and Kim played the game until 12:00AM because

Wayne Jordan - Direct examination
By Solicitor Mayes

1 the baby went to sleep about 10:00. So, we put him in the
2 bed.

3 This morning, around 6:00AM, the baby started crying.
4 So, I changed his diaper because he was wet and gave him a
5 bottle. Then I burped him and laid him on his back. So, I
6 went outside this morning because it was cool and I decided
7 to finish cleaning the yard.

8 So, my mother asked me where I was going and that's
9 when I was going to do. When I came back in the house about
10 6:45 and 6:50AM Kim hollered and said the baby's not
11 breathing. So, I told her to call 9-1-1 to get an ambulance
12 and the baby on the phone, and the lady on the phone talked
13 me through CPR until the ambulance came, and then they came
14 and took him to the hospital. Then the doctor told me they
15 tried to bring him back, but my baby boy just didn't make
16 it.

17 It has a line through the last two parts of the, of the
18 statement and the bottom says I have read each page of this
19 statement consisting of one page. Each page of which bears
20 my signature and corrections, if any, bear my initials, and
21 I certify the facts contained herein are true and correct.
22 I further certify that I made no, I made no requests for
23 advice or presence of a lawyer before/during any part of
24 this statement nor any time before it was finished did I
25 request that this statement be stopped. I also declare that

Wayne Jordan - Direct examination
By Solicitor Mayes

1 I was not told or prompted what to say in this statement.

2 This statement was completed at 10:02AM on the 7th day
3 of August, 2005. Witnessed was A.W. Jordan, which is me,
4 Anthony Wayne Jordan, and the person giving voluntary
5 statement, Mitchell C. Rivers:

6 Q All right. And does that complete the content of the
7 voluntary statement on August 7th?

8 A Yes.

9 Q All right. And when Mitchell, Mitchell Rivers was
10 filling out the voluntary statement and when you were
11 working with him, did he appear, appear to understand his
12 rights concerning giving or not giving a voluntary
13 statement?

14 A Yes.

15 Q Did he appear to be coherent?

16 A Yes, I mean he was, he was upset, of course, over his,
17 his, his, the baby being deceased, but he understood exactly
18 what was going on.

19 Q And based upon your observations, did Mitchell Rivers
20 statement appear to be freely and voluntarily given?

21 A He was by himself in the emergency room operating,
22 emergency room by himself, and I only issued this statement
23 to him. I walked away from him, let him give his statement,
24 and was notified that the statement was complete and I
25 walked back to his room.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q All right. And was he in custody at that point in
2 time?

3 A No, he was not.

4 Q All right. And ultimately did he leave the emergency
5 room with law enforcement or did he leave on his own?

6 A Left on his own.

7 Q Now, when did you next have involvement with Mitchell
8 Rivers pursuant to this investigation?

9 A The next time I -- we, we never interacted during the
10 course of the investigation. At no time did I ever arrest
11 him or place him under arrest or take him into my custody.
12 After speaking with -- after having investigations with
13 Special Agent Mike Anderson with the South Carolina Law
14 Enforcement Division, we decided to go ahead and offer the
15 polygraph test due to some, some different things coming up,
16 finding out what we knew through the autopsy and getting
17 several different statements from the family. We offered
18 Mr. Rivers a polygraph test and took him to Florence to the
19 regional office in Florence.

20 Q All right. And ultimately was he given a polygraph
21 examination?

22 A Yes, ma'am, he was.

23 Q And do you know the date of that?

24 A The polygraph for Mr. Rivers was given on 9/15/2005.

25 Q All right. And who was present for the polygraph

Wayne Jordan - Direct examination
By Solicitor Mayes

1 examination to be administered?

2 A For the exam, who gave him the exam?

3 Q Right.

4 A That would have been Rick Charles. He's an agent with
5 South Carolina Law Enforcement, Enforcement Division. Also
6 Julie Duff. She's an investigator with Florence City Police
7 Department.

8 Q All right. Were you present or in proximity where you
9 could be notified concerning the results of the polygraph?

10 A Yes, I transported him to Florence to the regional
11 office over in Effingham, and met with Agent Mike Anderson
12 and the two polygraph examiners, and basically turned
13 Mr. Rivers over to the two polygraph agents and waited their
14 results of the test.

15 Q Now, had he been placed under arrest at this point in
16 time?

17 Do you know?

18 A No, he was not.

19 Q Had he agreed to participate in a polygraph
20 examination?

21 A Yes, we told him several days before the polygraph on
22 the date and time of the polygraph and actually, actually I
23 went to his residence, picked him up from [REDACTED],
24 and I believe Agent Anderson was with me when we picked him
25 up and we carried him to Florence.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q All right. So, the polygraph examination wasn't, was
2 administered in Florence by Agent Rick Charles and then also
3 by Julie Duff, who was affiliated with the State Law
4 Enforcement Division at the time?

5 A Yes, ma'am.

6 Q And where would you have been following the polygraph
7 exam?

8 A After I basically released him over or introduced him
9 to Agent Charles and Ms. Duff, I basically just stood in,
10 sat in the office right there, their office, at their
11 regional office. I was, you know, I was probably two,
12 three, maybe four rooms away from him. But I was never in
13 sight contact with him.

14 Q At any point on that day, which would have been
15 September 15, 2005, did it come to your attention that Mr.
16 Rivers may be making a second statement or an additional
17 statement?

18 A Yes.

19 Q How did that come to your attention?

20 A Agent Charles came out and advised me of the polygraph,
21 which, which it showed deception to the polygraph, and that
22 he verbally gave a confession to them, and we brought him
23 into the conference room, which is, if, if I recall
24 correctly, they're -- because that's not my office. So, I'm
25 going to have to recall I believe. Brought him into a --

Wayne Jordan - Direct examination
By Solicitor Mayes

1 brought him out of the interview room, brought him into a
2 big, bigger room where there was a big conference table, and
3 we sat him down, and at that time he was read his rights
4 again, and interviewed a second time where he gave us a full
5 confession, which was placed on videotape.

6 Q All right. And that particular videotape was set up or
7 being run for what purpose?

8 A For the statement and for the, for the case file.

9 Q All right. And who was present during the video taping
10 of the, this additional statement for Mitchell Rivers on
11 September 15th?

12 A Myself and Special Agent Mike Anderson and I'm pretty
13 sure that Agent Charles and Investigator Duff was in the, in
14 the interview as well.

15 Q Now, prior to or, or at any point on, on September 15,
16 was he advised of his rights?

17 A Prior to the 15th?

18 Q Or on the 15th.

19 A Or on the 15th, yes, ma'am, he was.

20 Q How so?

21 A At the beginning when Agent, Agent, I'm sorry,
22 Investigator Duff read him his rights prior to the
23 polygraph, which I have a copy of.

24 Q Okay. And you are aware of that procedure, that being
25 part of their procedure as well?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A Yes, ma'am.

2 Q All right. And during the course of the videotaped
3 statement, did Mr. Rivers ever advise you that he did not
4 want to participate in the statement?

5 A To my knowledge, no, ma'am.

6 Q Did he ever advise you that he wanted to stop the
7 statement and request an attorney?

8 A No, ma'am.

9 Q Did you say or do anything to coerce a statement from
10 Mitchell Rivers?

11 A No, ma'am, I didn't.

12 Q Was he threatened in any way?

13 A No, ma'am, he was not.

14 Q Was he given any hope or promise or reward?

15 A No, ma'am, he was not.

16 Q And to the best of your knowledge, was his statement,
17 participation in the videotaped statement on September 15th
18 freely and voluntarily given?

19 A Yes, ma'am, it was.

20 Q How, how did you maintain a copy of that videotaped
21 statement?

22 A After, after the statement was taken, I placed it into
23 evidence, which it stayed until the Rule 5 was given out
24 where I made personal -- I made copies of them and handed
25 them up.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q And is that the same videotaped statement or DVD
2 recorded statement that you have present in court today?

3 A I have not seen that one. Yes, ma'am, I believe it's
4 gonna be the same one.

5 Q Are you aware of whether or not he made copies of that
6 statement?

7 A Yes, ma'am. I'm not -- yes, ma'am, yes, ma'am, yes,
8 ma'am.

9 SOLICITOR MAYES: Beg the Court's indulgence.
10 (Pause.)

11 A DVD copies were made, yes, ma'am.

12 SOLICITOR MAYES: Your Honor, we would have the DVD
13 marked as a Court Exhibit and, for practical purposes, we
14 can mark the original and I believe a DVD copy will play.

15 (WHEREUPON, the DVD was marked as Court's Exhibit No. 2
16 for identification purposes only and published to the Court
17 at this time.)

18 Q Investigator Jordan, when you stated before that you
19 had been notified that he gave a confession, what were you
20 referring to?

21 A That he just told the polygraph examiners that -- he
22 just admitted to the polygraph examiners that he had done
23 something wrong.

24 Q All right. Regarding the asphyxiation?

25 A Yes.

Wayne Jordan - Direct examination
By Solicitor Mayes

- 1 Q Now, were you aware of other injuries to the child
- 2 which were found at autopsy?
- 3 A I was aware of them, yes, ma'am.
- 4 Q And those would be head injury such as red contusions?
- 5 A That's correct.
- 6 Q And did he make any admissions during the course of
- 7 that statement acknowledging the red contusions underneath
- 8 his scalp?
- 9 A I don't recall that.
- 10 Q Okay.
- 11 A I do not recall that.
- 12 Q Now, do you have an opportunity to see him after the
- 13 videotaped statement?
- 14 A Yes I went ahead and transported him back to his
- 15 residence, and on the 19th myself and, and Agent Anderson
- 16 spoke with the solicitor, which was Jay Hodge at the time,
- 17 and told them the evidence that we had, and he went ahead --
- 18 we were advised at that time to go ahead and issue an arrest
- 19 warrant for child abuse.
- 20 Q All right.
- 21 A Homicide by child abuse.
- 22 Q And on what date was he arrested?
- 23 A That would be the 19th---
- 24 Q All right.
- 25 A ---of September.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q All right. And, so, he was served with a warrant at
2 that time?

3 A Yes, ma'am, he came and turned himself into the
4 Sheriff's Office.

5 Q All right. Now, did he also have the opportunity to
6 provide a follow-up statement after being served with the
7 arrest warrant?

8 A Well, I believe it was taken before the arrest warrant.
9 He came to the Sheriff's Office like we asked him to, and---

10 Q Do you have a copy of that statement?

11 A Yes, I do.

12 Q All right.

13 A And on the 19th, again, we used a voluntary statement
14 form. Again, the same one we used on the 7th, and at the
15 Sheriff's Office and he wrote us another statement, and the
16 statement basically said the same thing as the interview.

17 Q All right.

18 A That we just put it in writing.

19 Q And that -- according to the statement form, where was
20 that statement obtained?

21 A At the Sheriff's Office.

22 Q Okay. All right. What does it say on the form?

23 A You want me to read the whole form again?

24 Q Correct.

25 A Even the top cause it says the same thing at the top?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q All right. Go ahead.

2 A All right. The date is 9/19/2005, place, Chesterfield
3 County Courthouse. The time is 10:15AM. I, the undersigned,
4 Mitchell C. Rivers, am 28 years old, being born on [REDACTED] at
5 South Carolina. I now live at [REDACTED] [REDACTED] [REDACTED] [REDACTED], Cheraw,
6 South Carolina. The phone number's the same as the
7 [REDACTED].

8 I have been dully warned and advised by Investigator
9 A.W. Jordan, a person who's identified himself as CCSO,
10 which is the Chesterfield County Sheriff's Office, that I do
11 not have to make a statement at all nor answer any question
12 or do anything that might tend to go against me or
13 incriminate me in any manner, and that any statement I make
14 can and will be used against me on the trial or trials of
15 defense or defenses concerning which of the following
16 statements I have herein made.

17 Q All right. And did it go on to contain the same
18 language that you've previously---

19 A Yes, ma'am.

20 Q ---read into the record---

21 A Yes, ma'am.

22 Q ---explaining the right to an attorney?

23 A That's correct.

24 Q All right. And based upon your observations, did it
25 appear that Mitchell Rivers freely and voluntarily gave this

Wayne Jordan - Direct examination
By Solicitor Mayes

1 statement on September 19th?

2 A Yes, ma'am, he did.

3 Q And whose handwriting is this statement in?

4 A In his handwriting.

5 Q And whose signature is on the statement?

6 A His signature.

7 Q And do you recognize your signature anywhere?

8 A As a witness, yes, ma'am.

9 SOLICITOR MAYES: All right. Your Honor, at this time
10 we would offer this as Court's Exhibit 3, and I'm gonna ask
11 the officer to read the content of the statement into the
12 record.

13 (WHEREUPON, the statement was marked as Court's Exhibit
14 No. 3 for identification purposes only at this time.)

15 Q Please, please begin.

16 A Saturday about 8:00PM my wife, Kim, said she was going
17 to give the baby a bath and she did. So, she pat, she put
18 on an outfit with Daddy little helper on it. About 9:00PM
19 she, myself, and the baby went to the bed, brother's room
20 and played the game. Around about 10:00 the baby went to
21 sleep and we put him to bed.

22 So, my wife and me kept playing the game until about
23 12:00, close to 1:00. Then we decide to go to bed. That
24 night our baby had slept in the same bed and I laid him on
25 his side between my chest and my armpit and we both went to

Wayne Jordan - Direct examination
By Solicitor Mayes

1 sleep.

2 Around 6:00AM I woke and the baby was not breathing,
3 and I tried to, tried my hardest and hardest to do CPR that
4 morning to bring him back, and he was, and his color had
5 started coming back, and he had started breathing. So, I
6 laid him down in the play pen and went outside to clean off
7 the yard, came back inside and she said -- I came back
8 inside and she had said he stopped breathing.

9 So, I told her to call 9-1-1 to help me this time, and
10 I kept doing CPR like she said till the ambulance get there,
11 and that's when I -- did, did I know I was wrong for not
12 calling the 9-1-1 first when it happened, and I should had
13 told everybody, but I didn't know what to do. And Lord
14 knows I would never hurt my own son, and I'm sorry and I
15 regret it ever, every day. But, please, I beg all of you to
16 please help me.

17 Q All right. Does this also bear the signature of
18 Mitchell Rivers?

19 A 10:35AM the 19th of September of 2005 he signed it,
20 yes, ma'am.

21 Q And to the best of your recollection, was it after this
22 statement was obtained he was then served with the arrest
23 warrant?

24 A Yes, ma'am, he was taken over to the Sheriff's, to the
25 county jail.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q And at any point during his statement did he stop and
2 ask for an attorney?

3 A No, he didn't.

4 Q Did you threaten or coerce him in anyway in order to
5 obtain this statement?

6 A No, I didn't.

7 Q Did you promise him anything in exchange for giving a
8 statement to law enforcement

9 A No, I didn't.

10 Q To the best of your knowledge, did it appear to be
11 freely and voluntarily given?

12 A Yes, it was.

13 SOLICITOR MAYES: Beg the Court's indulgence.

14 (Pause.)

15 SOLICITOR MAYES: Nothing further of this witness at
16 this time, Your Honor.

17 MR. SWILLEY: Your Honor, I don't want to put you in a
18 bind. I'd like to take a little bit over 15 minutes. I
19 know it's 3:15 now. I feel like we need---

20 THE COURT: All right.

21 MR. SWILLEY: I need more time.

22 THE COURT: whatever you're most comfortable with and
23 that will be fine if we stop now if you don't have any
24 problem with it.

25 MR. SWILLEY: And just continue tomorrow morning with

1 this matter if that'd be all right?

2 THE COURT: All right. Anything before we stop for the
3 day?

4 SOLICITOR MAYES: Nothing from the State, Your Honor.

5 THE COURT: Okay. All right. The reason we're
6 stopping, if people are wondering why we're stopping a
7 little bit earlier today, there's a meeting of all the
8 judges from Columbia tonight.

9 Okay. Anything else, solicitor, to cover?

10 SOLICITOR FOARD: None, Your Honor.

11 THE COURT: All right. As I said, we'll be back at
12 nine o'clock. We got to work on those jail cases and we'll
13 work through a few of those. So, if y'all will be ready to
14 go just sort of on stand-by about 9:30.

15 MR. SWILLEY: Yes, Your Honor.

16 SOLICITOR FOARD: Sounds good.

17 THE COURT: Okay. And then the jury will be back at
18 11:00.

19 Okay. We're gonna stop for the day.

20 SOLICITOR FOARD: Thank you, Your Honor.

21

22 (WHEREUPON, Court was in recess for the evening.)

23

24

25

February 9th, 2011.

SOLICITOR MAYES: Your Honor, this is Indictment Number 2011-GS-13-0231, the State of South Carolina versus Mitchell Rivers. He is waiving presentment to the Grand Jury on this particular indictment for infliction of great bodily injury upon a child, and tenders a plea to this charge at this time.

THE COURT: Mr. Rivers?

DEFENDANT: Yes, sir.

THE COURT: I need your age.

DEFENDANT: Thirty-three.

THE COURT: And where do you reside now?

DEFENDANT: I think it was -- I had move to Rayford, North Carolina.

THE COURT: Rayford. That's where the House of Rayford is.

DEFENDANT: Yes, sir, I was working up there.

THE COURT: And I need your education.

DEFENDANT: Ninth grade.

THE COURT: Ninth?

DEFENDANT: Yes, sir.

THE COURT: And what was your occupation?

You said you worked in Rayford?

DEFENDANT: I was a live hanger.

1 THE COURT: And you're married?

2 DEFENDANT: Well, I was in thinking of getting a
3 divorce from Kimberly Quick.

4 THE COURT: And how many children do you have?

5 DEFENDANT: I don't have none, but one was on the way
6 by Michelle Adcock.

7 THE COURT: All right. Now, you have discussed the
8 original charges and the elements of that offense and
9 possible punishment as well as this plea that is now before
10 the Court to that offense and the elements and the possible
11 punishment all with your attorney?

12 DEFENDANT: Yes, sir.

13 THE COURT: And it is my understanding from the bench
14 conference that you have, all of you have discussed this
15 matter and you desire to enter a plea under North Carolina
16 versus Alford?

17 DEFENDANT: Yes, sir.

18 THE COURT: And is that correct?

19 DEFENDANT: Yes, sir.

20 THE COURT: You understand as a, by pleading under
21 Alford, that the State's gonna treat that as a conviction
22 and it will go on your criminal record?

23 DEFENDANT: Yes, sir, Your Honor.

24 THE COURT: Now, you correct me if I'm wrong. If
25 you're wanting to plead in some other fashion you, you tell

1 me. But that, that was my understanding from the bench,
2 bench conference, it was North Carolina versus Alford, and
3 let me talk with you a minute about that.

4 when you enter a plea of Alford, that's where you are
5 in a position that you're indicating to the court that you
6 feel like if you went to trial that the state would have
7 sufficient evidence to probably or possibly get a
8 conviction.

9 Is that, is that correct?

10 Is that your understanding?

11 DEFENDANT: Yes, sir.

12 THE COURT: And, of course, the other side of the
13 Alford issue here is you are pleading to a lesser offense
14 than what you were indicted for. Now, you were indicted for
15 homicide by child abuse, which could carry a life sentence
16 and a minimum of 20 years.

17 All y'all correct me if I misquote something cause
18 there's so many changes in the law going on now, and this
19 present charge that you're entering an Alford plea to is to
20 inflicting great bodily injury upon a child, and the maximum
21 that you could receive on that is up to 20 years. You need
22 to understand that's an 85 percent parole eligibility
23 situation or 85 percent service requirement under our
24 present law, and also it is a, indicated as a violent
25 offense.

1 Have you discussed that with counsel?

2 DEFENDANT: Yes, sir.

3 THE COURT: And that's your understanding?

4 DEFENDANT: Yes, sir.

5 THE COURT: Let me read the allegations to you now.

6 That Mitchell Rivers did, in Chesterfield, on or about
7 August the 7th, 2005, inflict great bodily injury upon a
8 child, ^{Child}, age four months, which created a
9 substantial risk of death and/or caused serious or permanent
10 disfigurement and/or protracted loss of impairment of the
11 function of any bodily member or organ.

12 That's what your understanding that you're entering,
13 entering this Alford plea to?

14 DEFENDANT: I didn't understand that.

15 MR. SWILLEY: Your Honor, beg the Court's indulgence
16 just one moment.

17 THE COURT: Mr. Rivers, I may of caused some confusion
18 in there. That's what the State's alleging, and I fully
19 understand that you're pleading under Alford. You're not
20 pleading guilty straight up. But that's what the allegation
21 in the indictment alleges.

22 Does that clarify it for you a little bit?

23 DEFENDANT: Yes, sir, that clarifies it, but I can't do
24 that. I'm sorry. I'm sorry. I can't do that. Over my
25 heart, now, I'm sorry, I can't, I can't plead guilty to

1 that. I'm sorry, Mr. Man. I'm, I'm just sorry. I can't do
2 that.

3 THE COURT: We don't want you to violate your conscious
4 in any way.

5 DEFENDANT: I just can't do that.

6 THE COURT: But don't let anybody else---

7 DEFENDANT: I know it.

8 THE COURT: ---pressure you or give you bad advice or
9 whatever on the other side of the coin too.

10 DEFENDANT: Yes, sir.

11 Do you understand?

12 DEFENDANT: Yes, sir, I understand that.

13 THE COURT: Because if that jury convicts you of that
14 original charge---

15 DEFENDANT: I know.

16 THE COURT: ---you understand that mandatory minimum
17 sentence.

18 DEFENDANT: I know.

19 THE COURT: The ones that are back their shaking their
20 head no, they're not the ones that are gonna have to serve a
21 life sentence possibly.

22 DEFENDANT: Yes, sir, I understand that.

23 THE COURT: All right. Mr. Bailiff, you'll have to
24 advise the jury to please be relaxed. We'll keep them
25 supplied and let's get on with this hearing we're in the

1 middle of.

2 And, Sheriff Jordan, on the stand, he's still under
3 oath, I'll remind you, sir. I believe it's Mr. Swilley's
4 witness at this time.

5 MR. SWILLEY: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. SWILLEY:

8 Q Morning, Investigator Jordan.

9 A Good morning.

10 Q Mr. Jordan, let me take you back to when you spoke with
11 Mr. Rivers at the hospital after the child had been brought
12 there. That -- can you tell me approximately where in the
13 hospital you were speaking to Mr. Rivers?

14 A He was in a -- if you go into the Chesterfield General
15 Hospital, there is a big waiting room where they have
16 divided that into two separate beds with a curtain
17 in-between, and he was sitting on the bed -- well, they call
18 it patient room number three. He was sitting on that bed
19 taking a, writing a statement out.

20 Q Okay. Well, where did you -- when you first initially
21 met him there, where, where were you?

22 A At that bed.

23 Q In that bed?

24 A Yes, sir.

25 Q Okay. So, it -- was it a spare room?

Wayne Jordan - Cross-examination
By Mr. Swilley

1 A well, it was -- I guess you call it a, a, an
2 observation room or an evaluation room. That's where you
3 would go to be evaluated by the ER doctor.

4 Q okay. How long after -- how, how much time had elapsed
5 from the point where, where he had known the child was
6 expired until the point where you spoke to him?

7 A I have no idea. They had already pronounced the child
8 before I even got on scene to the ER and I have no idea when
9 the doctors told him that the child had, had expired.

10 Q okay. When you're speaking to him at the time
11 initially, was he free to leave?

12 A Free to leave.

13 Q okay. Did you advise him of that?

14 A I never told him he could leave, but if he -- I never
15 told him he was under arrest. I never told him he had to
16 stay at the hospital.

17 Q okay. What would you have done if he had just
18 turned and walked away from you?

19 A I'd let him walk.

20 Q okay. On the initial statement that you gave him to
21 write, there's a small print that I think you read for Ms.
22 Mayes.

23 Did you read the small print to him?

24 A Yes.

25 Q You read---

Wayne Jordan - Cross-examination
By Mr. Swilley

- 1 A He read, he read -- I read that whole thing to him.
- 2 Q You read it verbatim?
- 3 A Yes. Yes, sir.
- 4 Q Okay. And you mentioned he was, he was upset at the
- 5 time?
- 6 A Of course he was upset, yes.
- 7 Q Okay. What did you tell him to -- what did you tell
- 8 him the reason for the statement was?
- 9 A That's protocol for our investigation when a child,
- 10 like I said, 17 and under dies in the State of South
- 11 Carolina, we have to do an investigation.
- 12 Q And you told him that?
- 13 A Yes.
- 14 Q Okay. Who -- do you remember who else was at the
- 15 hospital at the time that was around?
- 16 A It would of been Kimberly Quick, and she was writing
- 17 a statement as well.
- 18 Q Okay. Okay. Let me go -- let me, let me go back to --
- 19 after, after this statement, which Mr. Rivers wrote this
- 20 statement at the hospital, how much time had, did you say
- 21 had elapsed between then and when you gave him the polygraph
- 22 in Florence?
- 23 A If I can see -- he wrote the statement on the 7th. We
- 24 took him to Florence for a polygraph on 9/15/2009. So,
- 25 that -- almost a month, a little bit more than a month.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Q A month and a week?

2 A Yes.

3 Q Now, was there anything else besides the autopsy that
4 led you to want to give him a polygraph?

5 A The only thing -- that the statement that he gave us
6 didn't match up with what the autopsy said, with the
7 pictures that we had. None of that was clear. None of that
8 was consistent with his statement. His, his statement --
9 his initial statement given at the hospital and the pictures
10 that I've taken at the hospital and the autopsy, none of
11 that was consistent.

12 Q Okay. Did you have any communication with Mr. Rivers
13 in the time between the 7th of August of '05 and September
14 the 15th of 2005?

15 Did you have any, any interaction with him?

16 A The only, the only interaction I had was advising him
17 when the polygraph was being examined, was gonna take place,
18 and that I would pick him up, and asked him where I needed
19 to pick him up at other than, you know, I asked him if he
20 wanted to take a polygraph, and he said yes. I asked him --
21 and I told him when the polygraph was, and where we were
22 going, what time we needed to be there, and did he need a
23 ride. And if he did, where I needed to pick him up at.

24 Q So, you never discussed, discussed the substantive
25 matters of the case?

Wayne Jordan - Cross-examination
By Mr. Swilley

- 1 A No, sir, I didn't.
- 2 Q Okay. Now, you said that after it was indicated to
- 3 Mr. Rivers that he had, that there was deception indicated
- 4 by the polygraph, you said that he, he made a statement to
- 5 Mr. Charles and Ms. Duff?
- 6 A That's my understanding from those two, yes.
- 7 Q Do you know the -- I mean do you know what was said?
- 8 A The only thing that was said to me that, that after
- 9 they, you know, told him that the, there was deception noted
- 10 on the polygraph, he stated, I mean you can ask them,
- 11 they're here, I recall them telling me that he broke down
- 12 crying and said he did it, and then that's when they brought
- 13 him out to a big conference room area table and we took the
- 14 video statement.
- 15 Q Okay. Did you ever show him any autopsy photos before
- 16 he even spoke, when y'all took a statement in Florence?
- 17 A I do not recall that we did. I do not think we did.
- 18 Q Okay. Did you ever promise Mitchell that you would,
- 19 that you were gonna get him any kind of counseling for
- 20 anything or mention anything of that nature?
- 21 A Just told him we'd help him out. You know, I don't
- 22 remember calling and telling him I'm gonna get him
- 23 counseling.
- 24 Q You told him---
- 25 A I told him we, we would help him in anyway we could.

61
61

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Q Could you be more specific about how you told him you
2 were gonna help him or is that what you said?

3 A I told him we'd get you some help, we'd help you out.
4 I mean we tell everybody that.

5 Q Okay. Did he indicate to you what he took that to
6 mean?

7 A He didn't indicate to me. I mean I helped him out by
8 letting him go home that day after the polygraph.

9 Q Okay. And do you -- does your office use any kind of
10 form that the defendant initialed before he gives a written
11 statement as far as a Miranda waiver?

12 A We do have a form that we use.

13 Q That, that, that investigatee, I guess, would initial?

14 A We do have a form that we use, yes.

15 Q And did you use that with Mr. Rivers for the statement?

16 A No, cause it's on his statement form.

17 Q Okay. So, he didn't initial anything?

18 A He signed the bottom of his statement giving a true and
19 voluntary statement --

20 Q Okay.

21 A -- after his Miranda was read to him.

22 Q Okay.

23 A That's on the form.

24 Q Did you ever explain the rights to him besides your
25 recitation of him from the paper?

Wayne Jordan - Cross-examination
By Mr. Swilley

1 A As far as did I explain his rights to him?

2 Q Yeah, I mean besides what was written down on the, on
3 the form.

4 A No, it's black and white. I can't explain it no
5 different.

6 Q Okay.

7 A And, no, I didn't.

8 Q Okay. Did you ever, did you ever tell him to calm down
9 or, or get himself under control during any of these times?

10 A No, I didn't.

11 Q Okay. Did he ever give any kind of statement, both,
12 both verbal or, or written, when he wasn't sobbing
13 uncontrollably?

14 A He was never sobbing uncontrollably to me. I didn't
15 see that at all.

16 Q Okay. Thank you, Investigator Jordan. I have no
17 further questions.

18 REDIRECT EXAMINATION

19 BY SOLICITOR MAYES:

20 Q Investigator Jordan, based on all of your conversations
21 with Mitchell Rivers, did it ever appear to you that his
22 statements were not free and voluntarily---

23 A No.

24 SOLICITOR MAYES: Nothing further.

25 THE COURT: Anything else?

Julie Duff - Direct examination
By Solicitor Mayes

1 MR. SWILLEY: No recross, Your Honor.

2 THE COURT: You may step down. Thank you.

3 SOLICITOR MAYES: The State calls Julie Duff.

4 JULIE DUFF, having been first duly
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY SOLICITOR MAYES:

8 Q Ma'am, where are you currently employed?

9 A Florence Police Department.

10 Q All right.. And prior to being with the Florence Police
11 Department, were you employed by the State Law Enforcement
12 Division?

13 A No, I've always been employed with Florence Police
14 Department. In 2005 I went to certified American Polygraph
15 Association School, and the first state requirement is you
16 have to be, do an internship with a licensed certified
17 examiner. So, my agency sought out an internship split, and
18 I was assigned to Rick Charles.

19 Q Okay. So, you were doing an internship with the State
20 Law Enforcement Division?

21 A That's correct.

22 Q And were you working in that capacity in, on September
23 of 2005?

24 A Yes, I was.

25 Q All right. And you mentioned that you were working

Julie Duff - Direct examination
By Solicitor Mayes

1 with Agent Rick Charles?

2 A Yes, I was.

3 Q And is Agent Rick Charles a State Law Enforcement
4 Division agent?

5 A Yes, he is.

6 Q All right. And specifically what was involved with you
7 and Agent Charles in, in connection with giving polygraph
8 examinations?

9 A Some time that week he told me that we were going to be
10 in Florence on September 15th, that we would be running a
11 polygraph for another agent with SLED in Chesterfield. So,
12 that day when we got, you know, to the State Law Enforcement
13 Office at the, in that county, the PeeDee office, we met
14 with Agent Mike Anderson and Investigator Williamson.

15 Q All right. And what type of paperwork is involved in
16 going over the polygraph examination with a subject?

17 A We first advise him of his Miranda rights, and then at
18 the bottom of the form it's actually a waiver of rights and
19 he signed both of those. He also has to sign or, a consent
20 form stating that he has the right to refuse to take the
21 polygraph test, and if he agrees to take the polygraph test,
22 you have the right to stop the test at anytime. If you
23 agree to take the polygraph test, you have the right to
24 refuse to answer any of those questions.

25 He signed that. I signed that. We also do a very

Julie Duff - Direct examination
By Solicitor Mayes

1 basic information sheet just to gather some very basic
2 information about him, where he lives, where he works, date
3 of birth, so forth, and some various basic information about
4 his suitability are met to make sure he takes the polygraph
5 test.

6 Q All right. And specifically you mentioned that there
7 was a waiver of rights form.

8 Do you have a copy of that form with you today?

9 A Yes, I do.

10 Q What is the date on that form?

11 A September 15th, 2005.

12 Q And how do you recognize the form?

13 A It's in my handwriting and my signature on it and --.

14 Q All right. And does it also contain the signature of
15 Mitchell Rivers?

16 A Yes, it does.

17 Q Can you read into the record exactly what Mitchell
18 Rivers was advised of on September 15th, 2005?

19 A Yes, ma'am, I read these Miranda rights. Today's date
20 is September 15th, 2005. The time was 2:19PM. Before we
21 ask you any questions you must understand your rights. You
22 have the right to remain silent. Anything you say can and
23 will be used against you in a court of law. You have the
24 right to talk to a lawyer for advice before we ask you any
25 questions, and have him or her present with you during

Julie Duff - Direct examination
By Solicitor Mayes

1 questioning. If you have no money for lawyers fees, the
2 Court will appoint one to represent you without cost to you
3 if you wish. If you decide to answer questions now without
4 a lawyer present, you will still have the right to stop
5 answering questions at anytime to talk with a lawyer. I
6 read the statement of my rights, and I understand what my
7 rights are, and it's signed by him. And then it says waiver
8 of rights.

9 I am willing to make a statement and answer questions.
10 I do not want a lawyer at this time. I understand and know
11 what I'm doing. Any promises nor threats have been made to
12 me and neither pressure nor coercion of any kind has been
13 used to obtain my consent. Also signed by Mitchell C.
14 Rivers, and then I witnessed it.

15 Q All right. And then is there also an official report
16 in connection with this interview?

17 A Yes, there is.

18 Q All right. And do you have a copy of that official
19 report with you today?

20 A I do. But it needs to be passed up to me.

21 Q I'm gonna ask if you recognize this document.

22 A Yes, I do.

23 Q And how do you recognize that?

24 A This is a form that we filled out that day that was
25 given to Mr. Anderson who signed it and I signed it.

Julie Duff - Direct examination
By Solicitor Mayes

1 Q All right. What statements were made to you during --
2 let, let me ask you this.

3 When he signed the waiver of rights form that you
4 previously acknowledged, which I'll have marked as a Court's
5 Exhibit at this time.

6 (WHEREUPON, the consent form was marked as Court's
7 Exhibit No. 4 for identification purposes only at this
8 time.)

9 Q Did it appear that Mitchell Rivers understood the
10 rights as they were advised to him?

11 A Yes, he did.

12 Q And at anytime did he ask to talk with or stop
13 participation in the interview and examination?

14 A No, he did not.

15 Q At anytime did he request a lawyer?

16 A No, he did not.

17 Q Did you or any of the other officers involved make any
18 threats or use, use any coercion in order to get him to
19 participate in the interview and examination?

20 A No, he did not.

21 Q Were any promises made to him in exchange for his
22 participation in the interview?

23 A No.

24 Q Based upon your observations, did it appear to you that
25 Mitchell Rivers freely and voluntarily waived his rights and

Julie Duff - Direct examination
By Solicitor Mayes

1 agreed to participate in the interview and examination?

2 A Yes, he did.

3 Q Specifically what statements were made to you by
4 Mitchell Rivers?

5 A When he first initially went into the polygraph room,
6 he originally was sticking to his same story that he had
7 woken up by the baby crying. He said that he changed the
8 baby, that he fed the baby a bottle, that he placed him face
9 up, and then he went outside sometime so he could cut some
10 grass.

11 Q Okay. But let me stop you right there to give us an
12 understanding.

13 His initial story, story was that the baby appeared to
14 be healthy and, and was changed and given a bottle prior to
15 him going outside?

16 A That's correct. He then stated that his wife woke up
17 and found the baby, that he was face down, not breathing.
18 She called 9-1-1. He came in and helped her do CPR and
19 that---

20 Q Does it say---

21 A At some, at some point in time he was transported to
22 the hospital and pronounced dead.

23 Q Did the statement, at any point, change during the
24 course of the interview or examination?

25 A After the examination on, there was a -- he changed his

Julie Duff - Direct examination
By Solicitor Mayes

1 statement where we went and altered the questions based upon
2 his statements of, official statements. We kept the
3 questions that were asked during the examination the same.

4 But after he showed deception on the polygraph, of
5 course, I notified Agent Charles. He came in. Mr. Rivers
6 was, was crying, very emotionally upset. He said that he
7 did it. We sat and talked to him for a few minutes. We
8 asked him what happened. He said that he was holding the
9 baby during the night, that, that the baby had slept in his
10 arms during the night, and that he must have taken his arm
11 and smothered the baby against his chest area during the
12 night.

13 He said when he woke up the baby wasn't breathing, that
14 he got very scared, he tried CPR, that he wasn't experienced
15 in CPR. And, so, at that point he also made some statements
16 that maybe the baby -- it looked like the baby was breathing
17 some. So, he put the baby down. He went outside, cut grass
18 for a while, and the wife woke up. She notified him that
19 the baby was not breathing and called 9-1-1, got some
20 assistance from 9-1-1, and they started doing CPR, and --
21 but ultimately the baby was, was dead.

22 Q All right. Do you have with you a copy of the official
23 report that documents the post-interview comments as they
24 were reported --

25 A Yes, I do.

Julie Duff - Direct examination
By Solicitor Mayes

1 Q -- at the time?

2 A Yes, I do.

3 Q You have that document with you?

4 A Yes, I do.

5 Q And if you could please read into the record the
6 post-tech interview comments as they were documented with
7 the report?

8 A Examinee, which is Mr. Rivers, was advised of the
9 results of the examination. He confessed that the victim
10 was in bed with him that morning. He said the victim was
11 face down in the crook of his arm and not breathing. He
12 admitted that he did not change or feed the victim. He
13 claimed he attempted CPR and placed the victim face down in
14 the play pen. He said he then walked outside, without
15 waking his wife, knowing the victim was not breathing.

16 He said he must have accidentally smothered the victim
17 in his arms. He denied any knowledge -- and I think we even
18 talked to him about there was some old injuries or broken
19 ribs, and that he denied knowledge that the victim was
20 having previously broken ribs.

21 Q All right. And at that point he admitted that he knew
22 the baby was not breathing when he placed him into the play
23 pen---

24 A That's correct.

25 Q ---and left the room?

Julie Duff - Direct examination
By Solicitor Mayes

1 A That's correct.

2 SOLICITOR MAYES: Beg the Court's indulgence.

3 (Pause.)

4 Q At the point that the interview continued and those
5 statements were made that you have documented and have been
6 read into the record, at any point did it appear that his
7 statement was not free and voluntary at that time in point?

8 A No.

9 Q Following this statement to you, who else would of been
10 present during the course of, of the post-interview,
11 post-examination interview?

12 A We called in Mr. or Agent Mike Anderson with SLED and
13 we also called in Investigator William Jordan into the
14 conference room. We advised them -- they all said to us --
15 I'm sure that we spoke a few more minutes about the
16 statement, and then that's when William Jordan said he
17 wanted to video record it. Myself and Agent Charles, we
18 left the room and I'm sure we went back just when we started
19 to clean up the polygraph equipment and stuff.

20 Q All right. That would be yourself and Agent Charles
21 brought in Investigator Wayne Jordan and Investigator Mike
22 Williamson?

23 A That's correct.

24 Q And the videotape statement which was previously made a
25 Court's Exhibit yesterday, is that the same videotape

Julie Duff - Direct examination
By Solicitor Mayes

1 statement or videotaped interview that followed your
2 examination?

3 A That's correct.

4 SOLICITOR MAYES: Nothing further at this time, Your
5 Honor.

6 THE COURT: Your witness.

7 MR. SWILLEY: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. SWILLEY:

10 Q Ms. Duff, were you, were you the one that actually
11 advised Mr. Rivers of his rights in the interrogation room?

12 A You mean his statement, the rights that was---

13 Q The Miranda rights, did you advise Mr. Rivers of that?

14 A Not on the videotape, no.

15 Q No, no, no. I'm, I'm talking about before the
16 polygraph.

17 A Yes, in the polygraph room, which is not the
18 interrogation room, but in the polygraph room I advised him
19 of his Miranda rights, yes.

20 Q And you just read those off a sheet of paper?

21 A Yes, I did.

22 Q Okay. Anything -- any other comments about, about the
23 rights?

24 Did you explain, did you explain the rights after you
25 read them to him?

Julie Duff - Cross-examination
By Mr. Swilley

1 A I asked him if he understood his rights.

2 Q Okay. Now, I heard you telling Ms. Mayes -- how, how
3 long -- I'm sorry. Let me back up there.

4 How long did you talk to Mr. Rivers before Investigator
5 Jordan came in to do his interview?

6 A The polygraph examination---

7 Q No, I'm talking about after, between, end of the
8 polygraph and Investigator Jordan coming in to do his
9 interview.

10 A Maybe 20 minutes.

11 Q Twenty minutes.

12 Okay. And who did you say was in there with you?

13 A Agent Charles.

14 Q Agent Charles.

15 You said Mr. Rivers got very emotional, and you said,
16 and you said that -- I see in your report you said he
17 claimed he attempted CPR. Then he said he panicked and
18 placed the baby face down in the play pen and walked
19 outside.

20 No where in your post interview comments did you
21 mention that he stated that he put the baby down not
22 breathing?

23 Is there any reason why you didn't put in the
24 post-interview comments?

25 A I think I said that -- he said the victim was face down

Julie Duff - Cross-examination
By Mr. Swilley

1 in the crook of his arm and not breathing. Okay. He did,
2 did not change or plea -- he claim he attempted CPR and
3 placed the victim face down in the play pen. So, at no
4 point in time did he ever say the baby started breathing
5 back at that point.

6 Q But didn't you just tell Ms. Mayes you said he was
7 breathing a little bit after he attempted CPR?

8 A That was prior to the polygraph examination. That was
9 prior to him, prior to him being told that he was deceptive.

10 Q Okay.

11 A That was his original statement that he came in with
12 was that, you know, he woke up, the baby wasn't breathing,
13 he attempted CPR, felt the baby was breathing, and that's
14 why he put the child back in the play pen---

15 Q And, so, so---

16 A ---face up.

17 Q Okay.

18 A And then he went outside to cut the grass.

19 Q Okay.

20 A well, once he was told that he was deceptive, then he
21 went back and said that the baby slept in the crook of his
22 arm and when he woke up the baby wasn't breathing.

23 Q Okay.

24 A He changed his statement.

25 MR. SWILLEY: All right. Nothing, nothing further.

Julie Duff - Redirect examination
By Solicitor Mayes

1 REDIRECT EXAMINATION

2 BY SOLICITOR MAYES:

3 Q All right. And just, just to clarify, do you have a
4 document which details these various statements that were
5 given.

6 A Yes.

7 Q What, what is that document called?

8 A It's, it's called the South Carolina Law Enforcement
9 Division polygraph report. It's the, it's the final report
10 discussing questions, what the testing issue was, and what
11 the post-testing was.

12 Q All right. Well, pre-interview, what was your
13 understanding of what the testing issue was?

14 A Pre-interview was that, that the victim, the baby, the
15 four month old baby, woke up crying about 6:00AM, that he
16 changed the victim's diaper, that he fed him a bottle, put
17 him in the play pen face up. He said he went out to cut
18 grass and his wife woke up and found the baby face down and
19 not breathing. And from there they called 9-1-1 and
20 administered CPR.

21 And after he was told that he was deceptive on the
22 polygraph test, that's when he changed his statement and he
23 said, he confessed that he had smothered the baby in the
24 crook of his arm, and he must of smothered the baby, and
25 that when he woke up the baby was not breathing, and that he

Julie Duff - Redirect examination
By Solicitor Mayes

1 did not change the baby's diaper, he did not feed the baby,
2 and that he did attempt CPR, and that he placed the baby
3 face down in the play pen.

4 Q All right.

5 A That's, that's where I -- that's what we wrote down
6 that day that was told to us.

7 Q Do you have any document or any notation on the
8 document concerning what he believed or knew the baby's
9 condition to be as he placed the baby in the play pen?

10 A No, I don't, I don't have anything specifically. Well,
11 wait a second. He said that he walked outside, without
12 waking his wife, knowing the victim was not breathing. So,
13 so, he did tell us that he knew the baby wasn't breathing,
14 that he did place the baby face down in the play pen before
15 we went outside and cut grass.

16 Q All right. And that information, as documented, would
17 have come from who?

18 A Myself and Agent Charles. That was written on this
19 report.

20 Q All right. Based on your interview with the victim?

21 A With Mr. Mitchell Rivers.

22 SOLICITOR MAYES: All right. Nothing further.

23 MR. SWILLEY: I have nothing else.

24 THE COURT: Thank you. You may step down.

25 SOLICITOR MAYES: The State calls Agent Rick Charles.

Rick Charles - Direct examination
By Solicitor Mayes

1 RICK CHARLES, having been first duly
2 sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY SOLICITOR MAYES:

5 Q Agent Charles, where are you currently employed?

6 A South Carolina Law Enforcement Division.

7 Q All right. And what is your job title there?

8 A Senior Special Agent in the behavioral science unit,
9 and I'm now assigned to the cold case unit.

10 Q All right. And prior to you working in the cold case
11 unit, did you have involvement in polygraph examinations and
12 interviews connected with polygraph examination?

13 A Yes, ma'am, I was assigned to the PeeDee region as the
14 polygraph examiner for that region.

15 Q And did you have the opportunity to participate in the
16 interview with Mitchell Rivers during the case in question?

17 A Yes, I did.

18 Q I'm gonna show you a document and ask you whether or
19 not you recognize it.

20 A Yes, ma'am, this is the final typed copy of the
21 polygraph report that was issued after the examination was
22 conducted on the defendant.

23 Q All right. Were you present on the day that Mitchell
24 Rivers was actually interviewed in connection with the
25 polygraph examination?

Rick Charles - Direct examination
By Solicitor Mayes

1 A Yes, ma'am, I was. I was not in the room when the
2 examination was conducted. However, after Sergeant Duff
3 brought out the charts that were collected during the
4 examination, and after she evaluated them, I evaluated them,
5 and we both determined that he was being deceptive, we went
6 back in and talked to him about the fact that he was
7 deceptive during the test, we needed to get to the truth.

8 Q And what happened next?

9 A He changed his initial story. His initial story was
10 that the baby woke him up crying somewhere a few minutes
11 before 6:00 or around 6:00AM. He got up and changed the
12 baby, fed the baby a bottle, put the baby back in the play
13 pen or crib, and went outside to mow the lawn. We already
14 had some indication that that might not be the truth due to
15 the autopsy report, and the fact that the autopsy disclosed
16 that the baby had not been fed, and according to the medical
17 examiner, it would not have been enough time, if he had been
18 fed, for the baby to digest and process that long.

19 Q And what happened next?

20 A After we told him that, you know, he did not do well on
21 the test, that he was being deceptive, he did become
22 somewhat emotional and started crying and changed his story.

23 Q And do you have a way of documenting the
24 post-examination interviews or, or comments---

25 A Yes, ma'am.

Rick Charles - Direct examination
By Solicitor Mayes

1 Q ---as they were made to you and at the, Investigator
2 Duff by Mitchell Rivers?

3 A Yes, ma'am, it's documented in the
4 post-interview/comment section of the final polygraph
5 report.

6 Q And is that the document you have with you?

7 A Yes, ma'am.

8 Q At this point in time did it appear to you that
9 Mitchell Rivers was continuing to participate in the
10 interview freely and voluntarily?

11 A Yes, ma'am.

12 Q Were any threats or coercion used in order to get him
13 to continue the interview?

14 A None whatsoever.

15 Q Can you state for the record exactly what notation you
16 have made concerning the post-examination statement by
17 Mitchell Rivers?

18 A Yes, ma'am, I can read from the comment section.
19 Examinee, which was Mr., Mr. Mitchell Rivers, examinee was
20 advised of the results of the examination. He admitted the
21 victim went to sleep face down in the crook of his arm. He
22 said he woke up and victim was not breathing and he claimed
23 he attempted to CPR. He said he panicked and placed the
24 baby face down in the play pen and walked outside. He also
25 admitted that he did not, he did not feed the baby. He

Rick Charles - Direct examination
By Solicitor Mayes

1 denied causing any of the victim's rib injuries, and where
2 that comes from is, during the autopsy, the full -- they did
3 a full body x-ray from my understanding and they saw old
4 healing injuries, rib injuries there. He admitted that he
5 knew he was not breathing when he placed him in the play
6 pen.

7 Q All right. And you said that final portion that he
8 admitted that he knew the victim was not breathing and
9 placed him in the play pen would have come from whom, that
10 information came from whom?

11 A Mitchell Rivers.

12 SOLICITOR MAYES: Nothing further.

13 CROSS-EXAMINATION

14 BY MR. SWILLEY:

15 Q Investigator Charles, as far as Mr. Rivers' Miranda
16 rights, did you participate in advising him of his Miranda
17 rights?

18 A No, Sergeant Duff.

19 Q Okay.

20 A That's department politics, protocol.

21 Q All right. And you said that in his -- what was his
22 initial statement of the way things happened?

23 I'm sorry. You said that he claimed that he put the
24 baby down in the play pen face down, face up, and then went
25 to do yard work, Kim called him and said the baby wasn't

Rick Charles - Cross-examination
By Mr. Swilley

1 breathing, is that correct?

2 A Correct.

3 Q Okay.

4 A We knew that from the, the statement that he gave, the
5 initial statement that he gave, and Sergeant Duff also told
6 me that he gave, in that pre-test interview, he gave that
7 same version of that.

8 Q Okay. So, you -- and then you said, post-test
9 interview comments, you said that he, he panicked and placed
10 the baby face up in the play pen, you say he claimed he
11 attempted CPR.

12 Did he ever mention in the post-interview that the baby
13 began to breathe?

14 A No, first of all, he said he placed, placed the baby
15 face down. So --.

16 Q Okay. But he -- did he ever mention to you that the
17 baby breathed after he---

18 A No.

19 Q ---after he performed CPR?

20 A No.

21 Q Okay.

22 A He did not mention that the baby took a breath or
23 anything.

24 Q Mr. Mitchell or Mr. Rivers was sobbing at the time, is
25 that correct?

Rick Charles - Cross-examination
By Mr. Swilley

1 A Yes, he was.

2 Q Okay. Did you re, after the interview, did you
3 re-advise him of his Miranda rights?

4 A No.

5 Q About how much time had elapsed since the initial
6 reading of the Miranda rights before the polygraph until the
7 post-interview comments were made by him?

8 A If I could see the form?

9 Q I've got a copy.

10 A Okay. I need to see the -- I think the blue form
11 there. Okay. The initial, the initial examination started
12 at 2:15PM and he came out of the interview room at 4:32PM.
13 Now, the way the polygraph works is he is not -- the
14 majority of that time, a lot of that time is us going over
15 the forms, explaining the forms, explaining the rights
16 forms, the consent form, and Sergeant Duff also went into an
17 explanation of how the polygraph works on, how the body
18 reacts and responds. She goes back over the case facts with
19 the examinee, tell me what happened, that kind of thing, and
20 then the last thing she does before she actually gets into
21 the test is reviews every single question with the examinee
22 prior to the test.

23 So, probably an hour of that time was spent, you know,
24 during the pre-test and what we call the end test where
25 you're actually collecting the charts.

Rick Charles - Cross-examination
By Mr. Swilley

1 Q Okay. So, it's your testimony that about two hours and
2 15 minutes elapsed between the reading of the Miranda rights
3 and the post-interview comments?

4 A Yeah, that would be correct.

5 Q Okay. And, and Mr., Mr. Charles, by your recollection,
6 about how long did this post-interview conversation last?

7 A I'd say around maybe 15 or 20 minutes.

8 Q Okay.

9 A And that time is included in that out time of 4:32PM.

10 Q Okay. Did you and Mrs. Duff question him both at the
11 same time?

12 A Yes.

13 Q Okay.

14 A That's part of the interview.

15 Q And at no time during that questioning do you, you
16 remind him that he was still Mirandized?

17 A No.

18 Q Thank you, sir. I'm sorry. Thank you, Mr. Charles.

19 REDIRECT EXAMINATION

20 BY SOLICITOR MAYES:

21 Q Agent Charles, at any time did it appear that he wanted
22 to stop the interview?

23 A No, ma'am.

24 Q At anytime did it appear that the interview and
25 interview, post-examination interview comments were not

Rick Charles - Recross examination
By Mr. Swilley

1 freely and voluntarily given?

2 A No.

3 SOLICITOR MAYES: Nothing further, Your Honor.

4 RECROSS EXAMINATION

5 BY MR. SWILLEY:

6 Q Mr. Charles, just to clarify, did you, did you tell him
7 that he could stop the interview?

8 A During the reading of the consent form?

9 Q No, I'm talking, I'm talking about after the polygraph.

10 A That's all. We considered that all a part of the
11 polygraph.

12 Q Okay.

13 A So, he was told he could stop the test at anytime.

14 Q Thank you. That's, that's -- I have nothing further.

15 THE COURT: You may step down. Thank you.

16 SOLICITOR MAYES: Your Honor, the -- that, that
17 concludes a summary of the statements to be offered by the
18 state in this case, which includes the statements that were
19 made to Investigator William Jordan at the emergency room,
20 and during his follow-up investigation and contact with
21 Mitchell Rivers as well as the interview statements that
22 were made to Agent Charles and Investigator Duff in
23 September. Although there won't be mention of the polygraph
24 examination. I wouldn't imagine that the defense would open
25 the door to that.

1 We -- the State does offer the interview statements
2 that were made by Mitchell Rivers as well as the videotaped
3 interview, which is already been admitted as Court's
4 Exhibit.

5 MR. SWILLEY: Your Honor, in my view, I would argue
6 that, and you watched the tape too, due to Mr. Rivers'
7 extreme emotional state at the time, I would argue to the
8 Court, in the totality of the circumstances, he didn't make
9 any of those statements, knowingly, with a knowing and
10 voluntary and intelligent waiver of his Miranda rights, and
11 it appears to me that, due to his emotional state, that his
12 statements, none of the statements were voluntary.

13 Your Honor, specifically, as to the post-interview
14 comments with the, with Mrs. Duff and Mr. Charles, I think
15 Mr. Charles testified there was two hours and 15 minutes
16 that had elapsed from his initial Miranda rights that day
17 until the point where he made those specific comments. So,
18 I would argue that there's a, there was a constructive
19 non-waiver by Mr. Rivers on that grounds as to those
20 comments made directly after the polygraph purview.

21 So, Your Honor, the -- my argument to the Court would
22 be that there was not a knowingly and voluntary, voluntary
23 intelligent waiver of his rights and the statements weren't
24 made voluntarily in view of the totality of the
25 circumstances.

1 THE COURT: Okay. I've carefully observed this and I
2 think it's, if I remember correctly, it's State v. Childs
3 controls in this area. It's not -- I don't see any real
4 conflicting evidence here. The testimony in the record
5 indicates that the Miranda warnings were given verbatim from
6 a black and white copy. So, all Miranda rights were
7 administered at the appropriate time it appeared.

8 The Court finds that the defendant freely, voluntarily,
9 and intelligently entered into these statements. I don't
10 see any coercion, duress, threats, promises, or anything
11 like that that would effect. So, I will have to deny any
12 motion to suppress with the caveat though we still got to be
13 careful with the polygraph situation. It can't come in
14 under normal circumstances.

15 what else?

16 MR. SWILLEY: Your Honor, we may have already given Ms.
17 Mayes a copy of this as far as the motion. I think we made
18 cross-motions to keep out certain aspects of the collateral
19 evidence that was observed during the autopsy.

20 THE COURT: If counsel agrees with you, do you prefer
21 to have it verbally put on the record or do you agree that
22 the memoranda come in as argument?

23 what's y'all's pleasure on that?

24 SOLICITOR MAYES: Yes, sir, Your Honor. No objection
25 from the State. I believe we have previously submitted our

1 memorandums along with supporting documents.

2 THE COURT: I certainly don't mind making them a Court
3 Exhibit to the record.

4 MR. SWILLEY: Neither do I, Your Honor.

5 THE COURT: Both of you clearly stated your positions.

6 MR. SWILLEY: Yes, sir.

7 THE COURT: I'm gonna have to deny that motion too
8 based especially on the recent case. These child cases are
9 getting a little different treatment than what we normally
10 are use to involving adult cases and other type criminal
11 cases.

12 All right. You're protected on the record on that.
13 Anything else?

14 MR. SWILLEY: Your Honor, I also made a motion as to
15 the photographs, autopsy photographs. Being that I just
16 ruled on the previous motions as far as the relevance of
17 collateral issues, I would argue that the Court, that the
18 autopsy photographs, being that they are photographs of a
19 deceased infant, that any introduction would be a violation
20 of Rule 403 of the South Carolina Rules of Evidence that any
21 probative value that those photos may have would be greatly
22 outweighed by the chance of unfair prejudice towards the
23 defendant, and my understanding that Ms. Mayes wishes to
24 proffer the pathologist in this matter that would attest to
25 I think it's now all the injuries that the baby would have

1 as well as Investigator Jordan, who I believe was, who I
2 believe participated in that autopsy.

3 Your Honor, therefore, I think that, under 403, it --
4 those photographs would just be cumulative as to that and
5 extremely -- they would, they would -- the prejudice they
6 would induce would be extremely backwards as a dead
7 inference to the Courts. So, I would respectfully request
8 the Court suppress those photographs under Rule 403.

9 THE COURT: And I will keep that motion in mind, and I
10 will reserve. The way I handle that situation is that I
11 will review those photographs before they're presented to
12 the jury, of course, and if -- this is basically how I see
13 it, that the expert witness can use that photograph, and
14 sometimes they're, they're gruesome, but to support his
15 opinion or findings. In other words, they're scientific
16 evidence or whatever there that, that the expert can use or
17 something's there that he uses to justify his finding, I'm
18 gonna allow it in. But I'm not gonna allow repetitious
19 photographs in, and I'm not gonna allow anything that, that
20 I think is too prejudicial. But we'll have to take that on
21 a photo-by-photo basis.

22 MR. SWILLEY: Thank you, Your Honor.

23 SOLICITOR MAYES: And, Your Honor, just for the record,
24 I think there are several emergency room photographs that
25 were taken by Investigator Jordan actually at the emergency

1 room. Those will be the majority of the photos that the
2 State would offer, and in terms of autopsy, we don't know
3 that we're actually gonna offer any connected with the
4 autopsy. But if we do, it would only be a small number
5 which would be needed for the pathologist testimony. We
6 would submit those to the Court in advance.

7 THE COURT: Okay. Okay. That, I guess, completes
8 this.

9 Hearing nothing further, does counsel -- I know there's
10 been a lot of activities this morning.

11 Counsel, you need a minute or two to reassess where you
12 stand?

13 MR. SWILLEY: May I have the Court's indulgence one
14 moment?

15 (Pause.)

16 MR. SWILLEY: Can you give us a second to, to confer
17 with Mr. Rivers?

18 THE COURT: You got it.

19 MR. SWILLEY: Thank you, Your Honor.

20 (WHEREUPON, a short recess was taken at this time.)

21 THE COURT: Ready for the jury?

22 SOLICITOR MAYES: Yes, sir, Your Honor.

23 THE COURT: Bring them in.

24 (Whereupon, the following takes place within the
25 presence of the jury.)

1 THE COURT: You're gonna be, be foreperson of the jury.
2 Good afternoon, ladies and gentlemen. Let me, let me
3 begin by apologizing. I know you've been back there for
4 over an hour and we apologize for it. But the problem we
5 had, I think some of you are already aware of it, we lost
6 the first term of the year, the complete week, to the snow
7 storm, and we're having to combine a lot of that together.

8 So, that is thrown us somewhat behind. But we will try
9 to keep on track, and I know some of you may be already
10 thinking about tonight. We will try to monitor that on the
11 computer and know of, hopefully know a little further by
12 late this afternoon and we will try to make some contingent
13 plans or possibilities with the weather.

14 All right. We're, we're ready to get started and I
15 know I gave you some instructions yesterday, and, counsel,
16 do y'all waive polling of the jury considering my
17 instructions I gave yesterday?

18 SOLICITOR MAYES: Yes, sir, Your Honor.

19 MR. SWILLEY: Yes, Your Honor.

20 THE COURT: All right. Everybody's accounted for.
21 Madam Clerk, if you would administer the oath?

22 (WHEREUPON, the jury was placed under oath at this
23 time.)

24 THE COURT: Mr. Foreman, ladies and gentlemen of the
25 jury, I'm gonna make a brief opening statement to you to let

1 you know how we're gonna proceed, and I know we're already
2 getting close to the lunch hour. So, I suspect what we're
3 gonna do is gonna allow opening arguments after I get
4 through and we may take one witness or we may not. But
5 we'll see where we stand there.

6 All of you are aware of the fact that we are in the
7 mode that we call General Sessions Court, and that means
8 we're trying a, criminal cases that are pending here in
9 Chesterfield County, and this particular case, it's entitled
10 the State of South Carolina versus Mitchell Rivers. He's
11 charged with homicide by child abuse.

12 Now, to that charge and to the indictment, Mr. Rivers
13 has entered a plea of not guilty. That puts the burden of
14 proof on the State of South Carolina to prove Mr. Rivers'
15 guilt beyond a reasonable doubt. Now, I will give you a
16 full charge of the law at the conclusion of this case, and I
17 will talk to you about what we mean, under the law, by the
18 term reasonable doubt.

19 After I get through with this opening statement we will
20 have opening, my opening statement, counsel will have
21 opening statements to you if they so desire. It's not
22 mandatory. But should they see fit to do so, it's basically
23 to outline their position in the case to you.

24 After that will come the evidentiary portion of the
25 trial where you will receive the evidence. The evidence may

1 take different forms. It may be sworn testimony from this
2 witness stand. It may be photographs. It could be
3 documents. It could be other physical type items. It is
4 important that you listen and observe the evidence because
5 you are the sole finders of the facts in this case.

6 In South Carolina, the trial judge does not get
7 involved in the fact finding. I am the judge of the law.
8 The end result of any trial in our court is to reach a
9 verdict. Verdict is a Latin derivative word which, in
10 effect, means a true saying. So, it can be said that a
11 trial is a search for the truth.

12 Now, how do you reach a verdict?

13 You, the jury, listen and observe the evidence and you
14 decide what is the truthful evidence and you apply that
15 evidence to the law that I will provide to you during my
16 charge and thus to reach a verdict under the law as we say.

17 with that said, no one else will be allowed to find the
18 facts in this courtroom but you, the jury. So, it is
19 crucial that you listen and observe. Please do not fall
20 asleep on me. If you do, it causes problems. Should you
21 feel like that you are gonna fall asleep, let us know and we
22 will take a coffee break. So, we'll let you regroup.

23 Sometimes that's a problem in that afternoon, especially an
24 individual who's use to taking naps or whatever. So, just
25 wanted to talk with you about that should that, that occur.

1 once again, don't discuss the case with anyone. Don't
2 even discuss it amongst yourselves until I ask you to
3 deliberate. Should anybody try to discuss the case with
4 you, do not do so.

5 I told you already that the State has the burden of
6 proof. I also need to tell you that this defendant, and any
7 defendant in our criminal court system, is presumed innocent
8 until that burden of proof is met by the State. So, that
9 burden of proof is clearly upon the State and that's why
10 they will begin with their witnesses and begin with their
11 opening statement first because the burden is on them.

12 The defendant does not have to prove anything to you.
13 He is presumed innocent until you are convinced by evidence,
14 beyond a reasonable doubt, of his guilt. If the State
15 proves his guilt beyond a reasonable doubt it will be your
16 duty to find him guilty. If the State fails to do so, it
17 would be your duty to find him not guilty. When you are
18 asked to reach a verdict, whatever that verdict is, it will
19 have to be a unanimous verdict of all 12 deliberating
20 jurors.

21 After the evidentiary phase is completed where you will
22 receive all the evidence that's being presented will come
23 the closing argument portion where both sides will be given
24 ample opportunity to try to persuade you to see the evidence
25 as they see it.

1 what the attorneys say or argue is not evidence. Now,
2 they may quote the evidence or repeat the evidence or
3 attempt to explain the evidence to you. But what they say
4 is not evidence. So, you have to be the finders of fact of
5 what the evidence is. So, don't become confused with what
6 someone else may say that's not proper evidence.

7 From time to time, during the trial, I'll have to rule
8 on evidence or rule on matters of law, and it may mean that
9 I have to send you outside to take care of that because
10 that's my duty as the finder of the law, what we call the
11 judge of the law, and just because I rule one way or the
12 other doesn't mean that I favor one side or the other. I
13 just have to call it according to the rules of procedure and
14 evidence, as I understand it under our law here in the
15 State.

16 After the argument phase by counsel will come the
17 judge's charge of the law where I will provide the law of
18 the case to you, and once that is completed, you will then
19 be asked to deliberate the case and reach a verdict.

20 That's basically how we will proceed. If you have any
21 problems, you let us know. We'll try to address them.

22 One other thing, I do not prohibit note keeping. Some
23 judges do. I would suggest to you that you probably don't
24 want to do that. But I don't forbid you from doing that.
25 The reason I say -- if I were, if I were a juror I would not

1 do it, and this is the reason.

2 If you're keeping detailed notes, you're gonna have
3 your attention devoted to that notepad writing down what you
4 want to write down, and you, if you're like me, you may miss
5 something that's said while your attention is devoted to
6 writing that first thought down. So, that's a weakness of
7 keeping notes. Now, some people can do that and listen to
8 three people talking at one time. But I don't have that
9 capability. That will be up to you.

10 All right. Does anybody, at this time, after you've
11 had time to reflect on this matter, and responding to all
12 those questions yesterday, if you know of any valid reason
13 why you can not be a fair and impartial juror in this case,
14 you need to let us know at this time.

15 (No response.)

16 THE COURT: All right. We're gonna proceed. As I told
17 you, the burden of proof is on the State. I'll turn it over
18 to the solicitor.

19 Ms. Mayes.

20 SOLICITOR MAYES: May it please the Court.

21 Ladies and gentlemen, what this case is about is child
22 abuse, and you're gonna be hearing the testimony about this
23 case at times that might be difficult to listen to. And I
24 ask you to keep in mind that this testimony and evidence, as
25 presented, because it's absolutely necessary in the trial of

1 this nature.

2 I submit to you the worst imagined abuse is the abuse
3 of a child that leads to the death of a child, and this is
4 not a murder case. This is not a case where the State
5 proves premeditated murder, that someone plotted and planned
6 to kill someone that led up to their death. Because I
7 submit that's not ordinarily how child abuse happens.

8 Child abuse happens out of an act of rage, as an act of
9 frustration, or ultimately, as in this case, an act of
10 extreme indifference to human life, and that's what this
11 charge is. The charge is homicide by child abuse, and what
12 the State is required to prove and what the State will prove
13 is what's called, under the law, extreme indifference to
14 human life. Just not caring, not caring to nurture the
15 child or to save the child.

16 This defendant, Mitchell Rivers, is given custody of
17 this child, Child , and Child had
18 originally been born to a mother who had some mental
19 disabilities, and you'll hear testimony that, as a result of
20 those mental disabilities, Little Child was placed to
21 live with Mitchell Rivers and Mitchell Rivers wife, and some
22 other family members in their home on Short Horn Drive in
23 Chesterfield County, and you'll hear testimony that within a
24 few short months of Little Child , who's four months old,
25 being placed in the care of Mitchell Rivers, Child was

1 killed.

2 Child was killed by Mitchell Rivers. I submit the
3 evidence that you're gonna hear is that on the morning of
4 August 7th, 9-1-1 was called, EMS arrives, Little
5 Child is not breathing, he's taken to local hospital
6 here, Chesterfield County Hospital, and he's pronounced
7 dead.

8 What happens when a child dies under these
9 circumstances is that an autopsy is done, and you'll hear
10 testimony that when his autopsy was performed, it turns out
11 that Little Child died as a result of asphyxiation,
12 being smothered. But it didn't end there. Not only was he
13 smothered, you'll hear testimony that the pathologist, as
14 they performed the autopsy, they cut open the scalp and they
15 peeled back the scalp to see what was underneath, and at
16 autopsy was found old and new bruising and contusion along
17 the scalp.

18 You'll hear testimony that some of these contusions are
19 red, they're fresh, they just happened because Little
20 Child was not only asphyxiated or smothered, he was
21 beaten and smothered. You'll hear testimony about bruising
22 to his body. You'll hear testimony consistent with
23 Child being beaten and smothered.

24 And as Child is there in the emergency room, and
25 there's a local doctor, a doctor, a Doctor Davis who was

1 trying to save his life, trying to see if there's any air
2 that he can get into his lungs and help him breathe again,
3 Child or Mitchell Rivers says he doesn't know
4 what has happened to the baby.

5 His story then was that, on that morning, he had given
6 Little Child a bottle and that he then went outside to
7 cut the grass everybody was fine. Later when he talked to
8 law enforcement, you'll hear testimony that that story
9 changed and it's changed several times. You'll hear that he
10 later admitted that Child wasn't fine that morning.

11 His next story to law enforcement is that, when he
12 wakes up, he has Child in his arms and that Child
13 appears to have smothered as he laid with him, and you'll
14 hear that his story then becomes that he attempted CPR, that
15 CPR didn't work, and he put Child into his play pen not
16 breathing, face down, and left him there to die. Extreme
17 indifference to human life.

18 He did not call 9-1-1. He did not seek medical care
19 for Little Child. He left him in the play pen face
20 down, and ultimately what happened is that Child was
21 found by another family member. Ultimately, Mitchell Rivers
22 wife found Child, 9-1-1 was called, Child was taken
23 to the local emergency room, but it was too late.

24 I ask you to keep in mind, as you listen throughout the
25 State's case, to the testimony not only of the local

1 physician, but also the forensic pathologist who performed
2 the autopsy. It is hard to grasp how a child can be
3 subjected to ongoing maltreatment and to understand that
4 this was not the one and only event that Little ^{Child}
5 experienced. I ask you to keep that in mind because it's
6 important, when considering the statement by Mitchell
7 Rivers, that ^{Child} accidentally was smothered by him
8 that morning. The medical evidence suggests something
9 entirely different.

10 We thank you for your service.

11 THE COURT: Counsel.

12 MR. SWILLEY: Thank you, Your Honor.

13 Good afternoon, ladies and gentlemen.

14 My name is Matt Swilley, and I represent Mitchell
15 Charles Rivers seated next to me right here.

16 Now, what my job is to y'all this week or what my job
17 is this week in general is to show y'all that Mitchell
18 Rivers, Mitchell Charles Rivers, is not guilty of the crime
19 for which he is charged.

20 Now, the State will not prove, beyond a reasonable
21 doubt, that Mitchell Charles Rivers is guilty of this crime,
22 but there's an excellent reason why they can't do that.
23 He's not guilty. He is not guilty of homicide by child
24 abuse, the crime for which he is charged.

25 Now, as Ms. Mayes kind of laid out, to be guilty of

1 homicide by child abuse, you have to cause the death of a
2 child through either abuse or neglect under circumstances
3 that manifest extreme indifference to human life, and what
4 you will see, through the evidence presented to you,
5 throughout the course of this trial, is that these
6 circumstances occurred under anything but extreme
7 indifference to human life.

8 Now, I'm not denying the fact that the death of
9 Child did not (inaudible response)
10 client was a tragedy. Nobody's denying that. It was
11 a tragedy -- it's a tragedy when anybody dies before their
12 time is up. I won't argue that. One thing we're gonna have
13 to come to terms with is that one tragedy should not beget
14 another tragedy, and another tragedy would be to convict
15 Mitchell Charles Rivers for a crime that he didn't do, a
16 crime that he's not guilty of. It's important that this is
17 a tragedy, but it's not a crime by Mitchell Charles Rivers.

18 Now, this story starts many months, or not many months,
19 but many weeks before August the 7th of 2005. Now, Mitchell
20 Rivers is married, was married and is married to Kimberly
21 Quick Rivers. Kimberly's sister had a baby in April of
22 2005. Not able to take care of the child. Unable to take
23 care of him.

24 Kimberly and Mitchell adopt the child. Now, Mitchell,
25 he's now 33 years old. His whole life, since he was 16

1 years old, he's had to work in manual labor. He's not
2 educated. He's had to work with his hands and with his body
3 his whole life. Never made a lot of money. Doesn't have a
4 lot of money.

5 Now, he knew that it was gonna be a hard struggle
6 raising this child, but they took him in the house anyway.
7 He loved the child, named the child after himself,
8 Child

9 Now, throughout the course of the child being in their
10 care, it came to the attention of Kim and Mitchell that the
11 child had breathing issues. It had trouble breathing.
12 Sometimes it would wheeze. It had trouble getting air in
13 and out of its lungs. On more than one occasion Mitchell
14 and Kim took the child to the ER to get treated for these
15 breathing problems.

16 Now, on the night of August the 6th, which was a
17 Friday, of 2005, during the night Mitchell, took Child
18 into his arm, slept him in an adult bed with the child, and
19 later, early that morning, woke up and Child
20 wasn't breathing. Mitchell Charles, Mitchell Charles Rivers
21 panicked, but got up and did CPR on the child, performed
22 child CPR, CPR on the infant, and the infant began to
23 breathe again.

24 He could hear it breathe. He saw its stomach rise up.
25 He saw its color come back. The child was fine he thought.

1 Now, in retrospect, is that the path he should of
2 taken?

3 Probably not.

4 But this incident did not occur under circumstances
5 that manifest extreme indifference to human life.

6 Was it improper judgment?

7 Perhaps.

8 But not a crime.

9 Now, later that morning, Kimberly Quick Rivers noticed
10 that the child, laying in its play pen, wasn't breathing.
11 She hollered for Mitchell, Mitchell ran into the house,
12 started performing CPR on the baby. They called 9-1-1 and
13 the ambulance got there, and as the ambulance was arriving,
14 what you'll hear through testimony is that Mitchell Charles
15 Rivers was performing CPR on the child desperately trying to
16 revive that child.

17 He loved Child . He would never do
18 anything to harm Child , and it will --
19 it's gonna come into evidence that there were injuries
20 discovered on this child. Pay attention. Not one shred of
21 evidence will link anything bad that happened to that child
22 to my client at all. Not through testimony. Not through
23 medical evidence. Now through anything. Mitchell Rivers
24 never intentionally, or under circumstances that exhibit
25 great indifference to human life, ever harmed his child and

1 you're gonna see this.

2 Now, I know you're probably hungry, tired of talking to
3 me, been here a while. But I ask that you keep an open mind
4 throughout the course of this trial. There's gonna be some
5 awful, awful allegations and descriptions set forth, but
6 it's important that you use your brain, use your good common
7 sense that you got, to decide the facts of this case cause
8 y'all, ya'll decide the facts. Y'all are the judge of the
9 facts. As far as this case goes, what happens is what y'all
10 decide.

11 That's an extremely, extremely important duty to have.
12 It's probably the most power that y'all will ever exhibit
13 throughout the course of your lives is the power over
14 another man's life, the power to take somebody's freedom
15 away forever.

16 Now, there's three principles that I'd ask you to be
17 mindful of that Judge Burch went over.

18 Number one, Mr. Rivers is presumed innocent at all
19 times. He has -- he is, he is innocent until proven
20 otherwise.

21 Number two, the burden always rests upon the State.
22 Mitchell doesn't have to prove anything to anybody.

23 And, number three, and most importantly, the State has
24 to prove guilt beyond a reasonable doubt, and that's a high
25 high burden, a burden that they're not gonna be able to

1 meet.

2 I'd like to thank you for your service. I'd like to
3 thank you for your presence here today. I'd like to thank
4 you for your attention.

5 THE COURT: Thank you, counsel.

6 It's 17 till 1:00. Do we have a short witness that we
7 can work in or anybody we need to take as a witness now or
8 are you -- what's counsel's preference, to break for lunch?

9 SOLICITOR MAYES: May we approach?

10 (WHEREUPON, a bench conference was held out of the
11 hearing of the jury at this time.)

12 THE COURT: All right. Any witness we call at this
13 time is gonna take us way over into the lunch hour. So, we
14 don't want to do that. We will break for lunch till 2:00.
15 Everybody be back at 2:00. They're numerous places to eat
16 in Chesterfield, downtown, and on the outskirts.

17 So, that said, we will recess for lunch at this time.
18 Ask everybody to be back at two o'clock. The jury will
19 report to the jury room.

20 Everybody else remain seated in the courtroom while the
21 jury departs.

22 (WHEREUPON, the following takes place outside the
23 presence of the jury.)

24 THE COURT: See everybody at 2:00.

25 (WHEREUPON, Court was in recess for the lunch hour.)

Dena Owen - Direct examination
By Solicitor Mayes

1 (WHEREUPON, the following takes place within the
2 presence of the jury.)

3 THE COURT: Okay.

4 SOLICITOR MAYES: The state calls Dena Owen.

5 DENA OWEN, having been first duly
6 sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY SOLICITOR MAYES:

9 Q Now, Ms. Owen, where are you employed?

10 A At Chesterfield County Department of Social Services.

11 Q All right. I need you to speak up and speak into the
12 microphone as much as possible so that the last juror can
13 hear you.

14 You're employed at the Department of Social Services?

15 A That's correct.

16 Q And what is your job description now?

17 A I am a child protective services investigator.

18 Q And how long have you been with the Department of
19 Social Services in Chesterfield County?

20 A Approximately 15 years.

21 Q All right. Now, in general, how does D.S.S. get
22 involved in the issue of a foster parent placement or the
23 placement of a child with relatives in a foster care
24 situation?

25 A I am, I am a child protective service investigator.

Dena Owen - Direct examination
By Solicitor Mayes

1 When a report, an allegation of physical or a physical abuse
2 or neglect is made, then we, we do an investigation. Based
3 on what that investigation reveals, there may be a need for
4 removing the children from the home, which is done by law
5 enforcement, or an ex parte order from the Court at which
6 time relatives are considered and foster care is certainly
7 an option. It's not in every case, but it just depends on
8 what the allegations reveal.

9 Q All right. And when we talk about neglect, a child
10 neglect, can that include a parent who is mentally
11 incompetent or mentally disabled and unable to care for a
12 child?

13 A Yes.

14 Q In this particular case that involved the infant
15 Child , how did D.S.S. become involved in the
16 placement of Child ?

17 A Before I can speak about any case in particular, I have
18 to tell you that all of our records are confidential, and I
19 can not reveal any information without being ordered by the
20 Court to do so.

21 SOLICITOR MAYES: Okay. And, at this time, Your Honor,
22 I, I believe the witness is, is requesting a Court order for
23 further elaboration.

24 THE COURT: So ordered.

25 Q Now, do you have a file of your records?

Dena Owen - Direct examination
By Solicitor Mayes

1 A I do.

2 Q Okay. Do you have that with you today?

3 A I do.

4 Q All right. Where is it?

5 A Located on the bench just behind you.

6 SOLICITOR MAYES: And, Your Honor, may I approach?

7 THE COURT: Sure.

8 Q Now, on what date did D.S.S. become involved in the
9 placement of Child ?

10 A D.S.S. became involved initially with this case on 4/15
11 of 2005 at which point in time, based on the allegations,
12 the child was taken into emergency protective custody by law
13 enforcement.

14 Q All right. And when you talk about the allegations
15 specifically, what are you referring to?

16 A The allegations were simply that the biological mother
17 was not intellectually capable of adequately meeting the
18 needs of this child.

19 Q All right. And when you say not intellectually
20 capable, are you referring to a mental disability?

21 A That's correct.

22 Q And how is such a mental disability determined or
23 verified by D.S.S. according with reviewing the child
24 custody parent disability?

25 A The department actually had prior involvement and had

Dena Owen - Direct examination
By Solicitor Mayes

1 medical records that made statements that this was, that
2 Miss Quick was not able to take care of the minor child --

3 Q All right.

4 A -- was not possible. She received assistance for
5 intellectual disability.

6 Q All right. And when you say that she received
7 assistance for her intellectual disability, you're referring
8 to like a Social Security check?

9 A That's correct.

10 Q Okay. So, there had previously been a finding that she
11 suffered from a mental disability?

12 A That's correct.

13 Q Now, when you mentioned prior involvement, just to
14 clarify, where this infant ^{Child} is concerned,
15 have you ever been, up to this point, had there been any
16 allegation of physical abuse to ^{Child} ?

17 A No.

18 Q And, again, that date was 4/15/05?

19 A That's correct.

20 Q And where was it that you saw the child to come into
21 contact?

22 A He was at the hospital. That was two days after his
23 birth.

24 Q Okay. So, he was at the hospital because he had been
25 born?

Dena Owen - Direct examination
By Solicitor Mayes

1 A That's correct.

2 Q And do your records indicate or verify his date of
3 birth?

4 A [REDACTED].

5 Q All right. So, with the date of birth being [REDACTED]
6 and your involvement at 4/15/05 at the hospital, with an
7 understanding that Child [REDACTED] mother suffered from a mental
8 disability---

9 MR. SWILLEY: Objection, Your Honor. Leading the
10 witness.

11 SOLICITOR MAYES: I'm---

12 THE COURT: Repeat your question.

13 SOLICITOR MAYES: I can rephrase.

14 THE COURT: Repeat your question. I couldn't -- some
15 noise---

16 SOLICITOR MAYES: Yes, sir, Your Honor.

17 Q Having been at the hospital on 4/15/05 with the
18 understanding that the mother suffered from a mental
19 disability, what action did D.S.S. take next?

20 A D.S.S. took law enforcement to assess, to determine
21 whether or not the child needed to be placed into emergency
22 protective custody. I myself was accompanied by law
23 enforcement to the hospital at which time the minor child
24 was, in fact, placed in our custody on 4/15/05.

25 Q Okay. So, he, he was born and remains at the hospital

Dena Owen - Direct examination
By Solicitor Mayes

1 4/15/05, then he goes into your custody through D.S.S.?

2 A That's correct.

3 Q And, ultimately, how did he end up in the home of the
4 defendant, Mitchell Rivers?

5 A Just because the child was placed in emergency
6 protective custody doesn't mean that the investigation
7 concludes. The biological mother indicated her desire that
8 her child be placed with her sister, and stated, in fact,
9 that she had planned that or had previously decided that
10 that's the way she intended for this to go.

11 Kimberly was not present at the hospital on the day the
12 child was taken into custody. As a matter of fact, that is
13 not an option. So, our protocol, at that point in time, is
14 to certainly honor any parents' request and look into
15 relative beneficiary to have that child and no problem, then
16 we certainly try to honor that request if at all possible.

17 Q The name -- so, I want to make sure we have an
18 understanding of who's who to determine the family tree of
19 who you're talking about.

20 A Okay.

21 Q And with the infant being ^{Child} , his
22 biological mother is who?

23 A Jennifer Quick.

24 Q Jennifer Quick.

25 And is that the same person you mentioned previously as

Dena Owen - Direct examination
By Solicitor Mayes

1 being the person who was mentally disabled and determined
2 was unable to care for the child?

3 A That was correct.

4 Q And as, as we go about, you mentioned someone named
5 Kimberly.

6 who is Kimberly?

7 A Kimberly Quick is the sister of Jennifer Quick and the
8 aunt of the minor child, ^{Child}

9 Q All right. So, that would be Aunt Kimberly Quick, and
10 do you know what Kimberly Quick's last name was at that time
11 of this?

12 A Rivers.

13 Q Kimberly Quick Rivers, and was she married?

14 A Yes.

15 Q And who was she married to?

16 A Mr. Rivers.

17 Q Okay. That would be the defendant in this case,
18 Mitchell Rivers?

19 A That's correct.

20 Q okay. okay. So, you mentioned previously that on
21 4/15/05, at the hospital, the child was removed and then
22 ultimately the decision was made to place the child with the
23 child's aunt, Kimberly Quick Rivers, and the husband,
24 Mitchell Rivers.

25 On what date was Baby ^{Child} placed to live with

Dena Owen - Direct examination
By Solicitor Mayes

1 Kimberly and Mitchell Rivers?

2 A The 22nd of 2005.

3 Q Say that again.

4 A 4/22/05.

5 Q Okay. So, that would be April 22nd?

6 A That's correct.

7 SOLICITOR MAYES: Beg the Court's indulgence.

8 (Pause.)

9 Q Now, ultimately, after the child was placed with
10 Kimberly Quick Rivers and, and Mitchell Rivers, was D.S.S.
11 notified of the child's death on or about August 7th of
12 2005?

13 A Yeah.

14 Q All right. And at that point was it a D.S.S.
15 investigation or was it a law enforcement investigation?

16 A It's not an investigation that was done by our
17 department. Columbia handles all death investigations.

18 Q Thank you. Nothing further.

19 MR. SWILLEY: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. SWILLEY:

22 Q Afternoon, Ms. Owen.

23 A Afternoon.

24 Q Briefly, with whom was the child placed right after
25 April the 15th of 2005?

Dena Owen - Cross-examination
By Mr. Swilley

1 A The child was placed in a licensed foster home.

2 Q In a licensed foster home you said?

3 A That's correct.

4 Q I'm sorry.

5 would you speak into the mic a little bit?

6 A Yes.

7 Q okay.

8 A Licensed foster home.

9 Q okay. who was that foster home run by?

10 A The foster parents, which were I believe was Mr. and
11 Mrs. Catoe.

12 Q What were there -- do you know their first names?

13 A I don't.

14 Q okay. Did you ever meet these individuals?

15 A I have met them.

16 Q okay. And how long did you say that the child stayed
17 in the home of these people?

18 A well, I'm not sure the exact date that the child was
19 discharged from the hospital on Wednesday. It was on or
20 about the 16th. But the child was not placed with the
21 kimberly until the 22nd.

22 Q okay. So, that's seven -- about a week?

23 A Uh-huh. (Affirmative).

24 Q Okay. Mrs. Owen, does your department -- when, when
25 they go into a home to see if it's okay for children to be

Dena Owen - Cross-examination
By Mr. Swilley

- 1 adopted, do they do some kind of home study?
- 2 A We do home studies. We do not do adoption home
- 3 studies. We do not do adoptions.
- 4 Q Okay. Was there a home study done in this instance?
- 5 A Yes.
- 6 Q Okay. And who conducted that home study?
- 7 A Velma Hollimon.
- 8 Q I see.
- 9 And when these home studies are done, are they
- 10 thorough?
- 11 A Yes.
- 12 Q Okay. In your opinion, does your department do a
- 13 pretty good job?
- 14 A Yes.
- 15 Q Okay. And do you sometimes conduct these home studies
- 16 yourself?
- 17 A I do.
- 18 Q And, Ms. Owen, did -- when the Rivers home was studied
- 19 by D.S.S., was there anything found to be wrong with it?
- 20 A Based on the information we were given there were no
- 21 concerns.
- 22 Q Okay. And during this home study, isn't it true that
- 23 the investigators in your department, as in this case
- 24 Mrs. Hollimon, would she go around and ask neighbors kind of
- 25 the opinion of the individuals whom are being studied?

Dena Owen - Cross-examination
By Mr. Swilley

1 A She would.

2 Q And did she do that in this instance?

3 A She did.

4 Q And what were her results in general?

5 A I'm not sure if I, if I said -- I mean the home study
6 was favorable.

7 Q Very good.

8 How long does this home study go about, days?

9 A It depends.

10 Q Okay. How long did it go about in this circumstance?

11 A I'm not sure.

12 MR. SWILLEY: Okay. Beg the, the Court's indulgence
13 one moment.

14 THE COURT: Sure.

15 (Pause.)

16 MR. SWILLEY: Just one more question.

17 Ms., Ms. Owen, was this home study done between the
18 15th of April and the 22nd of April?

19 A Yes.

20 Q All right. Nothing, nothing further.

21 REDIRECT EXAMINATION

22 BY SOLICITOR MAYES:

23 Q All right. I'm gonna ask you follow-up questions,
24 Ms. Owen.

25 A Okay.

Dena Owen - Redirect examination
By Solicitor Mayes

1 Q Based on what Mr. Swilley just asked you, he asked you
2 was there a home study done, and your response was that,
3 based on the information you had, it was favorable.

4 A That's correct.

5 Q What did you mean by that?

6 A Based on statements given by Mrs. Quick or Mrs. Rivers,
7 I'm sorry, and Mr. Rivers, data collected from files in our
8 agency, and statements from other people, and our walk
9 through of the home, the information was favorable.

10 Q All right. And when you say based on information
11 obtained, does that include information obtained from the
12 defendant himself, Mitchell Rivers?

13 A That's correct.

14 Q And were you given a full or forthcoming information?

15 A The department was misled.

16 Q And when you say the department was misled, they were
17 misled by who?

18 MR. SWILLEY: Objection, Your Honor. Relevance. I
19 think she's going outside the scope of my---

20 THE COURT: If you want to pursue that question I need
21 to send the jury out.

22 SOLICITOR MAYES: Yes, sir, Your Honor.

23 THE COURT: Ladies and gentlemen of the jury, if y'all
24 step back to your room please.

25 (WHEREUPON, the following takes place outside the

Dena Owen - Redirect examination
By Solicitor Mayes

1 presence of the jury.)

2 THE COURT: All right.

3 SOLICITOR MAYES: Yes, sir, Your Honor. And for the
4 record, prior to this witness' testimony, I advised her and,
5 not to mention the prior involvement, which resulted -- it
6 was a 1997 investigation that resulted in the defendant,
7 Mitchell Rivers, being Court ordered onto the Central
8 Registry for Abuse and Neglect because of a physical abuse
9 investigation by PSS, and ultimately a finding of the Family
10 Court, and we had believed that the door wouldn't be opened
11 into the home study, and the fact that it was "favorable"
12 because, as this witness has, has explained, she did
13 question Mitchell Rivers about prior involvement, and I can
14 continue with the questioning.

15 MR. SWILLEY: Your Honor, I don't believe I opened the,
16 the door to that prior involvement in the 1997 case, Your
17 Honor. I asked her about a routine home study that was
18 done, about what was going on at the present, and she
19 answered to me that what she, she observed in 2005 during
20 this routine home study from the present house and it was
21 fine. I didn't go into anything that Mr. Rivers may or may
22 not have told her. Just about what her investigator or what
23 her department observed through this home study that's done.

24 THE COURT: Okay. I am going to allow the question,
25 but the only answer, as I understand it, will be permissible

Dena Owen - Redirect examination
By Solicitor Mayes

1 will be that she was misled by Mr. Rivers and whoever's
2 already been mentioned and it will go no further cause if I
3 allow that to go any further, it's gonna be treacherous
4 ground for later review.

5 SOLICITOR MAYES: Should I proffer those questions at
6 the time, Your Honor?

7 THE COURT: You may.

8 Q Now, Ms. Owen, you had indicated previously that, as
9 part of your investigation, you had spoken to Mitchell
10 Rivers?

11 A That's correct.

12 Q And you stated that, based on the information that you
13 had, that it was a favorable home study?

14 A That's correct.

15 Q What do you mean by that?

16 A Mr. Rivers stated to me, on two separate occasions,
17 that he had no prior involvement with DSS.

18 Q All right. And if you had had that information, would
19 this child have been placed in that home?

20 A Absolutely not.

21 SOLICITOR MAYES: That's the Court's proffer, Your
22 Honor.

23 MR. SWILLEY: Your Honor, I am gonna object to that as
24 far as, as far as that goes into the past instances with
25 DSS. I mean I didn't, I didn't -- I don't believe that door

Dena Owen - Redirect examination
By Solicitor Mayes

1 was ever opened by, by myself.

2 THE COURT: I'm gonna stand by my ruling, which is
3 somewhat favorable to you.

4 Bring them back.

5 (WHEREUPON, the following takes place within the
6 presence of the jury.)

7 THE COURT: Solicitor, you may proceed, but according
8 to my qualified sustaining of that objection.

9 CONTINUED REDIRECT EXAMINATION

10 BY SOLICITOR MAYES:

11 Q Now, Ms. Owen, you had mentioned previously that, as
12 part of your home study, there's contact with Mitchell
13 Rivers himself?

14 A That's correct.

15 Q And you stated previously that -- you used the word
16 misled.

17 What did you mean by that?

18 A Mr. Rivers was asked if he had had any prior
19 involvement with the Department of Social Services and he
20 indicated that he had not.

21 Q All right. And was that an accurate answer?

22 A It was not.

23 Q If DSS were aware that there had been prior involvement
24 with Mr. Rivers, would the child have been placed with
25 Mitchell Rivers in that home?

Dena Owen - Redirect examination
By Solicitor Mayes

1 A Absolutely not.

2 SOLICITOR MAYES: Nothing further, Your Honor.

3 MR. SWILLEY: No recross.

4 THE COURT: You may step down. Thank you.

5 SOLICITOR MAYES: State calls Richard Carnes.

6 RICHARD CARNES, having been first duly
7 sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY SOLICITOR MAYES:

10 Q Where are you employed?

11 A I'm currently employed with the Chesterfield County
12 Sheriff's Department narcotics unit.

13 Q All right. And do you have any prior type of
14 employment?

15 A I do. Before my retirement in March I was 23 years
16 employed with the county as the emergency services director
17 of 9-1-1 for that.

18 Q All right. And when you talk about emergency services
19 director of 9-1-1, does that include keeping records
20 affiliated with 9-1-1 calls?

21 A It does.

22 Q All right. And during that point in time in 2005,
23 would you have been the custodian of such records?

24 A Yes, ma'am, I would have.

25 Q Do you have with you today any records that relate to a

Richard Carnes - Direct examination
By Solicitor Mayes

1 9-1-1 call where emergency services request for residents in
2 Chesterfield County who involved an infant who was not
3 breathing?

4 A Yes, ma'am, I do.

5 Q And on what date was that call received?

6 A August the 7th, 2005.

7 Q And specifically did the record that you have with you
8 today indicate what time that call came into 9-1-1 services?

9 A Yes, ma'am, it came in at 9:53 that morning. Excuse
10 me. 6:53 that morning.

11 Q The records you have with you -- let me, let me ask you
12 this.

13 What type of records do you have with you?

14 A It's a CAD system, Computer Aided Dispatch System.
15 Anytime there's a 9-1-1 call to our dispatch center, for
16 every phone call that comes in, being on that admin line or
17 the 9-1-1 line, a CAD call is generated for, through that
18 system.

19 Q All right. And then those records are maintained by
20 9-1-1---

21 A Yes, ma'am.

22 Q ---center?

23 And the call was placed for 9-1-1 services at what
24 time?

25 A At 6:53.

Richard Carnes - Direct examination
By Solicitor Mayes

1 Q Would that be PM or AM?

2 A AM.

3 Q And what happens next once a call comes in for
4 emergency services?

5 A In, in the dispatch center, our standard operating or
6 SOB, our standard operating procedure, is once a call comes
7 in, the telecommunicator answers the call; they find out
8 information from the caller, the best they can, if it's a
9 law enforcement issued, fire, rescue, whatever services they
10 may need, and then it's CAD'ed to be dispatched to the
11 appropriate agencies to respond.

12 Q All right. What was the report of something wrong?
13 What was the reason for 9-1-1 services to be needed?

14 A In the dispatch remarks that the telecommunicator typed
15 in was typed in as 41, four month old baby, facing pillow,
16 not breathing.

17 Q All right. Four month old baby facing pillow not
18 breathing?

19 A Yes, ma'am.

20 Q And what happens next?

21 A Once they determined that it was a rescue, that someone
22 needed help, needed an ambulance, the dispatcher then will
23 get the information, as much information as they need to do,
24 and then it's a one line transfer here in Chesterfield
25 County to First Health EMS who does EMD dispatch, which is

Richard Carnes - Direct examination
By Solicitor Mayes

1 emergency medical dispatch, and it's just a one line
2 transfer, and then we monitor here -- we monitor their
3 trucks and their arrival time, departure time, in route
4 time, and things like that to end the CAD call cause we --
5 once we start the call, we have to have an end call for, end
6 time for the CAD call once it's been closed out.

7 So, telecommunicator, once she finds out that it is an
8 EMS call, EMS is needed, she will do a one line transfer,
9 and it's just on the console, she transfers that call, 9-1-1
10 call over to the First Health for emergency medical
11 dispatching and then she can monitor, she can monitor the
12 call as well.

13 Q All right. And in this particular case, as a result of
14 this call coming in, was EMS dispatched to that address?

15 A Yes, ma'am, they were. They called -- the initial call
16 was received from us and then transferred to dispatch.
17 Dispatch time on the call of 6:55AM and the time that they,
18 we received the call and then from the time the dispatch
19 was, like I said, 6:53 when we received it, 6:55 when it was
20 dispatched.

21 Q Okay. Meaning an ambulance sent out to the residence?

22 A Yes, ma'am, that's correct.

23 Q All right. And in the mean time you mentioned that the
24 call is transferred to First Health?

25 A Yes, ma'am.

Richard Carnes - Direct examination
By Solicitor Mayes

1 Q And what, what takes place when a call is transferred
2 to First Health?

3 A They, they have their dispatchers there are trained in
4 emergency medical technicians, paramedics, and they do the
5 emergency medical dispatch. If you call in needing someone
6 say to help with CPR, they can talk you through it. They
7 can talk you through for certain first aids, and they give
8 enough history -- they start getting a history, exactly
9 what's wrong so that they can tell the person who's in route
10 what they'll be facing once they get there.

11 Q All right. And have you had an opportunity to actually
12 pull the audio recording of the 9-1-1- call in this
13 particular case?

14 A I did.

15 Q And is that also part of your responsibilities as
16 records custodian for---

17 A It is.

18 Q ---9-1-1?

19 A It is. It is. All calls that -- any calls that's
20 involving any type of case that needs to be reviewed or for
21 a criminal investigation, I was -- I'm responsible for
22 pulling those tapes and keeping records of the log that they
23 sign out for those. They -- we pass -- once we got the
24 9-1-1 system up and running, no one gets a copy of any of
25 our CAD calls without signing for them.

Richard Carnes - Direct examination
By Solicitor Mayes

1 Q All right. And having had the opportunity to pull this
2 particular 9-1-1 call, do you have knowledge as to who the
3 First Health operator or dispatcher was who was on the phone
4 with the people at the residence?

5 A Yes, ma'am, listed tech, her name is Wanda Wycell.

6 Q Okay. And Wanda would be doing what while the
7 ambulance is in route?

8 A Gathering information about the patient, what kind of
9 problems the patient is having, like, you know, if anything
10 she could talk the person on the scene, that she could talk
11 through them through. She would gather any type of
12 information she could about the patient to transfer to the
13 truck as they would be in route to the scene.

14 Q All right. And was this tape altered or edited by you
15 in any way during the transfer of the call from your 9-1-1
16 services onto the audio recording local?

17 A No, ma'am, the audiotapes and, that we made copies of,
18 come straight, come straight off the hard drive from our
19 computer aided dispatch, and we do -- there's no way I can
20 alter them.

21 Q And is it a fair and accurate representation of the
22 9-1-1 call as it reflects---

23 A It was.

24 Q And do you have with you today any documentation
25 showing when the audio recording was provided to law

Richard Carnes - Direct examination
By Solicitor Mayes

1 enforcement and in what form?

2 A I do. There was a 9-1-1 release copy of the CAD call.
3 The copy was released to Wayne Jordan of the Chesterfield
4 County Sheriff's Office for use in the investigation. Date
5 of call was August 7th, 2005, and it was released that day
6 on August the 7th, 2005. Sergeant Jordan signed for it and
7 I signed as releasing officer.

8 Q And have you had the opportunity to observe the audio
9 to determine whether or not it, it appears to be the work of
10 Wanda Wycell?

11 A It is.

12 SOLICITOR MAYES: Your Honor, at this time we would
13 mark as State's Exhibit 1 and ask to publish to the jury.

14 MR. SWILLEY: No objection to that.

15 (WHEREUPON, the 9-1-1 call was marked as State's
16 Exhibit No. 1 and received into evidence at this time.)

17 THE COURT: All right. You may proceed.

18 (WHEREUPON, the 9-1-1 call was published to the jury at
19 this time.)

20 SOLICITOR MAYES: No further questions of this witness.

21 MR. SWILLEY: I have no questions of Mr. Carnes.

22 THE COURT: You may step down. Thank you, sir.

23 SOLICITOR MAYES: The State calls Ron Martin.

24 RON MARTIN, having been first duly
25 sworn, testified as follows:

Ron Martin - Direct examination
By Solicitor Mayes

1 DIRECT EXAMINATION

2 BY SOLICITOR MAYES:

3 Q where are you employed?

4 A First Health EMS in Chesterfield County.

5 Q All right. And how long have you worked with EMS?

6 A I've been involved with EMS for 19 years.

7 Q All right. And specifically what type of certificate
8 do you hold?

9 A I'm a nationally registered EMT paramedic.

10 Q All right. And that involves responding to scenes of
11 emergencies?

12 A Yes, ma'am.

13 Q All right. Were you working in that capacity in August
14 of 2005?

15 A Yes, ma'am.

16 Q Do you have with you today any record relating to an
17 emergency call that you responded to on or about
18 August 7th of 2005?

19 A Yes, ma'am, I have my DHEC run report.

20 Q All right. And particularly involving an infant by the
21 name of Child ?

22 A Yes, ma'am, we have it as Child

23 Q All right. And you're referring to the infant?

24 A Yes, ma'am, with a date of birth of [REDACTED].

25 Q All right. I'm gonna ask you specifically to refer to

Ron Martin - Direct examination
By Solicitor Mayes

1 the records that you have.

2 Do you have information concerning what time EMS
3 services would have arrived at the residence in Chesterfield
4 County after the call went in on or about 6:53AM?

5 A Yes, ma'am, we're showing our arrival time of 7:10AM.

6 Q All right. And who actually arrived with you?

7 A That day it was myself, my partner, Lee Wallace, and we
8 had a third person ride by the name of Marion Watson.

9 Q Okay. And, so, you're in the ambulance and you get a
10 call like this, what do you do upon arriving at the scene?

11 A Well, this particular day, we had made our plan in
12 route due to the emergency medical dispatch information.
13 with it being a pediatric, and with us having the advantage
14 of having a third person with us that morning, we made the
15 plan that, upon arrival, that I would go into the residence,
16 get the child, and come back to the ambulance. Instead of
17 taking all the equipment inside, bring the child to the
18 ambulance as fast as possible.

19 Q All right. And exactly what happened once you got to
20 the residence?

21 A We got to the residence, I was driving. I exited the
22 ambulance, went into the residence, found the child on a
23 kitchen table, immediately took the child back to the
24 ambulance.

25 Q All right. And what, if anything, was noted, you can

Ron Martin - Direct examination
By Solicitor Mayes

1 refer to, to your records if you need to, what, if anything,
2 was noted about the child's condition?

3 A When I first grabbed the child, my quick assessment was
4 just the child was not breathing, didn't have a pulse. As
5 soon as I got my, got the child to the ambulance, and put
6 the child on the stretcher, my partner did a quick head to
7 toe exam, immediately recognized what we call petechial
8 hemorrhage to the face.

9 Q All right. Now, you used the term petechial hemorrhage
10 to the face.

11 Can you break that down---

12 A Yes, ma'am.

13 Q ---for me?

14 A It's -- to try to breakdown easiest, it's more of a
15 bloodshot look. People probably understand a blood shot eye
16 look a little better, but what it is is ruptured of the
17 small capillaries in the face.

18 Q All right. And was that noted in, in the records that
19 you had there?

20 A Yes, ma'am.

21 Q And you mentioned that the child was not breathing and
22 did not have a pulse.

23 What, if any, medical care or treatment was provided to
24 the child to try to help, if anything?

25 A We did a full range. We started with our basic life

Ron Martin - Direct examination
By Solicitor Mayes

1 support skills and then worked our way up to place advanced
2 airways, IV access, heart medication to try to resuscitate.

3 Q All right. And what, if any, observations,
4 observations did you make while at the scene or appearing to
5 transport the child?

6 A As in?

7 Q Did -- was anything unusual noted?

8 A Just the biggest thing that was unusual is, especially
9 with children, even with adults, when we're working cardiac
10 arrest, we usually having trouble with having to keep people
11 away, and that particular day we didn't have that issue.

12 Q All right. When you transported the child out to the
13 ambulance, did anyone follow you out there?

14 A No one was right behind me, no, ma'am.

15 Q All right. And ultimately where did, where was the
16 child transported to?

17 A We took the child to Chesterfield General Hospital.

18 Q And did you seek treatment at Chesterfield General
19 Hospital?

20 A Yes, ma'am, they continued resuscitation for I'm not
21 sure how much longer.

22 Q All right. Well, did you remain present at
23 Chesterfield General Hospital?

24 A Yes, ma'am, we still assisted the staff with
25 resuscitation and we also, of course, had the complete

Ron Martin - Direct examination
By Solicitor Mayes

1 paperwork and then taken an opportunity to try to talk to
2 someone to get a little bit better history and try to
3 develop a time line of the situation.

4 Q All right. I want to ask you a little bit more about
5 that.

6 When you talk about needing to obtain a history, for
7 purposes of medical diagnosis and treatment, why did you
8 need to obtain a history about what may or may not have
9 happened?

10 A When we're working a cardiac arrest, our biggest goal
11 is to try to find underlying causes, things that we can
12 correct immediately. And when we start our questioning,
13 those are some of the things that we would focus on. That
14 particular day we weren't able to get a real significant
15 history other than some bronchitis was what that was told to
16 us. And then, while the doctor, of course, was talking to
17 Mr. Rivers, I was there too to try to get the information.
18 The only thing we were told then was that he had fed the
19 child I believe he said approximately---

20 MR. SWILLEY: Objection, Your Honor.

21 A ---6:15.

22 MR. SWILLEY: Hearsay.

23 SOLICITOR MAYES: I could ask a specific question or
24 lay a foundation, Your Honor.

25 Q I believe you mentioned that you were able to obtain a

Ron Martin - Direct examination
By Solicitor Mayes

1 history.

2 where did that occur at?

3 A It occurred at the hospital.

4 Q And why do you remain at the hospital as a patient's
5 being treated even after you, you dropped him off there for
6 further medical care?

7 A We remain to make sure the hospital doesn't need any
8 more assistance and also gather our information for
9 documentation purposes.

10 Q Okay. And for purposes of medical diagnosis and
11 treatment, why do you need to document a history by a parent
12 or a family member in a situation such as this?

13 A It's just standard and we were wanting to try to
14 establish any kind of time line just due to one particular
15 finding we did note.

16 Q And were you present when the defendant in this case,
17 Mitchell Rivers, was questioned or asked for a history as to
18 what may have led to the child's condition?

19 A Yes.

20 Q All right. And was that for purposes of medical
21 diagnosis and treatment---

22 A Yes.

23 Q ---that you requested for the statement?

24 A Yes, ma'am.

25 Q And then did you document, in anyway, the statement

Ron Martin - Direct examination
By Solicitor Mayes

1 that was provided?

2 A Yes, ma'am.

3 Q How did you document that?

4 A It was documented -- family members stated the patient
5 was okay at approximately 6:15AM. The father told ER MD
6 that he changed the baby's diaper at this time. Then mother
7 checked on him later and discovered that the baby was not
8 breathing.

9 Q All right. And just -- if I can get a detail, at
10 6:15AM -- let me back-up.

11 Again, this particular history or accounting was
12 provided by whom?

13 A This particular history here?

14 Q Uh-huh. (Affirmative).

15 A By Mr. Rivers.

16 Q All right. And that information was obtained at the
17 hospital?

18 A Yes, ma'am.

19 Q And at 6:15AM, what did Mitchell Rivers report to or
20 report as a history of the, of the child's condition?

21 A The history that I was presented was the bronchitis and
22 that the history to the present illness, as we call it, was
23 that at 6:15 he went to change the baby's diaper and at that
24 time the baby was fine.

25 Q All right. Can you read it exactly as it is noted on

Ron Martin - Direct examination
By Solicitor Mayes

1 your report?

2 A Family member stated the patient was okay at
3 approximately 6:15AM. The father told ER MD that he changed
4 the baby's diaper at this time.

5 Q Was anything noted, as you were there and as you were
6 present, was anything noted to yourself or to the emergency
7 room physician about the child being smothered during the
8 night?

9 A No, ma'am.

10 Q Was anything reported by Mr. Rivers about the child
11 having stopped breathing as he found the child in his arm?

12 A No, ma'am.

13 Q Now, while you were present in the emergency room, was
14 law enforcement there?

15 A I can't recall that to be honest with you.

16 Q Okay. At any point during the day were you present---

17 A Yes, ma'am.

18 Q ---when, when law enforcement was, was at the hospital
19 or on, on the premises?

20 A Yes, ma'am.

21 Q All right. What do you recall specifically about that?

22 A I just know that when law enforcement arrived we were
23 still there. The Coroner's Office also arrived. And, at
24 that time, resuscitation had been stopped, and we did go in
25 and point out our particular concerns with what we talked

Ron Martin - Direct examination
By Solicitor Mayes

1 about, the petechial hemorrhage, and then assisted with some
2 of the moving for picture taking purposes.

3 Q All right. And who did you assist or who, who would
4 you have offered assistance to as, as photographs were being
5 taken?

6 A At that time, Investigator Wayne Jordan and I'm -- the
7 coroner was Craig Walker.

8 Q And when you mentioned Wayne Jordan being there for
9 photographs, at that point is the baby alive or had the baby
10 already been pronounced deceased?

11 A Had been pronounced deceased.

12 Q All right. And you mentioned that you were pointing
13 out particular concerns.

14 Have you had the opportunity to review photographs that
15 were ultimately developed by law enforcement---

16 A Yes, I was.

17 Q ---at the emergency room?

18 A Yes, ma'am.

19 Q And do those photographs appear to be fair and accurate
20 representations of, of how you viewed Baby ^{Child}
21 on that day?

22 A Yes, ma'am.

23 Q And the facial petechia, were you able to observe that
24 in the photographs?

25 A Yes, ma'am.

Ron Martin - Direct examination
By Solicitor Mayes

- 1 SOLICITOR MAYES: Beg the Court's indulgence.
- 2 (Pause.)
- 3 SOLICITOR MAYES: May we approach?
- 4 THE COURT: Uh-huh. (Affirmative).
- 5 (WHEREUPON, a bench conference was held out of the
- 6 hearing of the jury at this time.)
- 7 (WHEREUPON, nine photographs were marked as State's
- 8 Exhibit Nos. 2 through 10 and received into evidence at this
- 9 time.)
- 10 Q All right. Now, you had mentioned that you were
- 11 present in the emergency room while certain photographs were
- 12 taken?
- 13 A Yes, ma'am.
- 14 Q I want to show you some photos and ask you whether or
- 15 not you recognize the person in the photos and the
- 16 circumstances under which they were taken and that's
- 17 starting with State's Exhibit 10.
- 18 A Yes, ma'am, it's a head picture of the deceased.
- 19 Q All right. And when you say the deceased, you're
- 20 referring to who?
- 21 A Child
- 22 Q Now, you had mentioned before the term facial petechia.
- 23 A Yes, ma'am.
- 24 Q I'm gonna ask you if you could tell us whether or not
- 25 you observed the facial petechia in these particular

Ron Martin - Direct examination
By Solicitor Mayes

1 photographs, which are State's Exhibit 3, State's Exhibit 5?

2 A Yes, ma'am, I see it in both.

3 SOLICITOR MAYES: And, Your Honor, if we may publish to
4 the jury?

5 THE COURT: Yes.

6 Q If you could, step down and show us in the photographs
7 what you were referring to specifically?

8 A (Witness comes down from the stand.)

9 It's the areas here below the eyes and over the eyes.
10 It's here also across the nose or across the bridge of the
11 eyes to the bridge of the nose here.

12 Q All right. And in the next photograph?

13 A In the next photograph, it's more of a full facial view
14 and you can see it all the way across with the eyes and
15 across the bridge of the nose of the cheeks there also.

16 Q Okay. Now, if you could, laying there, in addition to
17 these photos, State's Exhibit 3 and State's Exhibit 5, I'm
18 gonna ask you whether or not of any, anything else unusual
19 was observed externally to the child in the form of any
20 abrasions or lacerations?

21 A As in all the pictures?

22 Q Yes, sir.

23 A There were several things that were noted, yes, ma'am.

24 Q All right. I'm gonna show you what is State's Exhibit
25 9 and ask you whether or not anything unusual was noted in

Ron Martin - Direct examination
By Solicitor Mayes

1 that photograph?

2 A Yes, ma'am, there's several things. Excuse me.

3 There's bruising noted to the back occipital region of the
4 head here and behind the ear specifically is a term we call
5 a battle sign, which is consistent with a basilar skull
6 fracture.

7 Q well, let me ask you this.

8 what about any location on the torso of the child?

9 A Coming down you can see, on the back area here looking
10 at that, the modeling of this particular picture, the
11 modeling here and there's also the cut/slash lacerations
12 that's in the healing stage that's on the back.

13 Q All right. Can you show us what you're referring to?

14 A well, with the bruising to the back of the head here as
15 here.

16 Q All right.

17 A And then the -- what we call the battle sign, which is
18 behind the ear, and it's also a bruise here. Then, of
19 course, on the laceration as here, it's in the stages of
20 healing. You can actually see the scab as formed over the
21 healing.

22 Q All right. I'm gonna show you what is State's Exhibit
23 10 and ask you what, if anything, unusual is noted in that
24 photograph.

25 A Yes, ma'am, there's a bruise on the inside of the ear

Ron Martin - Direct examination
By Solicitor Mayes

1 and you also see some petechial hemorrhage of eyes, and,
2 more specifically, bruises inside the ear.

3 Q All right. And I'm gonna show you State's Exhibit 8
4 and ask you what, if anything, is noted in that photograph
5 which may or may not be unusual.

6 A Unusual, the, the petechial hemorrhage in regards to
7 this photograph. There is also a laceration over the lip
8 that is to the stage of healing.

9 Q All right. Thank you.

10 Now, having observed these photographs -- you can take
11 a seat.

12 A Thank you.

13 (Witness returns to the stand.)

14 Q Did any of these injuries that have been photographed
15 or that you are noted as appearing to be unusual, would any
16 of those have been caused by the medical treatment or care
17 that was provided by you or your coworkers on that day?

18 A No, ma'am, the only location that could of been
19 affected by us would be in the child's left leg.

20 Q All right. And what was done to the child's left leg?

21 A Actually it's a needle, we call interosseous needle.
22 It's just a needle that goes into the bone for access for an
23 IV for a child, which is just a rapid to point, and we have
24 to actually insert it. It does take some force to place it.

25 Q All right. Now, with these injuries taken into

Ron Martin - Direct examination
By Solicitor Mayes

1 account, was there ever any indication that the child had
2 regained consciousness while he was in your care?

3 A No, ma'am.

4 Q All right. And while you were present in the emergency
5 room, how much time -- do you have a notation as to when he
6 was pronounced dead?

7 A I'm not sure. I would have to look, refer back to it.
8 No, ma'am, I do not have a time documented on time of death.

9 Q He was pronounced dead while you were still at the
10 hospital?

11 A Yes, ma'am.

12 Q Thank you. Nothing further.

13 CROSS-EXAMINATION

14 BY MR. SWILLEY:

15 Q Afternoon, Mr. Martin. Let me take you back to when
16 you arrived at the Rivers house on [REDACTED] [REDACTED] [REDACTED].

17 A Yes, sir.

18 Q When you arrived, you said that the baby was laying on
19 the table, is that correct?

20 A Yes, sir.

21 Q With someone performing CPR on the baby at that time
22 you think?

23 A It was -- Mr. Rivers was over the child, yes, sir.

24 Q Okay. And the baby -- it was not the baby's --
25 somebody was actually attempting to help resuscitate the

Ron Martin - Cross-examination
By Mr. Swilley

1 child?

2 A I'm not gonna say resuscitate. There was someone
3 there.

4 Q Okay. All right. And just to clarify, you said no one
5 immediately followed you to the hospital, but once you got
6 to the hospital, as you said, Mr. Rivers was there shortly
7 there after your arrival, correct?

8 A Yes, sir, family arrived. I just don't know exactly
9 which time.

10 Q Okay. And let me go back and explain this facial
11 bruising and is the proper pronunciation petechia?

12 A Petechial hemorrhage is---

13 Q Okay.

14 A ---how I refer to it.

15 Q But is the bruising that was called, is called what?

16 A Petechial.

17 Q Petechial?

18 A Yes, sir.

19 Q Okay. And this petechia, this, this comes from the
20 capillaries in the face bursting, is that correct?

21 A Yes, sir.

22 Q Okay. It doesn't come from blunt force trauma,
23 correct?

24 A The petechial, no, sir.

25 Q Okay. And in this instance, did you ascertain that

Ron Martin - Cross-examination
By Mr. Swilley

1 this came from the child's struggling to breathe?

2 A It's consistent with, basically with some type of
3 strangulation.

4 Q Okay. Or suffocation?

5 A Yes, sir.

6 Q Okay. All right. And, Mr. Martin, you're -- not to
7 insult your credentials, you're, you're not a medical
8 doctor, are you?

9 A No, sir.

10 Q Okay. And these other injuries that you stated to Ms.
11 Mayes, there's no way that you can link those to the death
12 of the baby, can you, as far as contributing to the baby's
13 death?

14 A I can not, no, sir.

15 Q All right. Thank you, Mr. Martin. Nothing further.

16 REDIRECT EXAMINATION

17 BY SOLICITOR MAYES:

18 Q You mentioned before you're a paramedic?

19 A Yes, ma'am.

20 Q When you talk about linking things to death, who --
21 what, what type of medical field does that work?

22 A That's legal. Be more of the Coroner's Office, the
23 medical examiners.

24 Q Thank you. Nothing further.

25 THE COURT: You may---

1 MR. SWILLEY: No further questions.

2 THE COURT: You may step down.

3 WITNESS: Thank you.

4 SOLICITOR MAYES: May we approach?

5 THE COURT: Sure.

6 (WHEREUPON, a bench conference was held out of the
7 hearing of the jury at this time.)

8 THE COURT: Y'all stand up and stretch. If anybody
9 needs to go to the restroom, you may do so. We'll try to
10 hold it about five minutes.

11 (WHEREUPON, the following takes place outside the
12 presence of the jury.)

13 (WHEREUPON, the following takes place within the
14 presence of the jury.)

15 SOLICITOR MAYES: State calls Doctor Ross.

16 THE COURT: Doctor Ross, come up and be sworn please.

17 JANICE ROSS, having been first duly
18 sworn, testified as follows:

19 THE COURT: If you'll adjust that microphone as you see
20 fit.

21 DIRECT EXAMINATION

22 BY SOLICITOR MAYES:

23 Q Doctor Ross, where are you employed?

24 A In Newberry, South Carolina with Newberry Pathology
25 Associates.

Janice Ross - Direct examination
By Solicitor Ross

1 Q And can you give us some information concerning your
2 educational background and training?

3 A Yes, I got a B.S. Degree from the University of South
4 Carolina and started Medical School in Charleston at MUSC.
5 I finished and got my M.D. from Upstate Medical Center in
6 Syracuse, New York, and did, did further studying in
7 forensic pathology and have board certification here as at
8 home.

9 Q All right. I need you to give a little bit more detail
10 about that.

11 When you talk about having board certification in
12 pathology, what type of medicine are you referring to
13 specifically?

14 A Pathology is the study of disease, and through our
15 residency we learn how to do an autopsy. We learn how to
16 look at tissue that comes out of you from surgery to
17 identify cancers or, or infections. We learn how to do the
18 laboratory and hospital to identify diseases. Then forensic
19 pathology, the word forensic means legal. So, we use our
20 knowledge of pathology for legal matters such as homicides,
21 suicide, and accidents, rapes, that kind of thing as far as
22 doing an autopsy and identifying problems or injury.

23 Q Now, when you first obtained your medical degree, were
24 you practicing in forensic pathology?

25 A Yes.

Janice Ross - Direct examination
By Solicitor Ross

1 Q All right. And how many years have you been practicing
2 in the field of forensic pathology?

3 A For 34 years.

4 Q All right. Is it possible for you to estimate how many
5 autopsies you may have performed during the course of that
6 34 years?

7 A Over 5,000.

8 Q All right. And has your experience included autopsies
9 in cases which were ultimately determined to be homicides?

10 A Yes.

11 Q And have you testified previously in a court in South
12 Carolina including General Sessions Court or Criminal Court
13 that we're in now concerning your, your findings?

14 A Yes.

15 Q And does that include testifying as an expert witness
16 concerning your findings in homicide cases?

17 A Yes.

18 Q Can you tell us whether or not the field of forensic
19 pathology is accepted in the medical community?

20 A Yes.

21 Q All right. And specifically when we talk about the
22 field of forensic pathology, are there articles and research
23 that accompany that field of study?

24 A Yes.

25 Q And have you maintained training as well as clinical

Janice Ross - Direct examination
By Solicitor Ross

1 experience concerning researching articles in the field of
2 forensic pathology?

3 A Yes, I have.

4 SOLICITOR MAYES: Your Honor, at this time the State
5 would offer Doctor Janice Ross as an expert in the field of
6 forensic pathology.

7 MR. SWILLEY: No objection.

8 THE COURT: So qualified.

9 Q Doctor Ross, did you have the opportunity to perform an
10 autopsy on an infant child by the name of Child

11 ?

12 A Yes.

13 Q On what date was your autopsy performed?

14 A August 8th of 2005.

15 Q All right. So, if the child, the child died on
16 August 7th, your, your autopsy was performed the following
17 day?

18 A Correct.

19 Q At what time was your autopsy performed?

20 A At 8:30 a.m.

21 Q Now, when we talk about an autopsy, can you kind of
22 break it down for us and tell us exactly what happened to
23 the deceased when they arrived at your facility for medical
24 autopsy?

25 A Yes, the body is brought to us. We do the autopsy in

Janice Ross - Direct examination
By Solicitor Ross

1 the morgue at Newberry, Newberry County in the hospital.
2 The body is brought in a body bag. We open that and we do
3 an external examination with the clothing on the body, and
4 we do an external examination without the clothing on the,
5 the body not in the bag, take pictures, and intimate -- we,
6 we do full body x-rays and special x-rays to look for
7 fractures of any bone, and then we proceed with the autopsy
8 itself, which is to look at, to look at each organ and draw
9 fluids for toxicology and/or infectious diseases if any were
10 indicated.

11 Q All right. And how is it that your findings during an
12 autopsy are documented?

13 A Through the photography, x-ray, and then we have a
14 person there with a computer typing in things like organ
15 weights and anything that we want them to type in on our
16 report. We also do a diagram. The pathologist, myself,
17 does a diagram on the body.

18 Q All right. And specifically, in this particular case,
19 did you make a determination concerning the manner of death
20 to Child ?

21 A Yes.

22 Q What determination was concerning, was made concerning
23 the manner of death?

24 A The manner of death was homicide.

25 Q And did you make a determination concerning the cause

Janice Ross - Direct examination
By Solicitor Ross

1 of death?

2 A Yes.

3 Q What was your determination concerning the cause of
4 death?

5 A Asphyxia, which means that oxygen wasn't getting around
6 in the blood system or due to smothering.

7 Q All right. What, if any, findings did you make in
8 addition to the finding of asphyxia or smothering?

9 A We found externally, in the area of the scalp, some
10 bruises and some abrasions. Some abrasions would be a lift
11 with some bruises of the head, back head mostly, and several
12 small circular ones. We also found, x-rayed several rib
13 fractures that were healing.

14 Q All right. I want to stop you there and you can kind
15 of take you back through some of these particular findings.

16 Does your autopsy note how old ^{Child} was on
17 the, on the date of his death or at the time of his autopsy?

18 A He's four months old with a date of birth of

19 [REDACTED], [REDACTED].

20 Q Now, what, if anything, was significant about the
21 findings that you mentioned in a four month old infant?

22 A The, the four month old can't necessarily crawl around
23 and fall off things and cause bruises and abrasions to
24 himself or herself.

25 Q All right. So, when you talk about such findings in a

Janice Ross - Direct examination
By Solicitor Ross

1 non-mobile infant or in an infant who's not yet crawling or
2 walking, do you have an opinion as to whether those had,
3 those injuries would be consistent with accidental injury or
4 non-accidental injury?

5 MR. SWILLEY: Objection, Your Honor. It calls for
6 speculation.

7 THE COURT: I'm gonna have to overrule the objection.
8 She's been qualified as an expert.

9 A Well, it depends on the situation. It could be an
10 accidental injury, but it certainly was not self-inflicted
11 and it has -- it would be done by somebody else.

12 Q All right. Now, when we talk about the various
13 injuries that were noted, was that in one location or more
14 than one location?

15 A More than one.

16 Q All right. And do you have with you any diagram or
17 photographs that reflect your findings?

18 A Yes.

19 Q All right. I'm gonna show you a diagram of an infant
20 and ask you if you could review the diagram and then make
21 notations on the diagram consistent with any notations in
22 which your, your photographs indicate that were contusions
23 as, as you have mentioned here?

24 A Okay. There was a, was a scratch abrasion of the neck
25 right here. On the face was an abrasion here and there were

Janice Ross - Direct examination
By Solicitor Ross

1 petechia over the face. There was a swat abrasion on the
2 tip of the penis.

3 Now, on the back of the head, externally, we couldn't
4 see anything through the hair with the, the lag (phonetic)
5 mortis, which is the settling of blood by gravity after
6 death. But when we reflected the scalp, you could see a lot
7 of contusions, bruises on the back of the head. Some were
8 in the midline and some were on the right, very small
9 circular contusions. There's one large one that was on the
10 right side of the head.

11 SOLICITOR MAYES: Your Honor, we would offer these
12 diagrams as State's Exhibits as well, 11, 12, and 13.

13 MR. SWILLEY: Your Honor, I renew my objection under
14 403 that they're cumulative.

15 THE COURT: I'm gonna have to overrule that one and
16 allow it in.

17 (WHEREUPON, the diagrams were marked as State's Exhibit
18 Nos. 11, 12, and 13 and received into evidence at this
19 time.)

20 Q Doctor Ross, in discussing the bruising or, or
21 contusions that you noted, you mentioned that the scalp was,
22 was peeled back.

23 What exactly are you looking at when, when that is
24 done?

25 A Well, you're looking at the undersurface of the skin.

Janice Ross - Direct examination
By Solicitor Ross

1 As I said, on the surface of the skin from the outside, we
2 couldn't discern anything because of overlying lag
3 (phonetic) mortis or settling of blood plus the hairline.
4 But when you, when you can -- when you peel the head, the
5 scalp back in order to take the brain out as part of the
6 surgical autopsy procedure, then you can see these bruises.

7 Q All right. Now, were the bruises all the same color?

8 A They were mostly red, which means they were very
9 recent. Some of them had little areas of yellowness around
10 them. You can get -- those were older bruises.

11 Q All right. And I'm gonna ask you about the
12 significance of that, of that.

13 with some being older and then some appearing to be of
14 a different age, what, if anything, does that indicate?

15 A Injuries to the scalp in different ages.

16 Q All right. Can you tell us whether or not there was an
17 indication of, of physical abuse to the child taking these
18 observations into account?

19 MR. SWILLEY: Objection, Your Honor. Again, it calls
20 for speculation.

21 THE COURT: I'm gonna sustain that objection.

22 SOLICITOR MAYES: Yes, sir, Your Honor.

23 THE COURT: It calls for the ultimate issue of fact.

24 Q Can you tell us whether or not the contusions that were
25 observed are consistent or not consistent with a blunt force

Janice Ross - Direct examination
By Solicitor Ross

- 1 type trauma?
- 2 A They're consistent with a blunt force trauma.
- 3 Q Can you tell us whether the contusions that you noted
- 4 are consistent or may be consistent with trauma such as a
- 5 knuckle or a fist?
- 6 A They're consistent with those. There's no other
- 7 pattern to them.
- 8 Q You mentioned that there was facial petechia. I'm
- 9 gonna show you, on the photograph that is already in
- 10 evidence, and ask you what, if anything, you observed. This
- 11 would be State's Exhibit 5 and State's Exhibit 3.
- 12 A I'm sorry. What was the question?
- 13 Q What, if anything, is significant about those
- 14 photographs?
- 15 A These, these demonstrate petechia over the face.
- 16 Petechia are little red dots caused when there is
- 17 compression of the circulatory system especially the, the,
- 18 the veins and which are trying to get blood back down to the
- 19 heart. So, if you have a constriction or of the neck and/or
- 20 upper chest, vessels, pressure builds back-up in the
- 21 veinous, veinous system and then back into the smaller
- 22 capillaries and little red blood cells escape the
- 23 capillaries and causes little red dots visible under the
- 24 skin.
- 25 Q All right. And when do you normally see that at

Janice Ross - Direct examination
By Solicitor Ross

1 autopsy, the petechia that has been mentioned?

2 A We will -- when we first look at the body.

3 Q All right. I need you to speak up a little bit louder
4 so that even the last juror can hear you.

5 Doctor Ross, when we talk about the facial petechia or
6 the pinpoint marks that, that you have, have noted in the,
7 in the facial area, have you ever seen that before in an
8 autopsy?

9 A Yes.

10 Q All right. And from a medical standpoint and to a
11 reasonable degree of medical certainty, when do you normally
12 observe this type of finding in a deceased patient?

13 A In, in cases such as strangulations, some smothering,
14 something tight around the neck.

15 Q Can you tell us whether or not the facial petechia is
16 consistent with asphyxiation due to strangulation?

17 A Yes.

18 Q Or smothering?

19 A Yes.

20 Q Now, with a finding of the asphyxiation and the facial
21 petechia and the red colored contusions beneath the scalp,
22 can you tell us whether or not these events may have
23 occurred at the same time?

24 A They likely occurred at the same time, yes.

25 SOLICITOR MAYES: All right. Beg the Court's

Janice Ross - Direct examination
By Solicitor Ross

1 indulgence.

2 (Pause.)

3 Q Now, ultimately, Doctor Ross, why did you reach the
4 determination that this child's death was a homicide?

5 A Because of the history, the difference in the stories
6 that came down, the findings of the petechia, you know,
7 causing asphyxia, smothering, and the contusions around his
8 head. There was also, internally around his brain, was
9 subdural hemorrhage, which goes along with a blunt force
10 trauma to the head.

11 Q All right. I'm gonna ask you a little bit more about
12 that, the blunt force trauma to the head.

13 Specifically, what was the indication of blunt force
14 trauma?

15 A The bruises on the head and the internal blood around
16 the brain.

17 Q All right. So, the blood that you found around the
18 brain, was that in the same location as the contusions or at
19 different locations?

20 A Well, it's a, it's a large space. But it covers an
21 area of the brain and the top of the head.

22 Q Okay. And that -- the petechia that you mentioned
23 around the brain, did you have an opinion as to whether or
24 not that was an appropriate symptom?

25 A It would be recently, yes.

Janice Ross - Direct examination
By Solicitor Ross

1 Q Okay. Do you have an opinion as to whether or not that
2 may have occurred contemporaneous with the asphyxiation and
3 the contusions to the child's head?

4 A Yes, it would have.

5 Q Now, what about the stomach contents, what, if
6 anything, was noted, Doctor Ross?

7 A The stomach was empty.

8 Q And what can you tell us about a child who -- if, if he
9 had been given a bottle on the morning of, of his death,
10 within an hour, hour or two of his death, would you expect
11 to find stomach contents?

12 A Not -- no, not necessarily. Not necessarily after an
13 hour.

14 Q Okay. What do you mean by that specifically?

15 A The stomach contents would empty within an hour.

16 Q All right. If he had been given a bottle, let's say
17 hypothetically at 6:15 and then not breathing at 6:50, would
18 you expect there to be some indication of stomach contents?

19 A There may be some.

20 Q What, if anything, does or what, if any, type of force
21 would be necessary to result in asphyxiation with the
22 presence of petechia?

23 A What was -- I'm sorry.

24 Q Does it require for, any degree of force?

25 A Well, you're talking about a young child who is kind of

Janice Ross - Direct examination
By Solicitor Ross

1 elastic or bendable rib cage. So, it wouldn't -- it would
2 take significant force, but not as much as needed for an
3 adult to put pressure on the chest, for instance, and to
4 stop the breathing activity or to put something around the
5 neck to cause the petechia.

6 Q If a child had been laying on his own and, let's say,
7 hypothetically in a situation where a child is, is found
8 deceased in their crib, would you expect the presence of
9 petechia?

10 A No.

11 Q Why or why not?

12 A Because you wouldn't have the pressure on the immune
13 system as I, as I described before.

14 Q All right. So, with the presence of, of the pressure
15 resulting in the petechia and the asphyxiation, what, if
16 anything, does that indicate?

17 A That pressure was there.

18 Q Now, you mentioned also that there were other injuries
19 noted.

20 what were you referring to?

21 A The---

22 MR. SWILLEY: Objection, Your Honor. I think she's
23 already gone through that.

24 THE COURT: He's -- is this a subject that's already
25 been ground covered, repetitious?

Janice Ross - Direct examination
By Solicitor Ross

1 MR. SWILLEY: Yes, sir.

2 SOLICITOR MAYES: Your Honor, I'm asking for
3 specifically.

4 THE COURT: Okay.

5 Q Did your x-rays reveal any additional injuries?

6 A Yes, some old rib fractures, fractures.

7 Q All right. Now, when we talk about the rib fractures,
8 what, if anything, is significant about a rib fracture in a
9 four month old infant who is not yet crawling or walking?

10 A It usually indicates a squeezing of the chest cavity.
11 These were fractures in the back of the -- on the posterior
12 side of the back, part of the rib cage. And, so, that would
13 be a lot of pressure on the chest cavity.

14 Q All right. When you talk about rib fractures to that
15 area of the body, what type of squeezing or force might be
16 necessary to result in a fracture?

17 A By squeezing in the front and back or squeezing side to
18 side.

19 Q All right. What, if anything, was indicated about the
20 age or time frame in which the rib fractures were sustained?

21 A There was no significant recent bleeding around the
22 fractures indicating there being recent. Also, under the
23 microscope we looked at one, a couple of them and they are,
24 were in the healing process. You can age them to a certain
25 degree, but not specifically. Probably at least seven to

Janice Ross - Direct examination
By Solicitor Ross

1 fourteen days old.

2 Q All right. In preparation for this case, as well as
3 for purposes of medical diagnosis and treatment, have you
4 had the opportunity to review other medical records of this
5 child, ^{Child} ?

6 A Some, yes.

7 Q All right. Did you have the opportunity to observe any
8 records relating to what are called GI scans, GI scans for
9 the time period of, of June?

10 A Yes.

11 Q And specifically do you have those records with you
12 today?

13 A No, I do not.

14 Q Okay. Do you recall what, if anything -- beg the
15 Court's indulgence.

16 (Pause.)

17 Q I'm gonna show you these documents and ask you whether
18 or not you recognize them.

19 A Yes, these are reports of x-rays on ^{Child}
20 ^{Child} from June the 20th of 2005.

21 Q All right. Those x-rays were done June 20th of 2005?

22 A Correct.

23 Q And what, if anything, as part of the underlying data
24 in reaching your opinion today, what, if anything, is
25 significant about the radiologic findings?

Janice Ross - Direct examination
By Solicitor Ross

1 A Well, the only significance is that they did not report
2 any rib fractures at that time.

3 Q Okay. So, in the situation where -- do you have an
4 opinion as to whether or not the rib fractures that you
5 observed at autopsy in August would of occurred before or
6 after June 20th of 2005?

7 A Yes, I have an opinion.

8 Q All right. What is your opinion in that regard?

9 A That they would of occurred after June 20th.

10 SOLICITOR MAYES: Beg the Court's indulgence.

11 (Pause.)

12 SOLICITOR MAYES: Nothing further at this time, Your
13 Honor.

14 THE COURT: Your witness.

15 MR. SWILLEY: Thank you.

16 CROSS-EXAMINATION

17 BY MR. SWILLEY:

18 Q Afternoon, Doctor Ross.

19 A Afternoon.

20 Q Let me start out.

21 Doctor Ross, how many times did you examine the body of
22 Child , Child ?

23 A Once.

24 Q You examined it one time in camera? I'm mean -- I'm
25 sorry. Not -- one time in person?

Janice Ross - Cross-examination
By Mr. Swilley

- 1 I mean in the---
- 2 A Yes.
- 3 Q Okay.
- 4 A During the autopsy, yes.
- 5 Q Okay. And, Doctor Ross, let me ask you. How many --
- 6 let me ask you.
- 7 when did you give your autopsy report?
- 8 when did you put out your autopsy report?
- 9 A It's out May 2005.
- 10 Q And you performed it on August the 8th of 2005?
- 11 A Correct.
- 12 Q Okay. Now, Doctor Ross, you put in your original
- 13 autopsy that the manner of death was pending police
- 14 investigation?
- 15 A Correct.
- 16 Q Correct.
- 17 Okay. Now, let me ask you, does that mean that you let
- 18 the police determine what the manner of death is?
- 19 A No, when you do an autopsy, you have to correlate with
- 20 all the story and the findings at the scene. So, they're
- 21 not -- they're just telling me what they found at the
- 22 scene---
- 23 Q Okay. So---
- 24 A ---and the story of how this occurred.
- 25 Q I understand.

Janice Ross - Cross-examination
By Mr. Swilley

1 So, it would -- it appeared that your, that the manner
2 of death was not, is not really a medical determination
3 then, is it, entirely?

4 A It's a medical legal determination.

5 Q A medical legal determination?

6 A Yes.

7 Q Okay. Now, let me ask you.

8 What else -- after, after this original report came out
9 on the 9th, and you amended your report here on almost a
10 year later, no, I'm sorry, about six months later on the
11 31st of January of '06, what else, besides what the police
12 told you, caused you to change or amend what the manner of
13 death is?

14 A The fact that our other, other findings or other
15 studies were connected and I put tissue under a microscope,
16 did cultures, and got toxicology back and all those were
17 negative.

18 Q But wouldn't that -- wouldn't those facts go to the
19 matter not being ruled a homicide, if they were negative?

20 A No.

21 Q Okay.

22 A The, the---

23 Q So---

24 A If they were negative, so, they didn't have anything to
25 do with the death.

Janice Ross - Cross-examination
By Mr. Swilley

1 Q Okay. So, there were no drugs found in the baby's
2 system, correct, according to the toxicology reports?

3 A No.

4 Q All right. Let me ask you, let me ask you a more
5 specific question.

6 After your initial report, when you amended the report
7 on the 31st, what did you observe from your observation of
8 the child that would cause you to rule this as a homicide?

9 A The overall story.

10 Q Okay.

11 A The changing stories, there was negative medical
12 problems, natural diseases. There were old fractures.
13 There were bruises in different parts of the head and, and
14 abrasions on different parts of the body and the petechia.

15 Q Okay. But in your amended, in your amended autopsy
16 report, the only thing that's different, other than the
17 manner of death you put as a homicide, is that the foster
18 father changed his story. You didn't put any of the other
19 medical discoveries in there.

20 Is there any reason for that?

21 A I just don't always put a lot of negatives in my
22 report.

23 Q I understand. Thank you.

24 Now, let me ask you.

25 Your, your office is located in Newberry, is that

Janice Ross - Cross-examination
By Mr. Swilley

1 correct?

2 A Yes.

3 Q okay. How many law enforcement agencies use your
4 office for autopsy reports?

5 A The, the coroners order the autopsies and we do upwards
6 of 30 different counties.

7 Q Thirty different -- 30 out of the 46 counties of the
8 this state?

9 A Yes.

10 Q So, how many different law enforcement agencies do you
11 work with approximately?

12 A Well, you have the county offices, and you have highway
13 patrol, and state police. Several.

14 Q So, it -- so, it's -- it wouldn't -- it's a fair
15 assessment to say your office is the go to office for law
16 enforcement autopsies, correct?

17 A No, they're several, they're several in the state that
18 they can go to.

19 Q okay. But you---

20 A We are, we are one of three or four.

21 Q okay. Your, your, your practice gets the most law
22 enforcement business, correct?

23 A I'm not sure if we get the most. Probably USC does a
24 little more, a few more than we do.

25 Q okay. Now, let me ask you.

Janice Ross - Cross-examination
By Mr. Swilley

1 That must generate a substantial amount of income, does
2 it not, all these law enforcement autopsies?

3 A Yes.

4 Q Okay. And how many, how many independent autopsies do
5 you perform for individuals or other entities?

6 A We only do, for private autopsies, we may only -- we
7 may do six a year.

8 Q Six a year?

9 A Uh-huh. (Affirmative).

10 Yes.

11 Q As opposed to how many law enforcement autopsies a
12 year?

13 A Last year we did 878.

14 Q I understand.

15 And just to clarify, you never exhumed this body and,
16 and examined it again, correct?

17 A Correct.

18 Q Even though technically you could of done that?

19 I mean it's feasible?

20 A It's feasible. I don't think -- I wouldn't order it.
21 It would have to be the coroner or the judicial system.

22 Q I understand.

23 Well, let me ask you, Doctor Ross, who is the one that
24 contacted you and instructed you that, through the
25 investigation, that the facts had changed, for you to change

Janice Ross - Cross-examination
By Mr. Swilley

1 the manner of death?

2 who, who was the one that called and told you to do
3 that?

4 A Suzanne Mayes.

5 Q Ms. Mayes here?

6 A Ms. Mayes -- yes, the Solicitor's Office.

7 Q Okay. So, you're saying Ms. Mayes called you, gave you
8 these information, gave you this information and you changed
9 the manner of death, correct?

10 A Correct.

11 Q Okay. All right. And, Doctor Ross, again, I see
12 10/13/2010, which is five years later, the, your autopsy
13 report was amended again.

14 Do you recall that?

15 A Yes.

16 Q Okay. And this time you go back and, and note -- do
17 you recall noting that that investigation is ongoing at the
18 time of this report?

19 A Yes.

20 Q Okay. All right. And, Doctor Ross, just to clarify,
21 at this time when you did your second amended report, you
22 hadn't looked at the body again, had you?

23 A Correct.

24 Q Okay. But you did include other, other findings in
25 this re-amended report, correct?

Janice Ross - Cross-examination
By Mr. Swilley

1 A The only thing I included was I inadvertently omitted
2 it in -- those cases all went to my other parts of the file
3 were the fact of the rib, rib fractures.

4 Q Okay. So -- and who told you to re-amend it?
5 was that Ms. Mayes again?

6 A I don't recall having---

7 Q All right.

8 A I reviewed it again and that was October 13th and we
9 go over it and I re-amended because I knew I, that I omitted
10 that rib fracture on the official report although it
11 contained the rest of the findings.

12 Q I see.

13 So, Doctor Ross, it's fair to say you're, you're an arm
14 of the prosecution in this matter, is that correct?

15 A Yes.

16 Q Okay.

17 A I am -- well, I did the autopsy and concluded the
18 facts.

19 Q But you, you worked with Ms. Mayes and other law
20 enforcement agencies throughout this process, correct?

21 A Yes.

22 Q This is the first time you've ever seen me, is that
23 correct?

24 A Correct.

25 Q Okay. Now, Doctor Ross, going back to the prior

Janice Ross - Cross-examination
By Mr. Swilley

1 testimony on direct, is there anyway, through your
2 observations or otherwise, to tell whom might have caused
3 these collateral injuries?

4 A No.

5 Q No way to tell whom did that, who did that?

6 I'm sorry.

7 A No.

8 Q Okay.

9 A I mean a baby in the care of certain people when the---

10 Q Okay. I know that.

11 A ---in that time frame.

12 Q All right. Now, Doctor Ross, could you say, to a
13 reasonable degree of medical certainty, that any of these
14 other injuries attributed to the asphyxiation of the infant?

15 A Which one are you referring to?

16 Q All of them.

17 A The rib fractures were old and the other abrasions
18 were, to other parts of the body were probably consecutive,
19 done at the same time, although they did not cause the
20 death.

21 Q Okay. So, to clarify, none of the other injuries were
22 actually related to the asphyxiation, correct?

23 A I don't know they were not related. They may of been
24 occurred at the same time. They didn't -- they weren't
25 caused in the same manner as the smothering as a particular.

Janice Ross - Cross-examination
By Mr. Swilley

1 Q Okay. Now, Ms. Mayes asked you if some of these
2 bruises were consistent with blunt force trauma.

3 what types of bruises would be inconsistent with blunt
4 force trauma?

5 A If there's bleeding of the skin from a, sharp forceps,
6 injury, injury such as a knife thrown or a piece of glass.

7 Q Okay. And, and, again, it's---

8 A Or a bullet.

9 Q I see.

10 Again, you, you can't, you can't tell, to a reasonable
11 degree of medical certainty, or pinpoint when exactly these
12 bruises occurred, whether, where they occurred August the
13 7th or August the 1st or January the 14th?

14 You can't, you can't pinpoint that exactly, can you?

15 A Well, microscopically you can age it to a certain
16 extent. But, no, I can't say it was August 7th or
17 August 6th or August 10th.

18 Q Okay. So, you didn't, you didn't do that.

19 Okay. Now, Doctor Ross, going back to your direct
20 testimony, you said that there would have to be a
21 significant force to asphyxiate the child on it, correct?

22 A Yes.

23 Q All right. Now, as far as a significant force goes,
24 would it be feasible of an overweight individual rolling
25 over on a child to do this?

Janice Ross - Cross-examination
By Mr. Swilley

1 A Yes.

2 Q Okay. And, Doctor Ross, Ms. Mayes asked you if you
3 were familiar with the child's medical records preceding to
4 his death, and you had, you had viewed those, correct?

5 A Some of them.

6 Q Okay. Were you aware that the child had been
7 hospitalized due to breathing issues preceding to his death?

8 A I do recall something about that.

9 Q Okay. And would it be feasible that these breathing
10 abnormalities (sic) would have contributed to the child's
11 asphyxiation?

12 A They can cause some degree of asphyxiation, but they
13 don't cause the petechia.

14 Q Okay. So, the petechia -- is the petechia caused when,
15 when the air doesn't, like you said, the air doesn't
16 circulate and the bruising's caused, correct?

17 Correct?

18 A Petechia occurs because the pressure on the blood
19 vessels, and that prevents blood from circulating through
20 the heart and, and lungs to get re-oxygenated so it, in that
21 way, it decreases the oxygenation to the blood.

22 Q Okay. So, pressures on the blood vessels from what
23 exactly?

24 A From pressure on the neck or upper chest.

25 Q Okay. And did you find any evidence of bruising or

Janice Ross - Cross-examination
By Mr. Swilley

- 1 strangulation on the neck of the child?
- 2 A No, cause you don't -- we don't necessarily find that
- 3 in a child.
- 4 Q Okay. Did you find anything on the neck of the child
- 5 at all?
- 6 A No.
- 7 Q Nothing to suggest that the child is strangled,
- 8 correct?
- 9 A Right.
- 10 Q Okay. And you mentioned something about an infant
- 11 child having the, kind of like a rubbery I guess
- 12 physiological state somewhat, skeletal state?
- 13 Did you mention something about that to Ms. Mayes?
- 14 A Perivature -- more bendable than, for instance, mine.
- 15 But they're, they're softer.
- 16 Q I understand.
- 17 Doctor Ross, was there any injury to the chest of the
- 18 child that you noticed?
- 19 A There was a scratch abrasion on---
- 20 Q Internally I meant. I'm sorry.
- 21 A Oh, internally?
- 22 Q Yes.
- 23 I'm sorry. What was that---
- 24 A No.
- 25 MR. SWILLEY: Okay. Beg the Court's indulgence one

Janice Ross - Cross-examination
By Mr. Swilley

1 moment.

2 (Pause.)

3 MR. SWILLEY: Cross-examination at this time, Your
4 Honor.

5 REDIRECT EXAMINATION

6 BY SOLICITOR MAYES:

7 Q Now, Doctor Ross, you mentioned that the tissue studies
8 and toxicology were done in addition?

9 A Yes.

10 Q Why is that?

11 A That's part of the autopsy, to complete, complete
12 things. We look at tissue under the microscope to see if
13 there's any additional infection or natural disease that we
14 couldn't see. Just look at the tissue and toxicology is
15 automatic on every case with send, with a case we send to
16 SLED.

17 Q And when you talk about toxicology, you're talking
18 about looking for any type of drugs in the, in the blood
19 system?

20 A Yes, you do screenings for drugs of abuse and for some
21 therapeutic drugs. Not all poisons are routine I would say.

22 Q Can you tell us whether it's common or uncommon to
23 delay a finding on manner of death until tissue studies are
24 complete?

25 A It's fairly common.

Janice Ross - Redirect examination
By Solicitor Mayes

1 Q Can you tell us whether it's common or uncommon to
2 delay a finding on manner of death until toxicology studies
3 are complete?

4 A That's more common.

5 Q And what, if anything, was done to rule out natural,
6 natural causes of death?

7 A Well, all of the above. I just looked at the tissues
8 looking at it under the microscope and doing testing. For
9 instance, cultures if we suspect there's an infection.

10 Q All right. Now, on specifically as to -- do you issue
11 a report connected with your autopsy?

12 A Yes.

13 Q When did your initial report go out?

14 A Usually within a week of the autopsy.

15 Q What is the difference, if any, between a final autopsy
16 report and an initial autopsy report?

17 A Well, the initial autopsy report is very often the
18 final report. But in the cases where we're constantly
19 getting new information, you may have to amend it.

20 Q All right. And can you tell us when a final autopsy
21 report was issued in this particular case?

22 A I believe it was October 13th, 2010.

23 Q All right. Well, prior to that, what type of reports
24 have been issued?

25 A Well, the initial report went out August 9th, 2005.

Janice Ross - Redirect examination
By Solicitor Mayes

1 Q All right. And is it common or uncommon to not reach a
2 final finding on manner of death?

3 A It can be common.

4 Q Why is that?

5 A Because we need more information about what occurred
6 and how it occurred. The manner of death is -- the cause of
7 death is called -- the manner of death is how that cause
8 came about, and we -- the body tells a big story, but you
9 also need history of the findings that were seen and the
10 scenario according to witnesses if there are any.

11 Q All right. Now, when the initial autopsy is done, is
12 law enforcement, is law enforcement present?

13 A Usually -- very often.

14 Q All right. Do your notes indicate who was present from
15 law enforcement in, during the time of the initial autopsy?

16 A No; unfortunately not.

17 Q All right. And then when did you next issue a report
18 or, or an amendment to your report?

19 MR. SWILLEY: Objection, Your Honor. She's already
20 gone through that.

21 THE COURT: Well, it's just the second time I think
22 it's been mentioned. I'll overrule that. But I don't want
23 to hear it a third time.

24 A I'm not sure what you're, which one you're talking
25 about. It was amended---

Janice Ross - Redirect examination
By Solicitor Mayes

1 Q First of all, why were amendments made?

2 A The first amendment was made because the, I wanted to
3 change the manner of death to homicide from pending
4 investigation.

5 Q All right. And how or why is that done?
6 What's the process or procedure?

7 A Just initiating a report --

8 Q All right.

9 A -- after, after getting information on whoever's
10 investigating it.

11 Q All right. And can you tell us what, if anything, led
12 to an amendment of the report?

13 A Per the history of changing stories of the, of the
14 caretakers.

15 Q All right.

16 A And the -- let's say the report, but the negative
17 findings also, states we're reviewing it for manner, to rule
18 out natural disease.

19 Q All right. Now, in this -- in this particular case,
20 did -- had anything changed concerning your finding of
21 asphyxiation?

22 Q Do you know whether or not law enforcement provided you
23 with any additional information or the Solicitor's Office
24 provided you with any additional information?

25 A The Solicitor's Office did.

Janice Ross - Redirect examination
By Solicitor Mayes

1 Q All right. And as a result of you receiving
2 information from prosecutors, you made amendments to your
3 autopsy report?

4 A Yes.

5 Q Is that unusual or not unusual?

6 A It's not unusual.

7 Q All right. Now, when you talk about what Mr. Swilley
8 referred to as the blunt force trauma and work that might be
9 done microscopically, why or why not was that needed in this
10 particular case?

11 A I did look at the bruises microscopically to verify
12 that they were recent --

13 Q All right.

14 A -- which means, A, to bruise within days or hours --

15 Q Okay.

16 A -- unlike a heart attack, for instance.

17 Q All right.

18 A So, I could say it's a recent bruise or an old bruise
19 or recent, recent bruises.

20 Q All right. And specifically the, the bruises that you
21 noted were red, why -- do you have the opinion of why may
22 those red contusions be contemporaneous or at the same time
23 as the asphyxiation?

24 A Bruises release blood under the, in the soft tissue,
25 and blood obviously is red. But as the chemicals in the red

Janice Ross - Redirect examination
By Solicitor Mayes

1 blood cells breakdown, it, it, it causes a change in color
2 to yellow and green, green and yellow and you've seen
3 bruises on your own skin change colors, and that indicates
4 the breakdown of chemicals. So, just looking at it being
5 red, it's recent.

6 Q All right. Nothing further.

7 RECROSS EXAMINATION

8 BY MR. SWILLEY:

9 Q Doctor Ross, very briefly.

10 As you changed your report when Ms. Mayes called you,
11 would you have done that if I had called you?

12 A Yes.

13 Q You would just change your report if a defense attorney
14 called you?

15 A No, if you gave me the information that, that I
16 followed up and, and verified, then it may change something,
17 you know.

18 Q Did you verify this information?

19 A Yes.

20 Q With whom?

21 A Well, with the solicitors and, and investigators.

22 Q Okay. So, they just, they just told you about it and
23 you did it then?

24 A Yes.

25 Q Okay. Thank you.

Clay Nichols - Direct examination
By Solicitor Mayes

1 Nothing further.

2 THE COURT: You may step, you may step down. Thank
3 you.

4 SOLICITOR MAYES: The State calls Doctor Clay Nichols.

5 THE COURT: Anybody need a recess?

6 (No response.)

7 THE COURT: Okay.

8 CLAY NICHOLS, having been first duly
9 sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY SOLICITOR MAYES:

12 Q Employed in what capacity?

13 A Currently I'm the deputy chief medical examiner for the
14 State of North Carolina.

15 Q All right. And can you tell us some information
16 concerning your educational background and the training that
17 led to your current position?

18 A I received my Bachelor's of Science Degree from the
19 University of Oklahoma. After that I received my M.D. from
20 the University of Oklahoma. Following that I entered the
21 residency program in forensic and anatomical pathology at
22 MUSC. After that I was on the faculty at MUSC for ten years
23 teaching pathology to medical students, dental students,
24 pharmacy students, residents in pathology and fellows.

25 I went into private practice in Columbia in 2000 where

Clay Nichols - Direct examination
By Solicitor Mayes

1 I was also the chief medical examiner for Richland County,
2 and at the end of the year I changed positions to be the
3 deputy chief medical examiner for North Carolina. I'm
4 currently licensed in South Carolina and I'm also board
5 certified in both anatomic and forensic pathology.

6 Q All right. In, in your medical practice, have you ever
7 done any work that wasn't forensic pathology?

8 A Very little.

9 Q All right. And how many years have you been involved
10 in the practice, medical practice of forensic pathology?

11 A About 25 years.

12 Q All right. It is possible for you to estimate how many
13 autopsies you have performed during the course of those 25
14 years?

15 A Several thousand.

16 Q And have you testified previously as an expert in
17 courts of South Carolina including criminal court in the
18 field of forensic pathology?

19 A Yes, I have. And if I may back-up a little bit and add
20 some additional qualification. I was also the Chairman of
21 the South Carolina Child Fatalities Commission for eight
22 years.

23 Q All right. I want to ask you a little bit about that
24 specifically.

25 Your Honor, at this time the State would offer Doctor

Clay Nichols - Direct examination
By Solicitor Mayes

1 Clay Nichols as an expert in the field of forensic
2 pathology.

3 MR. SWILLEY: No objection.

4 THE COURT: So qualified.

5 Q Doctor Nichols, you mentioned your involvement in child
6 fatalities investigations.

7 What exactly does that entail?

8 A For the most part, that entails reviewing each and
9 every childhood death, except a natural death, in the State
10 of South Carolina. And meetings were set up with a
11 multidisciplinary board including pediatricians, solicitors,
12 welfare workers, people from the Department of Juvenile
13 Justice, advocates for the juvenile, for children and every
14 other month we'd go through 40 deaths and review the deaths
15 to ascertain whether or not the findings were correct.

16 Q All right. And we talked about child fatality reviews.

17 How common or un, uncommon are they in South Carolina?

18 A They're very common.

19 Q And, specifically, are there statutes or laws in place
20 to cover that?

21 A There is. There's a law that establishes the South
22 Carolina Child Fatality Commission.

23 Q And what does that allow, allow law enforcement to do
24 in the cases of a child's death?

25 A Law enforcement, as, as it relates to the commission,

Clay Nichols - Direct examination
By Solicitor Mayes

1 is pretty much SLED pulling together records, both medical
2 records, welfare records, any sort of criminal record, and
3 bringing everybody together. Although SLED doesn't have a
4 formal role in it as far as a criminal investigation per se,
5 they would coordinate the efforts.

6 Q All right. So, when there is the death of a child and
7 it's not due to natural causes or natural causes are ruled
8 out, what's the proper procedure?

9 A The procedure will be that the Coroner's Office is
10 notified, law enforcement's notified, and an investigation
11 takes place. Usually an autopsy's done, and, at some point,
12 all the paperwork comes together and a formal death
13 certificate is issued as far as the cause of death and we
14 usually hand up a report.

15 Q All right. And, Doctor Nichols, you've testified that,
16 as a member of the Child Fatality Task Force or Child
17 Fatalities Review Committee, you studied certain cases.

18 Have you had the opportunity to actually, actually have
19 clinical experience in homicides that involve children?

20 A Oh, yes.

21 Q Has that been on one occasion or more than one
22 occasion?

23 A More than one occasion.

24 Q All right. You mentioned that you were previously a
25 forensic pathologist in Richland County?

Clay Nichols - Direct examination
By Solicitor Mayes

1 A That's correct.

2 Q That's Richland County South Carolina in Columbia?

3 A That's correct, in Columbia.

4 Q Do you also have specific training and education in the
5 area of child homicides?

6 A Yes, I do. In fact, I've even published on child
7 homicide reviews.

8 Q And does that include homicides caused by child abuse
9 or neglect?

10 A Oh, yes.

11 Q Doctor Nichols, have you had the opportunity to review
12 case materials in this particular situation that involves
13 Child ?

14 A Yes, I have.

15 Q And does that include the opportunity to review the
16 autopsy findings and photographs and underlying data of
17 Doctor Janice Ross?

18 A Yes.

19 Q What is your opinion concerning the results of the
20 autopsy?

21 MR. SWILLEY: Objection, Your Honor. I think Doctor
22 Nichols is testified -- I think this is meant to bolster the
23 credibility of Doctor Ross. I don't think he has any, any
24 direct knowledge. He never examined the child himself. I
25 mean it's just, it's just, it's just cumulative.

Clay Nichols - Direct examination
By Solicitor Mayes

1 THE COURT: I'm gonna overrule it for right now. But
2 you may renew it in a minute if you see something that
3 supports what you're contending, contending at this time.

4 Go ahead.

5 Q Doctor Nichols, having reviewed the autopsy report,
6 autopsy findings, autopsy photographs, do you have an
7 opinion concerning the results of the autopsy?

8 A Yes, I've reviewed the autopsy photographs, the autopsy
9 report, and I agree with Doctor Ross that Mitchell Rivers
10 died as a result of asphyxiation due to smothering.

11 Q All right. To a reasonable degree of medical
12 certainty, do you have an opinion concerning any other
13 injuries which were noted to the child?

14 MR. SWILLEY: Objection, Your Honor. I move to renew
15 my former objection. It's cumulative. It only serves to
16 bolster the credibility of the prior witness. I think we've
17 already gone over all this.

18 THE COURT: I'm gonna overrule you on that. You may
19 cross-examine him on, on his examination of whatever he
20 examined in a few minutes. But for right now I'm not gonna
21 put a stop to it. I mean, you know, it's like I said,
22 normally, if I hear something twice, I don't have a problem
23 with it. But if I hear something three times, then it
24 starts getting to be cumulative to me or repetitious. So,
25 let's see.

Clay Nichols - Direct examination
By Solicitor Mayes

1 A Yes, I do have an opinion. I feel that -- it is my
2 opinion, to a reasonable degree of medical certainty, that
3 Child was subjected to physical abuse resulting in
4 multiple rib fractures as well as multiple abrasions and
5 contusions on his body. The timing of the injuries
6 indicates that these were not the same time, but he was
7 subjected to multiple incidents of blunt trauma.

8 Q All right. Now, specifically as to the injuries which
9 were to the scalp, do you have an opportunity to review
10 those findings?

11 A I reviewed the autopsy report as well as the
12 photographs, yes.

13 Q All right. Did you have the opportunity to review
14 findings specifically concerning contusions which were, were
15 described as red?

16 A Red or red blue. These were more recent contusions.
17 As Doctor Ross already testified, you certainly can look at
18 a bruise or set the skin with a bruise under the microscope.
19 But to specifically date it to an exact time, you can not do
20 that. So, these would be more recent bruises.

21 Q Can you tell us whether or not such bruises such as
22 bruising or red contusions may be contemporaneous with
23 asphyxiation?

24 A Given the, given the full picture, yes, and basically
25 what that means is that the bruises were received at or

Clay Nichols - Direct examination
By Solicitor Mayes

1 about the same time that the child was asphyxiated as
2 indicated by the I or, as mentioned multiple times, as
3 little red dots all over the face.

4 Q what, if anything, Doctor Nichols, is significant about
5 the finding that you mentioned in a four month old infant?

6 A Specifically, the rib fractures. Children aren't
7 suppose to have rib fractures like that. They're certain
8 indications that if the child were born with a bone disease,
9 you can certainly have rib fractures. But, once again, you
10 go back to the medical record, there was a chest study done
11 I believe in June, no rib fractures, the child dies, two
12 months later now we got healing rib fractures. So, in that
13 intervening six to eight weeks, you're having a child that's
14 been physically abused to the point of having multiple rib
15 fractures and they have begun to heal.

16 Q Looking on, Doctor Nichols, at contusions in multiple
17 locations, do you have an opinion as to whether those
18 findings would be accidental or non-accidental in a four
19 month old infant?

20 A They would be non-accidental.

21 MR. SWILLEY: Objection, Your Honor. It calls for
22 speculation I believe. He has no direct, he has no direct
23 knowledge of, of the, of the manner in which the child was
24 deceased. He just examined the file.

25 THE COURT: He's qualified as an expert witness.

Clay Nichols - Direct examination
By Solicitor Mayes

1 Q Doctor Nichols, first let me ask you, in your training
2 and experience, does that include the study of
3 non-accidental injuries to infants?

4 A Oh, yes.

5 Q And when I say non-accidental inflicted type of
6 injuries such as abuse?

7 A Yes.

8 Q And what, if anything, is significant about the
9 multiple contusions in a four month old infant?

10 A Well, first of all, multiple contusions indicate, at
11 some point, there was a blunt trauma injury, and blunt
12 trauma, it kind of begs a point. It's not sharp. They're,
13 there's some knife, some ice pick, or razor blade that
14 caused it. It's some sort of blunt object.

15 Also, in multiple locations, you have the, the scenario
16 where a child bangs their face, they bang the back of their
17 head, maybe their side of their face, how does a four month
18 old child, who's not mobile, get bruises all over their
19 head?

20 And that needs to be reconciled, and I think, in this
21 particular case, it indicates, once again, to repetitive
22 abuse of Child

23 SOLICITOR MAYES: Beg the Court's indulgence.

24 (Pause.)

25 Q When we talk about asphyxiation, it's specifically

Clay Nichols - Direct examination
By Solicitor Mayes

1 asphyxiation that has with it the petechia --

2 A Uh-huh. (Affirmative).

3 Q -- basically petechia of the eye, what is needed in
4 order to produce that type of medical finding?

5 A You need some sort of pressure on the chest; chest,
6 neck, forehead, something to block the, the nasal passages
7 or mouth so the child can't breathe, and also provide enough
8 pressure where the blood vessels in the face will now start
9 to rupture.

10 Q And does performing CPR on a child produce the facial
11 petechia?

12 A No, and in addition, you need -- the child has other
13 problems other than just CPR, and besides the multiple
14 bruises, the child also had bleeding on the brain, a
15 subdural hematoma. That does not come from CPR. You know,
16 taken one little incident and just looking at it and saying
17 well, it can be caused by anything, you're looking at the
18 total picture of the autopsy findings of Child

19 This is a classic case of Battered Child Syndrome.

20 Q Nothing further.

21 THE COURT: Your witness.

22 CROSS-EXAMINATION

23 BY MR. SWILLEY:

24 Q How are you doing, Doctor Nichols?

25 A How you do?

Clay Nichols - Cross-examination
By Mr. Swilley

1 I'm sorry. We haven't met.

2 Q My name is Matt Swilley. I represent---

3 A Matt.

4 Q ---Mr. Mitchell Rivers.

5 A Well, please to meet you, sir.

6 Q I have a question for you, Doctor Nichols.

7 Is there anything, throughout your investigation of
8 this matter, that will connect my client with that abuse
9 that you have observed from what you have seen?

10 A No, and nor would we expect that to occur.

11 Q Thank you, Doctor Nichols.

12 A You're welcome.

13 REDIRECT EXAMINATION

14 BY SOLICITOR MAYES:

15 Q Could you elaborate or explain your answer to that
16 particular question?

17 A An autopsy deals with the cause and manner of death,
18 and obviously, in the case of a homicide, you want to go a
19 little bit further to find out who did it, and this is why
20 we're all here today. But the autopsy seldom points to a
21 definite person as far as the person who caused the death.
22 We deal with the cause and manner of death.

23 Q All right. And, specifically, in a case like this, of
24 or a case of---

25 MR. SWILLEY: Objection, Your Honor. I don't think her

Clay Nichols - Redirect examination
By Solicitor Mayes

1 question -- I didn't cover that on cross-examination.

2 SOLICITOR MAYES: I haven't asked the question yet,
3 Your Honor.

4 THE COURT: All right. Doctor, if you will not answer
5 the question till I rule on the objection --

6 WITNESS: Yes, Your Honor.

7 THE COURT: -- if hearing any.

8 Q When you were asked about linking of a, a death to a
9 particular person, in a case like this of child physical
10 abuse, does it leave fingerprints?

11 A No, ma'am.

12 Q And in a case like this, it doesn't involve a sexual
13 assault, would you expect to have DNA evidence left behind?

14 A That's a little more technical question because if
15 you're in a, an environment, other caretakers at home, their
16 DNA is gonna be every place. But, no, you would not expect
17 to find semen or other type of similar DNA in this
18 particular child.

19 Q So, what factors are looked at or reviewed in
20 determining or, or linking an autopsy finding to any
21 particular person?

22 A We have access to the trial to bring the period that
23 the child died, and time of death is, is paramount here.
24 But it doesn't, once again, walk down to the child died.
25 Although I'm sure there's a time of death because they got

Clay Nichols - Redirect examination
By Solicitor Mayes

1 to the hospital. There could of been a period of injury
2 before the child was actually reported injured and got to
3 the hospital. So, you're looking at maybe six to twelve
4 hours that something could of had access to the child before
5 the child died, and Doctor Ross is not here, but she can
6 talk to that a little more clearly than I could.

7 Q Why is a kid -- why is a child's history or history of
8 relating to what may or may not have happened important?

9 MR. SWILLEY: Objection, Your Honor. I don't think
10 that was within the scope of my cross-examination.

11 THE COURT: Sustained.

12 SOLICITOR MAYES: Nothing further, Your Honor.

13 MR. SWILLEY: No recross.

14 THE COURT: Thank you, doctor.

15 WITNESS: Thank you, sir. It's a pleasure to be here
16 in Chesterfield. First time.

17 THE COURT: Pleasure to have you here.

18 Do we need, them for them to stay or does everybody
19 agree they can be excused?

20 MR. SWILLEY: They can be excused. No problem for me.

21 THE COURT: Beat the snow storm home.

22 WITNESS: I appreciate it, Your Honor. Be safe here.

23 THE COURT: Thank you.

24 WITNESS: Thank you for your time.

25 SOLICITOR MAYES: May we approach?

1 (WHEREUPON, a bench conference was held out of the
2 hearing of the jury at this time.)

3 THE COURT: Okay. I'm gonna defer to the Clerk's
4 office and the administration to determine about delay in
5 the morning or possible closure. We'll just have to see
6 what happens. But for right now we're gonna say ten
7 o'clock. If we get an accumulation of snow, I don't want
8 anybody to get hurt. We had people slipping and sliding
9 everywhere that last one we had, but I don't think this one
10 is gonna be as bad. We will delay possibly for a couple
11 hours.

12 So, Madam Clerk, I'm gonna defer to you.

13 How do you -- do you want to set up to call them or
14 would it be easier for them to call in?

15 CLERK: We use the call in number on the card that
16 you're given. Just call in, and if, if I have a delay, I'll
17 put it on there.

18 THE COURT: Okay.

19 CLERK: A message will be on there.

20 THE COURT: Right now we'll say 10:00. But it could
21 easily be a delay or if it looks like it's gonna be around
22 for probably the rest of the afternoon, we may not reconvene
23 or can not reconvene until Friday. But I don't think it's
24 gonna be that bad, but we'll, we'll play it by ear.

25 Remember my instructions. Don't let anybody

1 communicate with you, avoid any press coverage till this is
2 completed as far as local press.

3 Anything from the state or from the defense before I
4 release the jury for the evening?

5 MR. SWILLEY: There is not, Your Honor.

6 SOLICITOR MAYES: Nothing from the State, Your Honor.

7 THE COURT: Okay. Y'all have a good night. Hopefully
8 we'll see you in the morning. Probably worst case scenario
9 is around lunchtime.

10 (WHEREUPON, Court was adjourned for the evening.)

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

February 10th, 2011

THE COURT: Everybody ready?

MR. SWILLEY: We are, Your Honor.

THE COURT: Do you waive polling of the jury or does anybody want to?

SOLICITOR MAYES: We waive, Your Honor.

THE COURT: Polling of the jury?

MR. SWILLEY: I, I got no quarrel with waiving.

THE COURT: Okay. Everybody's in.

BAILIFF: Yes, sir.

THE COURT: Solicitor, y'all ready?

SOLICITOR MAYES: Yes, sir, Your Honor.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: Good morning. I trust everybody had a good night.

Us folks from Pageland got a snow last night. We had probably a little more than an inch. We got down to Providence Church and nothing.

Solicitor, you may call your next witness.

SOLICITOR MAYES: Yes, sir, Your Honor.

Investigator Wayne Jordan.

WAYNE JORDAN, having been first duly sworn, testified as follows:

Wayne Jordan - Direct examination
By Solicitor Mayes

1 DIRECT EXAMINATION

2 BY SOLICITOR MAYES:

3 Q Investigator Jordan, where are you employed and in what
4 capacity?

5 A Currently employed with the Chesterfield County
6 Sheriff's Office. I'm a staff sergeant with the CID unit,
7 which is Criminal Investigations Unit.

8 Q And how long have you been an investigator with the
9 Sheriff's Department?

10 A I've been an investigator with the Sheriff's Office for
11 18 years.

12 Q All right. And during the course of that 18 years,
13 have you had previous opportunity to investigate homicide
14 cases?

15 A Yes, I have.

16 Q Were you involved in the investigation concerning an
17 infant by the name of Child ?

18 A Yes, I was. I was the lead investigator for that death
19 investigation.

20 Q Can you tell us some information about how this became
21 a law enforcement investigation?

22 A Anytime that a child 17 or under dies in the State of
23 South Carolina, it is mandated that we are notified and we
24 do an investigation as to the manner of death.

25 Q All right. And is that specific to a South Carolina

Wayne Jordan - Direct examination.
By Solicitor Mayes

1 law?

2 A Yes, ma'am.

3 Q Now, on what date was law enforcement notified?

4 A I was notified at 6:30 in the morning on the 7th of
5 August, 2005.

6 Q Okay. Investigator Jordan, there's already been
7 testimony that on August 7th of 2005 there was a 9-1-1
8 call?

9 A That's correct.

10 Q And where did you first have contact with family
11 members in relation to this case?

12 A Like I said, I was on call, was an on call investigator
13 for the weekend, and I was at home and I was notified to
14 report to the Chesterfield General Emergency Room.

15 Q All right. What happened when you arrived at the
16 emergency room?

17 A When I arrived at the emergency room I was briefed by
18 one of the deputies there as to, as to what went on. Walked
19 into the emergency room and saw a infant lying on the bed on
20 the, on the stretcher there at the ER and had expired.

21 Q All right. So, at the time of your arrival Mitchell
22 Rivers was already deceased?

23 A That's correct. He was already expired.

24 Q What family members do you recall being present there
25 at Chesterfield General Hospital?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A I was directed to another room in the ER where I met
2 with -- I saw Mitchell Rivers and I saw Kimberly Quick
3 Rivers --

4 Q All right.

5 A -- which was -- I was told at that time was the father
6 and mother of the, of the child.

7 Q And do you have information as to whether or not they
8 were biological parents or the foster parents?

9 A At that time I was told that they were the parents. I
10 didn't get into the biological part. I'm assuming that they
11 were the parents. It was only after the investigation that
12 I found out that they were the adopted or they took the
13 child in their custody.

14 Q All right. Now, what happened after you had contact
15 with family members?

16 A At that time I went ahead, due to staff protocol, we
17 had to get a written statement from everybody that was
18 connected with the child during the, during the time of the
19 death, which I was told at that time the only folks that was
20 in the bedroom with the child would of been the mother,
21 Kimberly Quick Rivers, and Mitchell Rivers. When they had
22 gave them a voluntary statement form because at this time we
23 really don't ask a lot because we don't know really what the
24 matter definitely is.

25 So, at this time I went ahead and got them to give me a

Wayne Jordan - Direct examination
By Solicitor Mayes

1 voluntary statement, and they were not under arrest. They
2 could of left at anytime. I read the statement form to
3 them. I handed them the statement form. They wrote
4 statements for me. And while they were writing the
5 statements, I walked away from them and went into where the
6 body was at and I started taking photos of the body.

7 Q All right. Now, I want to back-up and kind of cover
8 with you your understanding of where the incident location
9 occurred, and that would be the location of which Child
10 was residing and was injured.

11 A The incident location was [REDACTED], which
12 is in Cheraw, and that was where the incident took place.

13 Q All right. So, what we're talking about is within the
14 confines of Chesterfield county?

15 A That's correct.

16 Q What, specific to your investigation, is your
17 understanding of the different residents of the home, how
18 many people, if you know, your investigation revealed or
19 that reside in the home with Child ?

20 A I was under the, the impression that, of course,
21 Child was in the home along with Kimberly and Mitchell.
22 Also the parents mentioned was in the residence as well as
23 one or two more people, and I, I really don't have their
24 names, but I think there's somewhere of five to seven folks
25 living in that home.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q And due to your investigation, what is your
2 understanding of where ^{Child} slept?

3 A In a play pen in the, Mitchell and Kimberly's bedroom.

4 Q All right. Did Kimberly Quick Rivers, who would be the
5 foster mother, did she cooperate with your investigation?

6 A Yes, she did. She gave a voluntary statement as well.

7 Q And on that morning, on August 7th, 2005, did
8 Mitchell Rivers also participate in giving a voluntary
9 statement to law enforcement?

10 A Yes, he did.

11 Q Now, leading up to taking the voluntary statement, what
12 instructions, if any, are persons given in regards to their
13 rights in connection with providing a voluntary statement?

14 A On, on the, on the voluntary statement, we, we read the
15 whole statement out to them. Of course, like I said, they
16 were not under arrest. They were not a suspect at the time.
17 They had free -- they were freely -- they could of left at
18 anytime and not cooperating with me. But they did. They
19 stayed. Both of them stayed. They both gave written, full
20 written statements of the events that led up to the incident
21 and that was basically my involvement.

22 SOLICITOR MAYES: Beg the Court's indulgence.

23 (Pause.)

24 Q I'm gonna show you a document and ask you whether or
25 not you recognize it.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A Yes, ma'am, this is the voluntary statement form that
2 was given to Mitchell Rivers the morning of the 7th.

3 Q I want you to start at the beginning and tell us the
4 date and time as it's reflected on that document.

5 A The date is 8/7/2005. The place is Chesterfield
6 General Hospital ER, and the time started with this
7 statement was 09:50 hours in the morning.

8 Q And whose signature is on that document?

9 A My signature's on it, A.W. Jordan, which is the
10 witness, and Mitchell C. Rivers is on it as being the one
11 giving the statement.

12 Q And is the document that you're holding appear to be a
13 true original of, of the statement that you've been
14 referring to?

15 A Yes, it is the true original.

16 SOLICITOR MAYES: Your Honor, at this time the State
17 would offer this document as evidence. I believe it would
18 be 14.

19 MR. SWILLEY: Your Honor, I, I renew my previous
20 objections.

21 THE COURT: Admitted subject to prior objections.

22 (WHEREUPON, the statement was marked as State's Exhibit
23 No. 14 and received into evidence at this time.)

24 Q Investigator Jordan, could you start at the top of the
25 document and take us through the document in terms of what

Wayne Jordan - Direct examination
By Solicitor Mayes

1 rights, if any, Mitchell Rivers would of been advised of
2 prior to filling out the voluntary statement?

3 A Yes, it says I, the undersigned, Mitchell Charles
4 Rivers, am 28 years old. Been born [REDACTED] at South
5 Carolina. I now live at [REDACTED] [REDACTED] [REDACTED] [REDACTED], Cheraw.

6 I have been duly warned and advised by investigator
7 A.W. Jordan, a person who has identified himself as CCSO,
8 which stands for the Chesterfield County Sheriff's Office,
9 that I do not have to make any statement at all nor answer
10 any questions or do anything that might tend to go against
11 me or incriminate me in any manner. That any statement I
12 make can and will be used against me on the trial or trials
13 for offense or offenses concerning which of the following
14 statements is herein made.

15 I was also warned and advised of my rights to the
16 advice and presence of a lawyer on my own choosing before or
17 at anytime during the requesting of the statement. I
18 make -- and if I am not able to hire a lawyer, I may request
19 that having a lawyer appointed for me by the proper
20 authority without cost or charge to me.

21 I do not want to talk with a lawyer, and hereby
22 knowingly and purposely waive my right to advice and
23 presence of a lawyer before or during questioning or at
24 anytime before or while I voluntarily make the following
25 statement to aforesaid person knowing that anything I can

Wayne Jordan - Direct examination
By Solicitor Mayes

1 and will, anything I say can and will be used against me in
2 a court or courts of law.

3 You want me to continue?

4 Q Yes.

5 A I declare that the following voluntary statement is
6 made to aforesaid person of my own free will without promise
7 or hope or reward, without fear or threat of physical harm,
8 without coercion, failure or offer of failure, without
9 leniency or offer of leniency by any person or persons with
10 whom so held.

11 Q All right. And the remainder of -- let me ask you
12 this.

13 Did Mitchell Rivers provide a statement in writing?

14 A He did provide a statement in writing.

15 Q And whose handwriting is the statement in?

16 A Mitchell Rivers.

17 Q All right. I'm gonna ask you to start at the beginning
18 of the statement, and if you could, slowly for the court
19 reporter, read into the record the statement of Mitchell
20 Rivers which was provided to law enforcement on the morning
21 of August 7th, 2005.

22 MR. SWILLEY: I'm gonna objection. My previous
23 objection as well as all hearsay.

24 THE COURT: You may proceed subject to that prior
25 objection.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A I, Mitchell Rivers, tells you what happened Saturday.
2 I got, went to Babcock and gotten a ride, riding lawn mower.
3 Then me and my, my brother, Bobbie, started cutting both
4 parts of the yard, of the land. Around 8:00 that night,
5 Nancy and Jennifer came over. There was talking to Kim, and
6 wanting to see the baby.

7 When they left, Kim said she was going to give him a
8 bath and put an outfit on him. So, he took his bath, and me
9 and my baby and Kim played the game until 12:00AM because
10 the baby went asleep about 10:00. So, we put him to bed.

11 This morning around 6:00AM the baby started crying.
12 So, I changed his diaper because he was wet and gave him a
13 bottle. Then I burped him and laid him on his back.

14 So, I went outside this morning because it was cool,
15 and I decided to get finished cleaning the yard. So, my
16 mother asked me where I was going and that's what I was
17 going to do.

18 When I came back from the house about 6:45, 6:50AM Kim
19 hollered and said that the baby's not breathing. So, I told
20 her to call 9-1-1, to get an ambulance, and the lady on the
21 phone talked me through CPR until the ambulance came, and
22 then they came and took him to the hospital. Then the
23 doctor told me they tried to bring him back, but my baby boy
24 just didn't make it.

25 Q All right. And is there a signature at the bottom?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A There is a signature of Mitchell C. Rivers.

2 Q Now, in this statement that is given on August 7th,
3 what time does he report to you the baby is not breathing
4 prior to being alerted by his wife?

5 MR. SWILLEY: Objection, Your Honor. She's already
6 covered that in the previous question..

7 THE COURT: I think he testified that---

8 SOLICITOR MAYES: I can ask him another question, Your
9 Honor.

10 Q In regards to this statement that is given on
11 August 7th, 2005, does Mitchell Rivers ever report
12 anything about having to do a CPR on the baby prior to
13 leaving the baby's room that morning?

14 A Prior to coming back in?

15 Q Correct.

16 A No.

17 Q Does he report any, anything concerning knowledge of
18 the baby asphyxiating during the night?

19 A Again, prior to?

20 Q Correct.

21 A From outside?

22 Q Right.

23 A No.

24 Q Does he report anything about having knowledge of the
25 baby being injured at all prior to coming in from outside?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A No.

2 Q Now, what happened after you took this first written
3 statement from Mitchell Rivers?

4 What was the next step in the, in the investigation?

5 A Mr. -- while he was saying that I was in the ER taking
6 pictures of the, the deceased.

7 Q Okay. Tell us about that in terms of where he would of
8 been and where you would of been as he filled out the
9 written statement.

10 A Again, I was in the room with the baby and he was in an
11 adjacent room. I could not see where he was at, you know,
12 because I never -- I knew where he was at, but I could not
13 see where he was at. So, he was in an adjacent room from me
14 probably 25, 50 feet away if you go out and go back around.
15 But he was in the next room over from me from where I was
16 taking pictures.

17 Q All right. And what purpose did you take photographs?

18 A For my case file, the crime scene -- my case file and
19 my investigation.

20 Q All right. I'm gonna show you some photographs and ask
21 you whether or not you recognize them.

22 A All these photos were taken by me at Chesterfield
23 General Hospital.

24 Q All right. Now, again -- and, and the child is
25 deceased at this point?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A Yes, ma'am.

2 Q What, if any, significance were the different areas
3 that you photographed?

4 A As pertains to No. 6, State's Exhibit No. 6, you see
5 bruising in the back of the base of the head.

6 SOLICITOR MAYES: Your Honor, may we publish?

7 THE COURT: Sure.

8 MR. SWILLEY: Your Honor, I would object to that. I
9 think these have already been published to the jury.
10 They've already been entered into evidence. I believe
11 Investigator Jordan's testified to that. More than one
12 witness testified to previously. I would object to the---

13 THE COURT: Overruled. Overruled.

14 A As pertains to State's Exhibit No. 5, this shows the
15 red, what, what I know as petechia to the nose and facial
16 area. Also some redness in here.

17 As pertains to State's Exhibit No. 4, this is just a
18 picture of the, from the chest up and it shows the
19 laceration to the, to the right side of the lip.

20 State's Exhibit No. 7, it shows bruising and it shows a
21 laceration to the left side, left rear side of the rib cage
22 back area.

23 And State's No. 9, again, it's just a close-up of the
24 back of the head where the bruising is at the back of the
25 basal or the back of the skull or basically the head. Also

Wayne Jordan - Direct examination
By Solicitor Mayes

1 it shows the laceration, which is an old laceration or what
2 I call as an old laceration to his back.

3 state's 10 shows, shows the, shows the right rear
4 inside the ears and mouth where there is a, a, bruising or
5 blood in the ear.

6 Q What's the next step after the photographs were being
7 taken?

8 A I went back to Mitchell and I went back to Kim. I
9 asked them if they were finished with their statements,
10 which they were, read over their statements, and advised
11 them that myself and, at the time, Coroner Don Baker needed
12 to go to the residence and photographed the residence,
13 photographed where the baby was found. So, at that time,
14 you know, they freely, they're freely to leave. They talked
15 about going back to the residence.

16 I went to the residence and spoke with the homeowner,
17 and told them what we needed to do. She gave us verbal
18 consent. I went into the residence, took pictures of the
19 residence, took pictures of where the baby was found, and
20 concluded my investigation at that point for myself and the
21 coroner.

22 Q I'm gonna show you some photographs and ask you whether
23 or not you recognize them.

24 A Yes, I -- yes, I took all these photos at the scene or
25 at the residence of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED].

Wayne Jordan - Direct examination
By Solicitor Mayes

- 1 Q All right. And who, who took the photographs?
- 2 A I took the photographs.
- 3 Q All right. And can you tell us whether or not those
- 4 photographs appear to be a fair and accurate representation
- 5 of the photographs that were taken inside and outside the
- 6 home on [REDACTED] [REDACTED] [REDACTED]?
- 7 A Yes, they are.
- 8 Q And what would the date of the photos be?
- 9 A The date is 8/7/2005.
- 10 Q So, that, that's the same day of the child being
- 11 deceased?
- 12 A That's correct.
- 13 Q How much time transpired, if you can estimate, between
- 14 when you would have left the hospital and when the
- 15 photographs would have been taken?
- 16 A He, he -- if he finished, finished his statement at
- 17 10:02 in the morning, we went directly over there after
- 18 speaking with him for a short period of time. I would have
- 19 to say anywhere from 10:45 till 11:15.
- 20 Q All right. Can you tell us what is in this particular
- 21 photograph?
- 22 A This is a picture of, of the, the edge of the bed that
- 23 Mitchell or Kimberly shared. It's also a picture of the
- 24 play pen in which was told to me where the baby was found,
- 25 where the baby would have slept. There's also clothes in

Wayne Jordan - Direct examination
By Solicitor Mayes

1 this picture of the baby in sort of the corner of the
2 bedroom.

3 Q All right. And in this particular photograph?

4 A This photograph is a picture of the full bed, and to
5 the left of the bed, if you're facing the foot of the bed,
6 towards the head, to the left of the bed would be the play
7 pen in which the baby was supposedly staying.

8 Q And this particular photograph?

9 A This is a overhead shot of the play pen. I was
10 standing directly over the play pen taking a downward shot
11 and it's showing the covers that was told to me that was in
12 the bed, in the play pen as long as, as well as the
13 comforter of, that the bed flowed in I would say as that was
14 in the bed, play pen.

15 Q All right.

16 A And this photo is the front photo. It would be a front
17 shot of the residence. You can see the front door of the
18 porch. There's a lawn mower in this picture, the green
19 riding lawn mower, the grass. Be a front shot of the
20 picture, of the trailer.

21 SOLICITOR MAYES: And, Your Honor, at this time these
22 would be offered as State's Exhibits 15, 16, 17, and 18.

23 MR. SWILLEY: Can I see those briefly?

24 (Pause.)

25 MR. SWILLEY: No objection.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 THE COURT: Okay. In without objection.

2 (WHEREUPON, the four photographs were marked as State's
3 Exhibit Nos. 15 through 18 and received into evidence at
4 this time.)

5 SOLICITOR MAYES: Your Honor, may we publish, publish?

6 THE COURT: Sure.

7 Q Now, what is the next step when there is an
8 investigation and law enforcement needs to determine cause
9 of death, for example?

10 A Our next step was -- standard protocol is taking,
11 having the baby transported to Newberry for autopsy.

12 Q And on what date was the autopsy performed?

13 A The autopsy was done on 8/8/2005.

14 Q Now, how is law enforcement advised of autopsy
15 findings?

16 A With adults, I usually go to my autopsies. Infants, I
17 can't take it. So, I don't go.

18 Q All right.

19 A But to answer your question, I was advised by the
20 coroner, which was Donnie Baker, of the preliminary results
21 of the autopsy.

22 Q All right. And when you're referring to the coroner,
23 you're referring to the, the Chesterfield County Coroner's
24 office?

25 A That's correct.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Q Can you tell us whether or not it's routine for them to
2 have a representative at, at autopsy or to be advised of the
3 autopsy results?

4 A Yeah, to be advised. I think they normally do not go.

5 Q Okay. What happened after law enforcement was advised
6 of the autopsy findings?

7 A We -- at that time, I called, I called SLED. I went
8 ahead and called for, for a SLED, a field agent to come out
9 and assist me with this. So, SLED sent Agent Mike Anderson,
10 which is assigned to the, was assigned to the PeeDee region
11 to come down and assist, and at that time we started
12 reinterviews. We interviewed again. So, we started back
13 with the, the mother and the father and brought them in for
14 a reinterview.

15 Q And you're referring to the foster mother and father,
16 which would be Mitchell Rivers?

17 A Mitchell Rivers and Kimberly Rivers, yes.

18 Q Was there an opportunity for the State Law Enforcement
19 Division to set up a date for a second interview?

20 A Yes.

21 Q And what was that date?

22 A For Mitchell or Kim?

23 Q For, for Mitchell Rivers --

24 A For Mitchell.

25 Q -- to be reinterviewed?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A He was reinterviewed over in Florence on 9/15/2005.

2 Q What other officers were present on the date of the
3 second interview for Mitchell Rivers?

4 A The other officers would of been Special Agent Rick
5 Charles with the State Law Enforcement Division and Sergeant
6 Julie Duff with the Florence City Police Department.

7 Q All right. And based upon your knowledge of the case
8 and your involvement, was Mitchell Rivers advised of his
9 Miranda warnings or his Miranda rights on
10 September 15th of 2005 during the course of the second
11 interview?

12 A That's correct.

13 Q All right. Now, at some point following the -- well,
14 let me ask you this.

15 Who, who actually conducted the first interview?

16 On September 15th, who actually had the initial
17 contact with Mitchell Rivers?

18 A Well, prior to that I contacted Mitchell, Mr. Rivers
19 and told him that we needed to do a reinterview. We had --
20 we needed to talk because some things came out that we
21 needed to talk about, and I asked him if he would go with me
22 over to Florence so we could talk with those agents I was
23 talking with.

24 So, he voluntarily rode. I picked him up from his
25 residence. We rode to Florence. And when we arrived at the

Wayne Jordan - Direct examination
By Solicitor Mayes

1 PeeDee region office over in Florence, which is actually in
2 Effingham, he met with Agent Charles and Sergeant Duff, and
3 they began talking, and I, I was not in on that interview.
4 So, they did their interview with him, and somewhere after
5 that interview I was advised that some statements were made
6 that I needed to know about.

7 Q All right. And at that point in time was Mitchell
8 Rivers in custody?

9 A No, he was not.

10 Q Had he been placed under arrest?

11 A No, he was not.

12 Q Had you said or done anything to coerce a statement
13 from Mitchell Rivers?

14 A At that time, no, I, I had not done that.

15 Q Okay. Had he been advised of his Miranda warnings or
16 rights prior to talking, speaking with you?

17 A Yes, he was.

18 Q All right. And how, if at all, did a second statement
19 come about?

20 A Agent Charles came out and spoke with me and told me
21 about the interview and said that, told me what was---

22 MR. SWILLEY: Objection, Your Honor. Hearsay.

23 THE COURT: Be careful with the hearsay unless you can
24 show me any exception.

25 Q You were, you were advised by Agent Charles that, not,

Wayne Jordan - Direct examination
By Solicitor Mayes

1 not the content of what you were advised by Agent Charles,
2 but what, what did you do as a result of being advised by
3 Agent Charles?

4 A We brought Mitchell out, myself, but Mitchell came out
5 to a conference room at, to a big conference table, and
6 myself and Special Agent Mike Anderson did a video
7 statement, took a video statement from him.

8 Q All right. And during the course of the video, video
9 statement, what techniques, if any, are, are used to keep
10 the interview conversation on?

11 A The only tape that we used was -- I set a up video
12 recorder. I read him his rights again on videotape, and
13 asked him to give us a statement, which he gave us a
14 statement.

15 Q All right. Have you had the opportunity to review the
16 videotaped statement that I have here in my possession?

17 A Yes, I have.

18 Q And is that videotaped statement a fair and accurate
19 representation of your interview with Mitchell Rivers on
20 September 15th, 2005?

21 A Yes, it is.

22 Q All right. And who else was present for the interview
23 on, on videotape?

24 A Special Agent Mike Anderson.

25 SOLICITOR MAYES: All right.. Your Honor, at this time

Wayne Jordan - Direct examination
By Solicitor Mayes

1 this will be State's Exhibit No. 19 for evidence.

2 MR. SWILLEY: Your Honor, I object to my previous
3 objections to this subject matter.

4 THE COURT: All right. It's in subject to that prior
5 objection.

6 (WHEREUPON, the statement was marked as State's Exhibit
7 No. 19 and received into evidence at this time.)

8 Q Have you also had the opportunity to review the DVD
9 version or to produce a DVD version of the original
10 videotaped statement?

11 A That's correct.

12 Q Is the DVD version a fair and accurate representation
13 of the original interview?

14 A Yes, it is.

15 Q What, if anything, Investigator Jordan, was significant
16 about the second interview with Mitchell Rivers?

17 A The second interview was an admission of what actually
18 transpired during the baby's death.

19 SOLICITOR MAYES: Your Honor, at this time we would ask
20 to publish.

21 THE COURT: You may proceed.

22 MR. SWILLEY: I, I object to my previous objections as
23 well.

24 THE COURT: So noted.

25 (WHEREUPON, State's Exhibit No. 19 was published to the

Wayne Jordan - Direct examination
By Solicitor Mayes

1 jury at this time.)

2 Q At this point during your interview with Mitchell
3 Rivers there was a discussion of him finding the baby and
4 providing or, or attempting to provide CPR.

5 where are you -- where is -- where in the home would
6 that have occurred?

7 MR. SWILLEY: Objection, Your Honor. Calls for
8 speculation.

9 SOLICITOR MAYES: Well, I, I can make it---

10 THE COURT: Well, he may know and he may not know, and
11 if he does try to speculate on it then I'll stop it. But go
12 ahead.

13 A I was---

14 Q The, the discussion about the CPR, is that the same CPR
15 that we heard in the 9-1-1 call or is that a separate event?

16 A Seems it's the same event. I haven't been involved in
17 that.

18 Q All right. Well, let me, let me back up and, and
19 clarify.

20 In, in this particular statement, what, what is, what
21 is Mitchell Rivers referring to when he says that he found
22 the baby not breathing?

23 A when he was in -- the baby was in his arms while he was
24 laying in the bed.

25 Q All right. So, that would of occurred in the bedroom?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A Yes.

2 Q Is that correct?

3 A In, in the, in the big bed that is taken in the bedroom
4 photo.

5 Q All right. And at that point, what, if anything -- was
6 law enforcement notified at that point according to his
7 statement?

8 A No.

9 Q All right. Or 9-1-1 or emergency services?

10 A No.

11 Q And what is his explanation for what had happened to
12 the baby or why the baby was not breathing?

13 A Because the baby was in his arms sleeping with him that
14 night and his arms had---

15 MR. SWILLEY: Objection, Your Honor.

16 THE COURT: Sustained.

17 Q All right. Following on this second interview, what
18 happened next?

19 A The video statement?

20 Q Correct.

21 A After this video statement?

22 I transported him back to his residence on [REDACTED] [REDACTED] t

23 [REDACTED] and advised him he needed to come see me the next, the
24 next day at the Sheriff's Office --

25 Q All right.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A -- or correction. It would of probably been the
2 Monday, next Monday at the Sheriff's Office.

3 Q All right. Do you have that specific date which you
4 would have come back for additional contact?

5 A That would of been -- he was advised to come to the
6 Sheriff's Office on the 19th of September.

7 Q All right. So, approximately four days later?

8 A Yes.

9 Q All right. Now, referring back to the videotaped
10 interview. In that interview, you were asking about a
11 pillow.

12 what, if anything, is the significance of a pillow to
13 you, to the investigation?

14 A The -- we were gonna use it for processing, but the
15 pillow was changed. The residence was cleaned.
16 Specifically the bed was cleaned up, the bedroom area was
17 cleaned prior to my arrival to the scene. So, therefore,
18 the pillow had been changed out. So, we had no idea which
19 pillow was in the play pen at the time of the, of this
20 called in incident.

21 Q Did you ask Mitchell Rivers in the videotape
22 specifically about the pillow?

23 A Yes.

24 Q All right. And what was his indication as to whether
25 the pillow that was originally in the play pen when the baby

Wayne Jordan - Direct examination
By Solicitor Mayes

1 was found is the same pillow that was present when law
2 enforcement arrived?

3 MR. SWILLEY: Objection, Your Honor. We just saw that.
4 Cumulative.

5 THE COURT: Sustained.

6 Q Did, did he and -- well, without, without going into
7 it, were you able to get information as to whether or not
8 you needed to process that pillow?

9 A Yes, I didn't need to cause it wasn't the right pillow.

10 Q Okay. Now, on the 19th, what, if anything, occurred
11 concerning your interview with Mitchell Rivers?

12 A On the 19th, he was instructed to come to the
13 Sheriff's Office, which he came to the Sheriff's Office.
14 Myself and, again, Agent Mike Anderson was present at the
15 Sheriff's Office, and just for a follow-up, to make sure his
16 story was gonna stay the same, we had him write a second --
17 well, a third, a second written statement I will call it.
18 We have our, our first statement at the hospital. We did a
19 video statement, and then, on the 19th, then, then being
20 at -- me and Mr. Anderson discussed the statement, parts of
21 it, and we decided to see if he'd make the same second
22 statement, and put it on writing, in writing, which he did.

23 Again, voluntary statement form on the 19th, read him
24 his rights again, which was provided on the statement form.
25 He freely and voluntarily went ahead and wrote us another

Wayne Jordan - Direct examination
By Solicitor Mayes

1 statement.

2 Q All right. I'm gonna ask you if you recognize this
3 document and, if so, how.

4 A This is the original written statements. There were
5 two that, on the 19th, when he came into the Sheriff's
6 Office. He handwritten---

7 Q All right.

8 A ---handwrote it.

9 Q And in this particular statement, how was he advised of
10 his rights?

11 A Again, the rights were on the form.

12 Q Are those the same rights that you previously read into
13 the record as part of the voluntary statement form?

14 A Same, same rights, yes, ma'am.

15 Q And did Mitchell Rivers appear to understand his
16 rights?

17 A He did.

18 Q Was he in custody at that point in time?

19 A At that point in time he was not.

20 Q Okay. Was he threatened or coerced in anyway in order
21 to participate in a statement?

22 A No, ma'am.

23 Q And does, does the statement bear his signature?

24 A It does.

25 Q And whose handwriting is this statement in?

Wayne Jordan - Direct examination
By Solicitor Mayes

1 A His.

2 Q All right.

3 A Mitchell Rivers.

4 Q Could you start at the very beginning of the statement
5 with the date and time and read into the record the content
6 of the statement?

7 A The date---

8 SOLICITOR MAYES: Beg the Court's indulgence. We would
9 offer this at this time, Your Honor, as State's Exhibit 20.

10 THE COURT: Counsel.

11 MR. SWILLEY: I object to my previous objections to
12 this subject matter.

13 THE COURT: So noted.

14 (WHEREUPON, the statement was marked as State's Exhibit
15 No. 20 and received into evidence at this time.)

16 Q If you could start at the beginning of his statement
17 which was made at this time.

18 A The date is 9/19/05. The place is Chesterfield County
19 Courthouse, which was, at that time, the Sheriff's Office.
20 The time was 10:15AM in the morning.

21 It says I, the undersigned, Mitchell C. Rivers, am 28
22 years old. Have being born on [REDACTED] in South Carolina, and
23 I live at [REDACTED], Cheraw, South Carolina. I
24 have been duly sworn -- correction. I have been duly
25 warned and advised by Investigator A.W. Jordan, a person who

Wayne Jordan - Direct examination
By Solicitor Mayes

1 identified himself as CCSO, Chesterfield County Sheriff's
2 Office, that I do not have to make any statement at all.

3 Q All right. Let me stop you right there.

4 Are the -- is the remainder of the voluntary statement
5 identical to the previous voluntary statement that you read
6 into the record?

7 A It is.

8 Q All right. And if you could start with where Mitchell
9 Rivers actually makes a statement in his handwriting?

10 A His handwriting, it says Saturday, about 8:00PM, my
11 wife, Kim, said that, said she was going to give the baby a
12 bath and she did. So, she put on an outfit with daddy
13 little helper on it. About 9:00PM, she, myself, and the
14 baby went into my brother's room and played the game.
15 Around about 10:00 the baby went to sleep, and we put him in
16 bed, put him to bed.

17 So, my wife and me kept playing the game until about
18 12:00, close to 1:00. Then we decided to go to bed. That
19 night our baby had slept in the same bed, and I was -- laid
20 him on the side between my chest and armpit, and we both
21 went to sleep.

22 Around 6:00AM I woke up and the baby was not breathing,
23 and I tried my hardest and hardest to do CPR that morning to
24 bring him back, and his color had started coming back and he
25 had started breathing.

Wayne Jordan - Direct examination
By Solicitor Mayes

1 so, I laid him down in the play pen and went outside to
2 clean off the yard. I came back inside and she had said he
3 stopped breathing. So, I told her to call 9-1-1 to help me
4 this time, and I kept doing CPR like she said till the
5 ambulance get there, and that's when I did, I know I was
6 wrong for not calling the 9-1-1 first when that happened,
7 and I should have told them that, everybody, but I did not
8 know what to do. Lord knows I would never hurt my own son,
9 and I'm sorry, and I regret it everyday. But I please beg
10 you, all of you to please help me.

11 Q All right. And does that statement bear his signature
12 on it?

13 A Yes, it does.

14 Q And what happened following that, the statement on
15 September 19th, 2005?

16 A He was arrested that day---

17 Q All right.

18 A ---and taken to the Chesterfield County Sheriff's
19 office, to the jail.

20 Q All right. And he was, he was arrested on that day
21 following the statement?

22 A Following the statement, yes.

23 SOLICITOR MAYES: Beg the Court's indulgence.

24 (Pause.)

25 Q Now, what, if any, communication did the Sheriff's

Wayne Jordan - Direct examination
By Solicitor Mayes

1 Office maintain with the Coroner's Office?

2 A The only other communication was getting the paperwork
3 as to the finalization of the autopsy.

4 Q All right.

5 SOLICITOR MAYES: Nothing further at this time, Your
6 Honor.

7 MR. SWILLEY: Thank you, Your Honor.

8 THE COURT: Your witness.

9 CROSS-EXAMINATION

10 BY MR. SWILLEY:

11 Q Hello, Investigator Jordan.

12 A Good morning.

13 Q Let me go back.

14 Investigator Jordan, you said when you were at the
15 hospital, did you just have contact with Mitchell and Kim?

16 A That's the only two I took a statement from.

17 Q Okay. Do you -- but do you remember seeing anybody
18 else at the hospital besides Mitchell and Kim and the
19 doctors and ER personnel or I mean, I'm sorry, EMS
20 personnel?

21 A Did I see them?

22 Q Yeah.

23 A Of course.

24 Q Okay. And do you recall who, who, who each of them
25 was?

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Was it his father, sisters, brothers?

2 A Do I recall seeing his father, sisters, brothers, or
3 just the ER staff?

4 Q The, the family.

5 I mean do you recall specifically who they were?

6 A I recall seeing the doctor. I recall seeing one of the
7 nurses, which was Dan. Matter of fact, he assisted me in
8 taking some photos, positioning the body while I took my
9 photos. I recall seeing the EMS folks. I recall seeing
10 Kenny Wallace. I recall seeing the coroner -- well, the
11 deputy coroner. I recall seeing Carl. I recall seeing my
12 deputies. I know I saw Mitchell. I know I saw Kim. I want
13 to say I saw some of his family, but can I tell you who his
14 family was, I can't tell you who that was.

15 Q Thank you.

16 When you approached Mitchell and discussed the matter,
17 was he upset at the time?

18 A Of course.

19 Q Was he crying?

20 A Of course.

21 Q Did you, did you tell him to calm down, get a hold of
22 himself?

23 A I told him to guide, guide himself cause he was upset
24 and he was crying.

25 Q Okay. Well, do you know how, about how long after

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Mitchell had heard about the death of the baby y'all
2 discussed this matter?

3 A I can't give you a time frame. I can tell you it was
4 within -- it was before he gave a statement. He knew about
5 his child dying.

6 Q But you can't give me an approximation, the time
7 between his discovery of this---

8 A Right after, during the time the doctor told him that
9 the baby had expired.

10 Q Okay. Now, you said when you went to the Rivers home
11 that day after you left the hospital, do you recall who was
12 in the house at the time and what, about what time this was?

13 A Again, it was somewhere, it was somewhere after
14 10:02 because he made a statement at 10:02. His statement
15 ended at -- his first initial statement ended at 10:02. So,
16 I'm gonna say around 10:30, anywhere from 10:30 to 10:00,
17 till, till 9:15 is when I saw the Coroner Baker and went to
18 the residence. I mean I can't tell you to the minute, but
19 somewhere between 10:30 and 11:45, 11:15.

20 Q Okay. And is that about how long you were at the
21 residence, about 45 minutes, or were you there longer?

22 A I was there every bit of 45 to an hour, 45 minutes to
23 an hour.

24 Q Okay. And you -- I heard you stated that the, the
25 owner of the residence let you in, take pictures.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Who was that?

2 A I would assume that's his mother. I remember her
3 because of the oxygen.

4 Q Okay.

5 A She was sitting on the couch when -- if you walk into
6 the residence, there was a couch along the wall, and I
7 remember her sitting on that couch, and we, we talked, and I
8 believe, I believe, it's not in my notes, but I believe I
9 talked to his father and told his father what was going on,
10 which they already knew what was going on, as far as the
11 death of the child. But I, I discussed and told him that it
12 was, by law, I had to come to this residence and I had to
13 take photos and I had to speak with everybody.

14 Q And did you speak with everybody in the home?

15 A Did I individually one-on-one speak with them, I don't
16 believe I did. I think I talked to them as a group because
17 there wasn't any room. So, no, no, I didn't. I didn't take
18 an individual statement about one-on-one with them, no.

19 Q Okay. So, you didn't get any written, written
20 statements from at, at this, at this house, correct?

21 A No.

22 Q Okay. How long is the Sheriff's Office -- you -- I
23 heard Ms. Mayes testified or you testified to Ms. Mayes that
24 you worked with the autopsy, Newberry Pathology, Pathology
25 Associates I believe?

Wayne Jordan - Cross-examination
By Mr. Swilley

1 A Uh-huh. (Affirmative).

2 Q How long is the Sheriff's Office been using that
3 particular practice?

4 A I've been in law enforcement for 17 years. Eight of it
5 being with Cheraw P.D., and since -- four of it being with
6 Rogers City, and been back here in 2003. Chesterfield
7 County Sheriff's Office, to my knowledge, has used Newberry
8 Pathology for eight years, my whole career with the
9 Sheriff's Office, and I would say, venture to say they used
10 it before I got back, came back home.

11 Q Okay. And what -- as far as the autopsy, what, what
12 role did you play in this autopsy?

13 A Again, I didn't go -- I don't do, I don't do infant
14 autopsies. I got children of my own. I don't want to see
15 it.

16 Q Okay.

17 A So, my role with this, this autopsy would be a phone
18 call from the Corner's Office as to, to the, to the suspect,
19 all findings that was found, and that we needed to open up
20 the investigation, follow-up on what we were doing.

21 Q Okay. So, you yourself never advised Doctor Ross or
22 anybody from Newberry to---

23 A I never talked with Doctor Ross.

24 Q Okay. Okay. Let me go back to the second statement
25 that you took from Mitchell, the video that we saw here.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 That was a month and a week about after the death of
2 the child, correct?

3 A Yeah.

4 Q Okay. Now, and who transported Mitchell to the, to
5 Effingham, the office in Effingham in Florence?

6 A I did.

7 Q You yourself?

8 A Yes.

9 Q Okay.

10 A I drove in my truck, in my, in my cab of my vehicle,
11 which is a green Ford Explorer at the time. Picked him up
12 from his residence, [REDACTED], [REDACTED], [REDACTED], we talked a
13 little more, told him we needed to go down there and talk.
14 He, he said he wanted to go, he would go, no problems. He
15 went by his residence and we rode.

16 Q You said the county car, is that, is that a police car?

17 A Well, that's an unmarked Ford Explorer.

18 Q Okay.

19 A I'm a criminal investigator. So, I have an unmarked
20 vehicle.

21 Q I understand.

22 Now, when you got him to the SLED office, did you, in
23 proceeding to any interviews, did you show him any pictures
24 of the autopsy or any pictures that you took from the
25 hospital?

Wayne Jordan - Cross-examination
By Mr. Swilley

- 1 A I, I don't recall showing him any pictures, If I did,
- 2 I don't recall. I can't say that I did. I can't say that I
- 3 didn't. I don't recall.
- 4 Q And did you observe anyone else do so?
- 5 A I -- no.
- 6 Q Okay.
- 7 A If anybody showed it it would of been me, and I don't
- 8 recall -- I was the only one who took pictures. I was the
- 9 only one that had the pictures.
- 10 Q I understand.
- 11 And I -- and in going back to the second statement, did
- 12 you ever, at anytime, tell Mitchell to try to calm himself
- 13 down for the second time when he was, when he was sobbing?
- 14 A I don't know that I did. I can't say that I did. I
- 15 didn't tell him. I don't think I told him.
- 16 Q Okay. But, investigator, to your knowledge, was there
- 17 ever, a time when you were consulting about Mitchell or
- 18 consulting with Mitchell about this matter where he wasn't
- 19 in tears, crying?
- 20 Do you recall any, any time ever, about the subject
- 21 matter?
- 22 A He wasn't -- he cried some on the video. He didn't cry
- 23 the whole time on the video and the video speaks, states for
- 24 itself. He did cry on the video. He didn't cry on the
- 25 video. Sometimes when I talked with him he was crying.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Sometimes he didn't. I mean there's a range of emotions
2 there. He didn't cry, and he did cry.

3 Q Okay. And you said you yourself personally took
4 Mitchell back to Cheraw?

5 A I personally put back, him back in my truck. I didn't
6 put him, but he walked back to my truck, got in the
7 passenger side, and I drove him back to [REDACTED]
8 [REDACTED].

9 Q Okay. Investigator Jordan, you said that you asked him
10 to come -- and what, what day of the week was that?

11 Was that a Saturday?

12 A No, it would of been -- well, if it was the 19th, it
13 was probably a Thursday, a Thursday or Friday because if
14 there was a time frame that I did not arrest him, it would
15 of been a Monday, that he came up there on a Monday. So, I
16 mean I don't have a calendar. I'm gonna say that it was a
17 Thursday or Friday. He came back in on Monday.

18 Q Okay. I'm not asking you to speculate here.

19 So, between the time the second statement and Mitchell
20 coming back to the police station on his own accord, did you
21 consult with anybody about this matter or pertaining to this
22 matter?

23 A I did run all the -- I ran everything by the -- I run
24 everything by the solicitor at the time, which is Jay Hahs,
25 told him what I had, told him the facts of the case that we

Wayne Jordan - Cross-examination
By Mr. Swilley

1 had at that point, and he advised me what actions I needed
2 to take.

3 Q Okay. And what did he advise you to do?

4 A To obtain an arrest warrant for him for homicide by
5 child abuse.

6 Q Okay. All right. But before you obtained this
7 warrant, you got a second or third, I'm sorry, third
8 statement or second written statement from Mitchell?

9 A That's correct.

10 Q That was on that Monday, correct?

11 A That's correct.

12 Q Okay. And did I hear your testimony is you let him go
13 home after there?

14 A No.

15 Q Okay. You kept him there and then you served a warrant
16 on him?

17 A That's correct.

18 Q Okay. And let me talk about the finalization of the
19 autopsy.

20 when was that exactly or when did you get word about
21 that?

22 A As far as -- I mean I just received paperwork. I mean
23 nobody ever called me again.

24 Q Okay.

25 A After I talked with the other, Coroner Baker the day of

Wayne Jordan - Cross-examination
By Mr. Swilley

1 the original, the date of the autopsy and he told me the
2 findings, the preliminary findings, I had talked to nobody
3 else at the Coroner's Office nor did I talk to anybody else
4 within the pathologist about it. I just received paperwork
5 in the mail and put it all in our case file.

6 MR. SWILLEY: Okay. Beg the Court's indulgence.

7 (Pause.)

8 SOLICITOR MAYES: Nothing further at this time, Your
9 Honor.

10 THE COURT: You can step down.

11 Next witness gonna be short or long?

12 SOLICITOR MAYES: It will be Sergeant Duff, Your Honor.

13 THE COURT: Anybody need a recess now?

14 Let's go ahead and take 15 minutes. We'll come back
15 and start up with the next testimony.

16 The jury may step back to the room.

17 (WHEREUPON, a short recess was taken at this time, and
18 the following takes place within the presence of the jury.)

19 THE COURT: I think we're ready.

20 SOLICITOR MAYES: The State calls Sergeant Julie Duff.

21 JULIE DUFF, having been first duly
22 sworn, testified as follows:

23 THE COURT: Be seated in the witness box.

24 DIRECT EXAMINATION

25 BY SOLICITOR MAYES:

Wayne Jordan - Cross-examination
By Mr. Swilley

- 1 Q You're employed in what capacity?
- 2 A Florence Police Department. I'm a sergeant over the
- 3 criminal investigations unit.
- 4 Q All right. And how long have you been with criminal
- 5 investigations?
- 6 A I've been employed with the department for 24 years,
- 7 but I've been with the criminal investigations unit 12
- 8 years.
- 9 Q All right. And have you also had the opportunity to be
- 10 involved in communication or work together in conjunction
- 11 with the State Law Enforcement Division?
- 12 A Yes, in 2005 my department allowed me to do an
- 13 internship with SLED to learn how to---
- 14 Q All right.
- 15 A ---become a better interviewer.
- 16 Q Okay. Now, I'm gonna take you back to 2005 and ask you
- 17 whether or not you had the opportunity to be involved in a
- 18 homicide investigation concerning an infant by the name of
- 19 Child ?
- 20 A Yes, I did.
- 21 Q And on what date did you become involved in this
- 22 investigation?
- 23 A September 15th, 2005.
- 24 Q All right. And was anyone else also accompanying you
- 25 in connection with the investigation?

Wayne Jordan - Cross-examination
By Mr. Swilley

1 A Yes, Special Agent Rick Charles who I work with on a
2 daily basis.

3 Q All right. And Agent Rick Charles is employed by what
4 agency?

5 A South Carolina Law Enforcement Division.

6 Q All right. So, you and the SLED agent became involved
7 on, on September 15th of, of 2005, and where did you have
8 contact with any individuals in relation to this case?

9 A The SLED office, which is at the PeeDee regional office
10 in Kennesaw, South Carolina.

11 Q All right. And who specifically did you have contact
12 with in regards to this investigation?

13 A Special Agent Mike Anderson had advised Special Agent
14 Rick Charles that they needed our assistance. Present that
15 day was Investigator Wayne Jordan, Chesterfield County
16 Sheriff's Office, Mike Anderson, Agent Rick Charles, and
17 myself.

18 Q All right. And who, if anyone, who -- what, what
19 subject or subjects did you have contact with regarding the
20 investigation?

21 Who were you interviewing?

22 A Oh, thank you. Mitchell Rivers.

23 Q All right. And have you had the opportunity to
24 interview anyone else in connection with the case as well?

25 A No.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Q All right. Now, when you first had contact with
2 Mitchell Rivers, how was he advised of his, what we call
3 Miranda warnings or Miranda rights?

4 A We have a form that we use that we read them to them
5 verbatim, word-for-word. So, we read it to him, he signed
6 it, and I signed it.

7 Q All right. I'm gonna show you a document and ask you
8 whether you recognize it?

9 A Yes, I do.

10 Q And how is it that you recognize that document?

11 A It's in my handwriting and my signature's on it.

12 Q All right. And what is that document?

13 A This is South Carolina Law Enforcement Division Miranda
14 rights form.

15 Q All right. And does it bear any other signatures?

16 A Yes, Mitchell Rivers, Mitchell C. Rivers signed twice.

17 Q All right. And does that document appear to be a true
18 and accurate representation of the Miranda form that
19 Mitchell Rivers was advised of?

20 A Yes, it is.

21 SOLICITOR MAYES: Your Honor, at this time the State
22 would offer the Miranda form as Exhibit 21 I believe.

23 MR. SWILLEY: I object on my previous objections.
24 Subject to that, and it's also the prior objection is
25 renewed. It will still be entered.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 THE COURT: Subject to that prior objection.

2 (WHEREUPON, the statement was marked as State's Exhibit
3 No. 21 and received into evidence at this time.)

4 Q Now, if you could, Sergeant Duff, start at the
5 beginning of that document and tell us exactly what Mitchell
6 Rivers was advised of on this particular day?

7 A He was advised these are your Miranda rights, the
8 location, SLED PeeDee office, date is September 15th,
9 2005, the time was 2:19PM, and I read to him before we ask
10 you any questions, you must understand your rights.

11 You have the right to remain silent. Anything you say
12 can and will be used against you in a court of law. You
13 have the right to talk to a lawyer for advice before we ask
14 you any questions. You may have him or her present with you
15 during the questioning. If you have no money for lawyer's
16 fees, the Court will appoint the lawyer to represent you
17 without cost to you if you wish. If you decide to answer
18 questions now or without a lawyer present, you will still
19 have the right to stop answering questions at anytime until
20 you talk with a lawyer.

21 I have read this statement of my rights and I
22 understand what my rights are, and it's signed by Mitchell
23 C. Rivers, and then at the bottom it says waiver of rights.
24 I am willing to make a statement and answer questions. I do
25 not want a lawyer at this time. I understand and know what

Wayne Jordan - Cross-examination
By Mr. Swilley

1 I'm doing. Any promises, promises nor threats have been
2 made to me. Neither pressure nor coercion of any kind has
3 been used against me, and it's signed by Mitchell C. Rivers,
4 and then I signed it as a witness.

5 Q All right. And did -- the date of the signatures on
6 the subsequent interview that was conducted?

7 A The date is September 15th, 2005, which was a
8 Thursday.

9 Q And at this point in time, was Mitchell Rivers in
10 police custody?

11 A No, he was not.

12 Q Were any threats or coercion used by yourself or Agent
13 Charles in order to obtain a statement?

14 A No, they were not.

15 Q Were any promises of reward made to Mitchell Rivers in
16 exchange for a statement?

17 A None at all.

18 Q Based upon your observations, did the statement of
19 Mitchell Rivers or the interview with Mitchell Rivers appear
20 to be free and voluntarily given?

21 A Yes, it was. Mitchell Orders (sic) was actually
22 informed that he could stop the interview at anytime. He
23 was told that he could leave at anytime. He was told that
24 if he needed water, bathroom, or anything that he could get
25 up and leave. That he was there very freely and he said

Wayne Jordan - Cross-examination
By Mr. Swilley

1 that he wanted to talk to us and he sat down and, and talked
2 with us.

3 Q All right. And at the beginning of the interview, tell
4 us what happened.

5 A This is basically just an opportunity for us to sit
6 down and gather some facts about what happened in a very, as
7 relaxed atmosphere as you can get. The PeeDee regional
8 office is like a -- it's a house that has been transformed
9 into offices. So, they're very comfortable chairs that we
10 sit in. It was just him and I sitting in a room, and I
11 asked him to basically tell me what had happened.

12 I had been given some, some information prior to from
13 the investigators, Special Agent Mark Anderson, so I would
14 have an understanding of what had taken place. So, when he
15 sat down and started talking with me, he gave his original
16 version of the story, which if I can refer back to the
17 written statement number one, and he said that Alexander had
18 woke up crying about 6:00AM.

19 MR. SWILLEY: Objection, Your Honor. Renew my previous
20 objections, but hearsay.

21 THE COURT: Noted.

22 You may continue though.

23 A He said that he had changed the, the baby's diaper,
24 that he fed him a bottle, and that he put him back in the
25 play pen. I think we went on to reference, you know, was it

Wayne Jordan - Cross-examination
By Mr. Swilley

1 not a crib and he said no, they used the play pen as his
2 crib, that's where he slept, and that he also made a point
3 of saying that the baby was face up.

4 He then said that, you know, the baby was fine, and
5 that he went outside, and he cut some grass at 6:00
6 something in the morning.

7 He said, at that point in time, that Kimberly woke up
8 and that the baby was face down in the pillow. Of course,
9 face down and that the baby wasn't breathing, and that she
10 called 9-1-1. He said that he attempted CPR on ^{Child}
11 ^{Child}, and he said this was some time about
12 6:50 in the morning.

13 He said EMS came. They worked on the baby. The baby
14 went to, excuse me, to the hospital and to the ER and that
15 the baby didn't make it.

16 Q All right. And during the course of the interview, did
17 the information he was providing change or evolve in any
18 matter?

19 A Yes, you know, it was a -- we, we were talking for
20 quite a while just so that we could have some more
21 understanding because, you know -- so, later on in the
22 interview he told us he wanted to change his story. He
23 confessed that he had done it, and I asked him what do you
24 mean, and he said I did it. He said that the baby,
25 Alexander, was not in the bed, I mean, excuse me, was not in

Wayne Jordan - Cross-examination
By Mr. Swilley

1 the play pen, that he was in the bed with him.

2 He was holding the baby in the crook of his arm, and
3 that the baby had slept with him most of the night, and that
4 his arm -- he must of pulled the baby into his chest. He
5 said the baby was face down in the crook of his arm, and the
6 baby was not breathing. The baby was not breathing.

7 He also stated that he didn't tell the truth, that he
8 said he had not fed the baby any bottle. He said he did not
9 change the baby. He stated that he did try to do CPR, but
10 he, he wasn't certified or qualified on CPR and really
11 didn't know what he was doing with the CPR.

12 He said at that point in time he placed the baby face
13 down in the play pen. He said he then went outside. He did
14 not wake up his wife and tell Kimberly there was something
15 wrong with the baby. At that time of the morning he didn't
16 seek any help. He went outside, he knew the baby was not
17 breathing, and he said he went outside to smoke some crack,
18 and he said later his wife notified him that the baby was
19 not breathing. He also stated that he must have
20 accidentally smothered the baby in his arm.

21 The only injuries that we knew or were advised of to
22 the, ^{Child} body, was the, those ribs, and, so, we
23 questioned him about that. He said he had no knowledge of
24 the baby having any previously broken ribs.

25 Q All right. And when you come into, in an interview, do

Wayne Jordan - Cross-examination
By Mr. Swilley

1 you know, necessarily have every known fact or what is that
2 technique for preparing for the interview?

3 A We really don't want to know everything. I haven't
4 even seen the pictures. I wasn't told about anything
5 related to the autopsy. I only know that the baby had died
6 from asphyxiation. I didn't know where the house was
7 located other than it was in Chesterfield County. I didn't
8 know that Mr. and Mrs. Rivers lived in the home with his
9 parents. Didn't have all these facts. But this is not
10 necessarily, necessary to have all these facts to gather the
11 information and the facts from that individual.

12 Q: All right. And, specifically, as the interview has
13 concluded, do you have a way of documenting the statements
14 that has been provided to you?

15 A We sit down very very quickly, especially after we
16 notified Investigator Jordan, Special Agent Mike Anderson
17 that he had indeed made mistakes, that he changed his story,
18 we sit down very quickly and we just sit there and document
19 everything that was said.

20 Q All right. And you mentioned that you notified Agent,
21 I'm sorry, Investigator Jordan and Agent Mike Anderson from
22 the State Law Enforcement Division?

23 A They were just one room over.

24 Q All right. And you are aware that a videotaped
25 statement was also---

Wayne Jordan - Cross-examination
By Mr. Swilley

1 MR. SWILLEY: Objection, Your Honor. Leading the
2 witness.

3 SOLICITOR MAYES: I can rephrase.

4 Q Are you aware as to whether or not a videotaped
5 statement was taken in this case?

6 A Yes, I am. What actually happened was we brought
7 Mr. Rivers into the conference room cause it had more
8 seating to see him. There was probably ten, fifteen minutes
9 of discussion about what had, the statement had changed. At
10 that point in time Investigator Jordan said he wanted to
11 conduct a video interview with myself and Mr., or excuse me,
12 Special Agent Rick Charles left the room.

13 Q All right. Now, specifically as to any documentation
14 you have with you today, you have any documentation which
15 reflects the statement as it was provided to you?

16 A I just have my own investigator notes.

17 Q Any, any documentation post-interview?

18 SOLICITOR MAYES: Beg the Court's indulgence.

19 THE COURT: Uh-huh. (Affirmative).

20 (Pause.)

21 Q Whose handwriting is that in?

22 A Mine.

23 Q Okay. Did you have the opportunity to document the
24 statement of Mitchell Rivers on September 15th, 2005?

25 A Yes, I did.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Q All right. I'm gonna ask you to slowly read into the
2 record your documentation of that statement.

3 MR. SWILLEY: I'm gonna object. I think that's already
4 been gone over. Plus I don't, I don't see how it's hearsay.
5 That's not, that's not exactly verbatim when you said that's
6 her own personal notes.

7 THE COURT: It's permissible. I'll have to overrule
8 you on that.

9 Q Please continue.

10 A Okay. He confessed that the victim was in bed with him
11 that morning. He said victim was face down in crook of his
12 arm and not breathing. He admitted that he did not change
13 or feed victim. He claimed he attempted CPR and then placed
14 victim face down in the play pen. He said he then walked
15 outside without waking his wife knowing victim was not
16 breathing. He said he must of accidentally smothered victim
17 in his arm, and he denied knowledge of victim's broken ribs.

18 Q Does that included your -- does that conclude your
19 documentation?

20 A Yes, it does.

21 SOLICITOR MAYES: Nothing further.

22 CROSS-EXAMINATION

23 BY MR. SWILLEY:

24 Q Morning, Investigator or Officer Duff.

25 Just to clarify, this statement given by Mr. Rivers was

Wayne Jordan - Cross-examination
By Mr. Swilley

1 not recorded, correct?

2 A No, it was not.

3 Q Okay. So, he didn't write any of this, what he's, what
4 you claim he's telling you now for you, did he?

5 A No, he did not.

6 Q Okay. All right. This, this is the involvement in the
7 case?

8 You didn't have any other involvement in this case,
9 correct?

10 A No, I did not.

11 Q Okay. How long did you say you talked to him?

12 A The interview started at 2:15 and it ended at 4:13.

13 Q Okay. All right. So, you were, you were going off
14 your notes you took subsequent to your speaking with
15 Mr. Rivers, correct?

16 A Yes.

17 Q Going off the notes that you took after the interview
18 with Mr. Rivers, correct---

19 A That's correct.

20 Q ---not contemporaneously. Thank you.

21 And why, why were you or is there any reason that you
22 didn't get him to write what he said down himself?

23 A That's the purpose the, of the, of our interview. Once
24 he makes a confession or admission, we bring an investigator
25 in and they talk to him.

Wayne Jordan - Cross-examination
By Mr. Swilley

1 Q Okay. Thank you, Investigator Duff.

2 I have nothing further.

3 SOLICITOR MAYES: Nothing further.

4 THE COURT: You may step down. Thank you.

5 SOLICITOR MAYES: The State calls agent Rick Charles.

6 RICK CHARLES, having been first duly
7 sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY SOLICITOR MAYES:

10 Q Agent Charles, where are you employed and in what
11 capacity?

12 A I'm a senior special agent with the South Carolina Law
13 Enforcement Division, and I'm currently assigned to the
14 behavioral science unit, cold cases.

15 Q All right. And how long have you been an agent with
16 the State Law Enforcement Division?

17 A I've been with SLED for ten years, and I was with
18 Spartanburg County Sheriff's Office for seven years.

19 Q All right. And how much of your career has been in the
20 field of criminal investigations?

21 A Twenty-seven years. I'm also retired Air Force
22 criminal investigator and I started in 1983.

23 Q All right. And prior to 2005, have you had the
24 opportunity to participate in homicide investigations?

25 A Yes, ma'am.

Rick Charles - Direct examination
By Solicitor Mayes

1 Q And on or about September of 2005, were you involved in
2 a investigation concerning Child ?

3 A Yes, ma'am, that's correct.

4 Q And kind of take us through your initial involvement in
5 the case?

6 Were there any particular people that you had contact
7 with?

8 A Yes, ma'am, we were asked to assist in the
9 investigation by Investigator Wayne Jordan and Special Agent
10 Mike Anderson. He and I worked together in the PeeDee
11 region out of Florence.

12 Q All right. And what subject or subjects did you have
13 contact with during the course of the investigation?

14 A I was able to sit down and interview the defendant,
15 Mitchell Rivers.

16 Q All right. And in addition to Mitchell Rivers, did you
17 interview any other subject or subjects affiliated with the
18 case?

19 A Yes, ma'am, interviewed Kimberly Rivers.

20 Q All right. That would be Kimberly Quick Rivers?

21 A Yes, ma'am.

22 Q All right. And on what date did you have contact with
23 the defendant, Mitchell Rivers?

24 A I believe that was the 15th of September of 2005.

25 Q All right. And we've heard previously from Agent Duff.

Rick Charles - Direct examination
By Solicitor Mayes

1 Can you tell us whether or not you were present during
2 portions of Sergeant Duff's interview with Mitchell Rivers?

3 A Yes, ma'am, during the latter portions she asked me to
4 step in and assist her with the interview.

5 Q Now, tell us a little bit about your background and
6 training in connection with conducting interviews with, not
7 necessarily suspects, but any subject in connection with a
8 criminal investigation?

9 A Well, throughout my 27 year career I've attended
10 numerous interview courses and training at various locations
11 throughout the United States.

12 Q All right. And tell us a little bit about the approach
13 or tone of interview on your interviewing any subject in
14 connection with the investigations?

15 A I only interviewed -- you know, you see things on TV
16 about people screaming and hollering, and it's really not
17 that way. I mean I found that you get more cooperation from
18 somebody by talking to them like you're a human being, and
19 treating themselves, giving them, you know, leaving them some
20 self-respect. So, you know, it's -- obviously you want to,
21 want to get to the truth of the matter. You still want to
22 treat that person like a human being.

23 Q All right. And how did you describe the tone or
24 overall tone of the interview with Mitchell Rivers on
25 September 15th 2005?

Rick Charles - Direct examination
By Solicitor Mayes

1 A Oh, very, very low key. You know, like I said before,
2 the things you see on TV about investigators screaming and
3 hollering and throwing things and slamming books down,
4 that's just not in my regimen. I mean I was taught to treat
5 people the way you wanted to be treated. So, it was very
6 low key, no screaming, no hollering, no hollering. That's
7 just, that's just not my, my style to do, way to do
8 interviews.

9 Q Was any coercion or threats or any coercion or threats
10 used in order to have Mitchell Rivers participate in this
11 interview?

12 A No, ma'am, he had been previously advised of his
13 Miranda rights by Sergeant Duff, and he was told that, you
14 know, he didn't have to be here, didn't have to talk to us,
15 could have an attorney of his own choosing and at the
16 State's cost if he wished to. He didn't have to say
17 anything, make any statements whatsoever.

18 Q All right. Were any promises of reward made in
19 exchange for his participation in the interview?

20 A No, ma'am, there was not.

21 Q Did it appear to you that his participation in the
22 interview was free and voluntarily---

23 A Yes.

24 Q ---free and voluntary?

25 A Absolutely.

Rick Charles - Direct examination
By Solicitor Mayes

1 Q Start at, start at the beginning of what your
2 recollection of the interview with Mitchell Rivers on
3 September 15th of 2005, and tell us what you recall of
4 that interview.

5 A Okay.

6 MR. SWILLEY: Objection, Your Honor. I think the other
7 witness testified -- it was about this exact same occurrence
8 before Investigator Charles. I would object that it's
9 cumulative and waste of time. So, under Rule 403.

10 THE COURT: Overruled.

11 A Could you repeat the question please?

12 Q Could you start actually giving of the interview and
13 take us through how the interview flowed, what you remember
14 about the beginning, and what, if anything, may of changed
15 during the course of the interview?

16 A All right. Well, we had already been briefed on some
17 of the case, case facts by Investigator Jordan and Special
18 Agent Anderson, and we knew that the defendant's story was
19 that, that, initially that he gets up -- the baby had woke
20 him up by crying somewhere around 6:00, 6:00AM, maybe just
21 before, that he had gotten up, and he had changed the baby's
22 diaper, and he had fed the baby, and put the baby face up
23 back in the, the play pen or crib, and he had gone outside
24 to do some yard work, mow the grass from what I remember he
25 was gonna do.

Rick Charles - Direct examination
By Solicitor Mayes

1 We were told about an old rib injury that was healing
2 that was discovered during the autopsy, and one of the
3 things that caused us concern was also, not only the rib
4 injury, but the, the fact that---

5 MR. SWILLEY: Objection. I think we've already heard
6 this. I think he's also testifying about what he was told,
7 which would be hearsay as well.

8 Q Well, let me ask you this.

9 Were there any specific portions that you questioned
10 Mitchell Rivers about?

11 A Yes, first of all, when we were briefed on the case, we
12 were given a copy of his written statement and given a copy
13 of the incident report that was generated by the
14 Chesterfield County Sheriff's Office. There was information
15 in there between the statement, the statement that was
16 given, the autopsy report that I read, the incident report
17 that I read that caused me some concerns. We knew there was
18 some prior injuries. We weren't told about every prior
19 injury, but we were told about the rib injury that was
20 discovered. We were also told that, based on the autopsy
21 report, that there were no stomach contents found.

22 MR. SWILLEY: Objection, Your Honor. He's testifying
23 about what he was told.

24 THE COURT: Did you find out the rib injuries was from
25 the autopsy report or somebody tell you that?

Rick Charles - Direct examination
By Solicitor Mayes

1 WITNESS: No, sir, it was in the, the autopsy report.

2 THE COURT: All right. Overruled.

3 Q And let me ask you specifically, did you question
4 Mitchell Rivers in connection with your understanding of, of
5 the finding of no stomach, stomach contents?

6 A Yes, sir.

7 Q All right. And that, that was factored into your
8 interview as well?

9 A Yes, it does.

10 Q All right. So, during the course of the interview,
11 what, what, if anything, occurred concerning Mitchell Rivers
12 statement?

13 A Okay. He -- after, after he was asked about these
14 inconsistencies that were found, he changed his story and
15 to, on the video interview and the final written statement
16 what he saw.

17 Q All right. And did you have the opportunity to
18 document yourself what the final story was and how the story
19 had finally changed?

20 A Yes.

21 Q And how did you go about documenting that?

22 A It was on a written form.

23 Q All right. And do you have a copy of that written
24 form?

25 A I think it's---

Rick Charles - Direct examination
By Solicitor Mayes

1 SOLICITOR MAYES: Beg the Court's indulgence.

2 A ---probably in evidence. (Tape off.)

3 Q I'm going to show you three documents and ask you
4 whether or not you recognize it.

5 A Yes, ma'am.

6 Q And who prepared that document?

7 A I did.

8 Q All right. And can you tell us whether or not that
9 document contains your recollection of the statement that
10 was given to you on September 15th, 2005, by Mitchell
11 Rivers?

12 A Yes, ma'am, it was given to myself and Sergeant Duff.

13 Q All right. And I'm gonna ask you to start at the
14 beginning of your documentation and relate to us exactly
15 what you documented, whether told to you by Mitchell Rivers
16 on September 15th at the close of the interview.

17 A At the close of the interview.

18 okay. He admitted that the victim went to sleep face
19 down in the crook of his arm. He said he woke up and victim
20 was not breathing. He claimed he attempted CPR. He said he
21 panicked and placed the baby face down in the play pen and
22 walked outside. He also admitted he did not feed the baby.
23 He did not cause any of the victim's rib injuries and he
24 admitted that he knew victim was not breathing when he
25 placed him in the play pen.

Rick Charles - Direct examination
By Solicitor Mayes

1 Q And the portion about not breathing when he placed him
2 in, in the play pen --

3 A Uh-huh. (Affirmative).

4 Q -- does anything come after that?

5 A No, ma'am.

6 Q And upon obtaining this new information for Mitchell
7 Rivers, what, if anything, did you do next?

8 A Okay. Myself and Sergeant Duff exited the room, and we
9 briefed Agent Henderson and Sergeant Wayne Jordan on the
10 information that the defendant relayed to us.

11 Q All right.

12 A And then we documented what he told us.

13 SOLICITOR MAYES: Beg the Court's indulgence.

14 (Pause.)

15 SOLICITOR MAYES: Nothing further.

16 CROSS-EXAMINATION

17 BY MR. SWILLEY:

18 Q Investigator Charles, I asked before, to your
19 recollection, this, this statement that you just read, it
20 wasn't recorded by Mr. Rivers, correct?

21 A What do you mean recorded?

22 He did--

23 Q He didn't write it down, did he?

24 A No, no.

25 Q And that, that was written by or produced by yourself,

Wayne Jordan - Cross-examination
By Mr. Swilley;

1 correct?

2 A Correct.

3 Q Okay. Subsequent to your conversation with Mr. Rivers,
4 correct?

5 A That's correct.

6 Q How subsequent?

7 How long?

8 A Probably within five minutes after we exited the, the
9 interview room --

10 Q Uh-huh. (Affirmative).

11 A -- and briefed Special Agent Anderson and Sergeant
12 Jordan and, and basically the defendant went in and sat down
13 with them in a conference room---

14 Q Okay. I don't---

15 A ---and Sergeant Duff recorded this on paper.

16 Q Okay. And you weren't there for the video statement
17 that Investigator Jordan was playing, correct?

18 A Not physically in that room.

19 Q That's what I meant.

20 A But next door.

21 Q Okay. And is the real reason you didn't get Mitchell
22 to write down what you claim that he told you---

23 A No, that's usually the, the function of the case agent
24 or the case investigator, which was Sergeant Jordan and
25 Special Agent Anderson.

Rick Charles - Redirect examination
By Solicitor Mayes

1 Q Thank you, Investigator Charles. I have no more
2 questions of you.

3 REDIRECT EXAMINATION

4 BY SOLICITOR MAYES:

5 Q Were you aware as to whether or not that videotape, a
6 videotaped statement was planned?

7 A I knew that Sergeant Jordan had brought a video
8 capability with him.

9 Q All right. And after you concluded your interview, did
10 you have any further participation in the videotaped
11 statement that was given to Investigator Jordan?

12 A No, ma'am.

13 SOLICITOR MAYES: Nothing further.

14 MR. SWILLEY: No recross.

15 THE COURT: You may step down. Thank you.

16 SOLICITOR MAYES: The State rests.

17 THE COURT: All right. Anything at this time?

18 MR. SWILLEY: I have, I have motions when you deem
19 appropriate, Your Honor.

20 THE COURT: Just a second.

21 (Pause.)

22 THE COURT: We will come back and handle motions
23 because the county's arranged for lunch for the jury. We're
24 arranging transportation.

25 I'm gonna have to send some security. So, therefore, I

Rick Charles - Redirect examination
By Solicitor Mayes

1 need to inquire of counsel do you require oaths of the
2 members of the security or do you waive?

3 SOLICITOR MAYES: State waives, Your Honor.

4 MR. SWILLEY: Your Honor, could you clarify that for
5 me?

6 I'm not sure I'm understanding.

7 THE COURT: The bailiffs, the bailiffs that attend and
8 the, the -- we'll have a deputy or two that we'll have to
9 drive the vehicles. If you don't waive the oaths, I have to
10 put them under oath.

11 MR. SWILLEY: I'll waive.

12 THE COURT: Thank you. Save the Court time.

13 All right. Are we ready to go or I need to ask the
14 jury to step back a minute?

15 Sheriff, have we got the vans out there?

16 Ladies and gentlemen, step back in the room. Let us
17 get the van arranged. We're running a little ahead of what
18 we had planned.

19 (WHEREUPON, the following takes place outside the
20 presence of the jury.)

21 THE COURT: All right. We're in recess for lunch.
22 Everybody stay clear while the jury leaves.

23 (WHEREUPON, Court was in recess for the lunch hour.)

24 THE COURT: Okay.

25 MR. SWILLEY: We move for a directed verdict at this

Rick Charles - Redirect examination
By Solicitor Mayes

1 time in light of the fact that the evidence proffered by the
2 State is not competent evidence to show that this death
3 occurred under circumstances that manifest an extreme
4 indifference to human life. Your Honor, also, the statute
5 mandates the death has to result of -- the death has to
6 result from abuse or neglect. We believe that is proper.
7 The State and the testimony of my client would indicate that
8 death occurred or the injury occurred while he was asleep.
9 Therefore, I make the motion for directed verdict on
10 homicide by child abuse.

11 THE COURT: Based on the evidence before me and the
12 wording of the statute that he is charged under and also
13 some prior cases, I'll have to deny your motion at this
14 time.

15 MR. SWILLEY: Thank you.

16 THE COURT: Defense gonna require testimony?

17 MR. SWILLEY: We will, Your Honor. At this time the
18 defense would call the defendant, Mitchell Rivers.

19 THE COURT: Mr. Rivers, I need to talk with you a
20 little bit before we do that.

21 MR. SWILLEY: You want us to come up to the bar?

22 THE COURT: You're fine.

23 Mr. Rivers, certainly in your defense you can testify
24 if you so desire. But it is important that you understand
25 that you have the constitutional right, under the United

Rick Charles - Redirect examination
By Solicitor Mayes

1 states Constitution, the Fifth Amendment, as well as a
2 counterpart provision of our State Constitution, to elect
3 not to testify. In other words, commonly called: you have a
4 right to remain silent.

5 Any decision to testify has to be a personal decision
6 on your part. It must be made freely, voluntarily, and
7 intelligently by you. No one else can make the decision for
8 you. You have to -- please understand me now that if you
9 elect to testify, you will be treated as any other witness.
10 You can be impeached as any other witness. In other words,
11 you can be cross-examined fully once you open that door by
12 taking the stand, and the Fifth Amendment, of course,
13 protects you as far as electing not to testify.

14 If you elected not to testify, I wouldn't even tell the
15 jury that you have that right to remain silent, and it can't
16 even be talked about by them in the jury room. You can not
17 mitigate against you in anyway.

18 Now, if you elect to testify, keep in mind, once again,
19 you can be cross-examined as any other witness subject to
20 the rules of procedure and evidence though. Before you make
21 a final decision as to whether you wish to testify or not,
22 I'll give you ample opportunity to discuss it with counsel.
23 If you tell me you've already discussed it, and you don't
24 have any questions, then that will be fine.

25 Have you discussed this issue with counsel?

Rick Charles - Redirect examination
By Solicitor Mayes

1 DEFENDANT: Yes, sir, Your Honor.

2 THE COURT: And you're making a decision on your own?

3 DEFENDANT: Yes, sir, Your Honor.

4 THE COURT: Freely, voluntarily, and intelligently with
5 no one promising you anything or threatening you in anyway?

6 DEFENDANT: Yes, sir, Your Honor.

7 THE COURT: And do you have any questions at this time?

8 DEFENDANT: No, sir, Your Honor.

9 THE COURT: You understand what your counsel's gone
10 over with you?

11 DEFENDANT: Yes, sir, Your Honor.

12 THE COURT: You understand what I've gone over with
13 you?

14 DEFENDANT: Yes, sir, Your Honor.

15 THE COURT: Do you wish to testify or not?

16 DEFENDANT: Yes, sir, Your Honor.

17 THE COURT: All right. Bring the jury in.

18 (WHEREUPON, the following takes place within the
19 presence of the jury.)

20 MR. SWILLEY: At this time the defense would call
21 Mitchell C. Rivers to the stand.

22 THE COURT: If you'll come around and be sworn, please.

23 MITCHELL RIVERS, having been first
24 duly sworn, testified as follows:

25 DIRECT EXAMINATION

Mitchell Rivers - Direct examination
By Mr. Swilley

1 BY MR. SWILLEY:

2 Q Please state your name for the record.

3 A Mitchell Charles Rivers.

4 Q Mitchell, where are you from?

5 A Chesterfield County.

6 Q Is that Cheraw?

7 A Yeah, I stay in Cheraw.

8 Q Did you grow up in Cheraw?

9 A Yes, sir.

10 Q Okay. Mitchell, how far have you gone in school?

11 A Ninth grade.

12 Q Why did you drop out of school?

13 A Cause my mama had gotten sick, and I had told them -- I
14 had asked my mama and dad can I be, start working cause to
15 help out the family cause my oldest brother-in-law, next to
16 the oldest brother, had died.

17 Q I see.

18 And what are some of the jobs that you -- what, what
19 are the types of jobs that you worked from the age of 16
20 until now?

21 A It was cutting farm, Batesburg, race track farm off of
22 [REDACTED] and [REDACTED] [REDACTED] in Marchville, North Carolina.

23 Q What types of, of actual work did you do at those
24 places?

25 A At the cutting farm, I was AI'ing turkeys, artificial

Mitchell Rivers - Direct examination
By Mr. Swilley

1 insemination, and Beckman Pride, I was a live handler and
2 stack off.

3 Q I see.

4 Now, Mitchell, what, what address did you grow up at?

5 A The address I grew up at was in -- it was originally,
6 originally in Chesterfield County. I was staying by the
7 workplace down there.

8 Q Okay. And when did you move onto the house on [REDACTED]
9 [REDACTED]?

10 A Been moved -- I moved out to the house on [REDACTED] [REDACTED]
11 [REDACTED], it was like in I say at least '90, probably about
12 '90, about 2000. Close to 2000.

13 Q So, about ten years?

14 A About ten years.

15 Q Well, Mitchell who, who owned that house?

16 A The---

17 Q who owns that house?

18 A The resident house?

19 Q Yes.

20 A 193, my father's, Charles Rivers, own that house.

21 Q Okay. And, Mitchell -- and, Mitchell, in 2005, is that
22 the house where you were living?

23 A 2005, that's the house I moved into, but we was staying
24 in Laney Trailer Park.

25 Q Okay. Now, Mitchell, to whom are you married?

Mitchell Rivers - Direct examination
By Mr. Swilley

1 A Kimberly Quick. Kimberly Quick Rivers.

2 Q Okay. When did y'all get married?

3 A We got married in 2000, be 2000. We got married in
4 2000 on Valentine's Day.

5 Q Do you and Kim have any biological children?

6 That is children that she has for herself that are
7 yours?

8 A No, sir.

9 Q Okay. Now, Mitchell, do you remember when you took in
10 Kim's niece, nephew, that is Child ?

11 A Yes, sir.

12 Q Okay. And can you tell me the process?

13 Can, can you give me a -- can you tell me how that came
14 to be?

15 A Well, me and my wife, Kimberly, had talked it over
16 cause her sister, Jennifer Quick, was unfit to have him, and
17 she had told me that she really wanted to have the baby, and
18 I had told her I will help with the baby because he was a
19 family member by marriage. That was my nephew by marriage.

20 Q Now, who, who named Child
21 Child ?

22 A I wanted to name the child Child , and me, Kim,
23 and Jennifer all agreed to it.

24 Q Okay. And who is Jennifer?

25 A She's my sister-in-law, the biological mother.

Mitchell Rivers - Direct examination
By Mr. Swilley

- 1 Q Okay. Mitchell, during the time -- after y'all adopted
- 2 the baby, tell me some of the things that would be important
- 3 that happened in the weeks to come.
- 4 A In the weeks to come, we was, like I said, we was
- 5 staying in Laney Trailer Park.
- 6 Q And let me, let me clarify.
- 7 How, how close is that to your father's home?
- 8 A It's like, like about three miles from my dad's home.
- 9 Q Okay. Continue.
- 10 A At that time we was staying at Laney Trailer Park, and
- 11 I, I was just getting off work, and my wife came into the
- 12 work and sat there and said that DSS people was gonna come
- 13 to evaluate the house.
- 14 Q Okay. Let me, let me cut to when -- I'm sorry. Don't
- 15 mean to cut you off.
- 16 Can you cut -- let me cut to what notably happened
- 17 after the adoption had taken place and the baby was in you
- 18 and Kim's care.
- 19 What, what, what -- what happened -- what did you see
- 20 with the baby in the weeks to come?
- 21 A Oh, in the weeks to come he had breathing problem.
- 22 Q Okay. And could you explain the kinds of problems that
- 23 the child was, was having during that period?
- 24 A It was like you can sit there and hear like fluid. I
- 25 mean you can literally hear the fluid in his lungs like

Mitchell Rivers - Direct examination
By Mr. Swilley

1 water was boiling. So, June the 3rd, me and Kim had took
2 him to the doctor's office.

3 Q And what doctor is that?

4 A If I'm not mistaken, Doctor Schultz and them's office
5 if I'm not mistaken.

6 Q And is that here in Chesterfield County?

7 A Yes, sir.

8 Q Okay. And do you remember anything that doctor told
9 you about the problem and what you were suppose to do to, to
10 help the child?

11 A She said that the baby had bronchitis, and that they
12 had to put him on a, the machine thing. It's like a
13 breathing thing that clears up, open up the chest. But in
14 June to, to -- June 20th, 21st, and 22nd, we had to take
15 him to the hospital.

16 Q Okay. And why did you take him to the hospital then?

17 A Because his, his -- he still wasn't right, and the
18 doctor had told us that if he got so much fluid on his lungs
19 and like he was drowning on his own lungs.

20 Q Okay. How -- do you remember how long the baby stayed
21 at the hospital then?

22 A Three days. It's June the 20th, 21st, and the
23 22nd.

24 Q Okay.

25 A Cause I didn't go to work them days.

Mitchell Rivers - Direct examination
By Mr. Swilley

1 Q Now, Mitchell, about your job at the time, did you work
2 full-time?

3 A Full-time, yes, sir.

4 Q And did you also sometimes have to work weekends?

5 A Yes, sir.

6 Q Okay. And from what, what were the hours during the
7 day in which you were working?

8 A From 5:00 in the morning till 6:00 at night.

9 Q Okay. And who took care of the child during the
10 daytime?

11 A Kimberly Quick Rivers.

12 Q Okay. well, Mitchell, let me ask you, at this time,
13 what was different about your physical appearance then than
14 now?

15 A Then and now, talking about my physical appearance?

16 Q Yes.

17 A Of me?

18 Q Yes.

19 A I was weighing about 300 something pounds. Plus
20 300 pounds.

21 Q Okay. So, you were heavier now?

22 A Right.

23 Q Okay.

24 A I was heavier then than now. I'm weighing two, 202
25 now, about 212 now.

Mitchell Rivers - Direct examination
By Mr. Swilley

1 Q Okay. All right. Mitchell, I need you to go back to
2 the night of August the 6th, okay, and I need you to tell me
3 what happened that night and into that next morning around
4 noon.

5 Can you do that?

6 A Yes, sir, I can do it.

7 Q Okay.

8 A It was 6:00. I was getting off work. Around about
9 7:00 or 8:00, Kim was gonna give ^{Child} a bath.
10 I cal him M.J. And I told her -- she had asked me what kind
11 of outfit she want to put on. I said put daddy's little
12 helper on. So, she gave him a bath and took the baby to
13 her. And after she got through giving him a bath, she came
14 and brought him back to me.

15 Around about 8:00, around about 8:00 or 9:00, me and
16 her in my brother's room, the purpose room, to play the
17 game, me, her, and my baby.

18 Q What kind of game was that?

19 A It was a Play Station Two.

20 Q Video game?

21 A It was Mortal Combat. Yeah, it's a good game.

22 Q Okay. Keep going.

23 A And I saw ^{Child} on my left leg over here
24 and I had the joy stick right there. And, so, he just---

25 Q Tell -- what, and what's a joy stick?

Mitchell Rivers - Direct examination
By Mr. Swilley

1 A It's a controller for the Play Station.

2 Q Okay. Go ahead.

3 A And when I had the joy stick, he would reach, like play
4 with the joy stick, and I asked him, I said, you want to
5 play the game, do you want to play the game, and he'll start
6 smiling. So, last time I know he was like dozing off to
7 sleep around about close to ten o'clock.

8 All right. So, me and Kim went and put him in the bed
9 around about ten o'clock. So, I asked Kim, I said that---

10 Q And, and the bed, do you mean the bed that he uses, the
11 bed?

12 A Our bed.

13 Q Okay.

14 A He was in our bed.

15 Q Okay.

16 A About the middle length of the bed. okay. Me and Kim
17 went back in there to play the game till about, I say till
18 about 12:00, around about eleven, twelve o'clock, and then
19 me and her went back in the living room. She got on this
20 side of me, and I was on this side cause the reason why I
21 didn't put him in the pen because my mom had told me that
22 his feet was like cold like ice and that's she's afraid that
23 something -- he's not gonna be here because the way his feet
24 was freezing. And, so, I told my mama, please don't tell me
25 that.

Mitchell Rivers - Direct examination
By Mr. Swilley

1 And, so, we lay down. I put him on the right side
2 right here over like this right here.

3 Q Okay.

4 A Kim was on this side of me, and then we went to sleep.
5 I kissed him on the forehead, told him I loved him, and I
6 said I hope that I'll see you in the morning. I gave Kim a
7 kiss and told her that I love her too. So, all us went to
8 sleep together.

9 All right. Around about 6:00 that morning I woke up
10 and his face was like under my armpit, and then his face was
11 like up under my armpit, and then I got up and I was trying
12 to do CPR and blowing in his mouth, and I asked God, I said
13 God, just please don't let this happen to me. I'm doing
14 CPR. His stomach was coming up and going down, and then
15 that's when he started wheezing. It's like he was crying.
16 His color was coming back.

17 Then I'm thinking that he okay. So, I laid him down,
18 and then that's when I went outside to get finished cutting
19 the grass.

20 Q Now, Mitchell, at anytime did you ever leave the child
21 while it was not breathing?

22 A No, sir.

23 Q Okay. Did you, did you think the child was breathing
24 on its own when you left it in the play pen?

25 A Yes, sir, cause when I laid him down I could sit there

Mitchell Rivers - Direct examination
By Mr. Swilley

1 and see his -- from the way I laid him, he was like you
2 could see his, like his stomach was still breathing like
3 going back in and out.

4 Q Okay. Now, Mitchell -- okay. Continue on with the
5 story.

6 A And, so, I was cutting my grass, got finished cutting
7 the grass, and I was getting off the lawn mower. Kimberly
8 Rivers came -- when I was going back in the house, Kim come
9 and said the baby stopped breathing. So, I ran in there and
10 grabbed him. I said Kim, hurry up and please call 9-1-1.
11 So, she called 9-1-1 for me. So, I tried to start the CPR
12 again from the bedroom to the front room because the lady
13 told me to put him on a flat surface. So, she was talking
14 me through it.

15 And, so, when I was doing that, she just said -- she
16 asked me has, has he started breathing. He wasn't
17 breathing. He wasn't doing nothing. Then I kept doing CPR,
18 kept doing it, and she kept telling him, Kim telling me I'm
19 doing good, I'm doing good. And the only thing I kept doing
20 was doing CPR till the ambulance came in.

21 When the ambulance guy came in, he got my son and
22 automatically I went right behind him outside, and
23 Mr. Marion Watson, he was up there while they was putting
24 him in the ambulance cause I even asked them can I go ride
25 with them in the ambulance to the hospital, and Mr. Marion

Mitchell Rivers - Direct examination
By Mr. Swilley

1 Watson had told me that his complexion was coming back and
2 that he's got a pulse.

3 So, they told me to hurry up, get in the ambulance, and
4 let's go. So, me, my wife, Kim, my brother, Bobbie, my
5 cousin, Eric Winson, went to the hospital.

6 Q Okay. On your own?

7 A On your own.

8 Q Okay. And, Mitchell, did you own a car at the time?

9 A No, sir, I did not. Well, I had owned a Toyota Camry,
10 but the ignition was messed up. So, my brother, Bobbie,
11 took us in his Cadillac.

12 Q Okay. And how -- and that was -- was that after the
13 ambulance left?

14 A Right after the ambulance left.

15 Q Okay. Go ahead.

16 A And, so, we got down into the hospital. They put us in
17 like a little conference room. It was me, Kim, my brother,
18 Bobbie, and Eric. All of us in the conference room. The
19 doctor came in, I don't know his name, but I know he, he had
20 glasses and kind of short, had darker brown hair. He walked
21 in and sat there and said that his complexion came back, but
22 he got a slightly pulse and the only thing we can do right
23 now is pray for him.

24 I got on my knees when he told me that, and I prayed to
25 God, I said, God, I said please do not take my child away

Mitchell Rivers - Direct examination
By Mr. Swilley

1 from me cause that's all I got in this world right now. I
2 said please. I said everything else can be taken away from
3 me. Please do not take my child away.

4 And by the time I had said that, all of sudden there
5 they called code blue. And, so, the doctor went back in
6 there for like ten minutes, ten minutes and came back, sat
7 there and said that he did all he could do, his heart just
8 couldn't take it. So, that's when I started crying and so
9 they told us do you want to see the baby.

10 Kim went back there first and see the baby on
11 outpatient table number one. We went through that
12 yesterday, outpatient table number one. And it was two
13 nurses that came to get me to try to get me. I was gonna go
14 out there, back there to try to maybe see the baby, but I
15 just, I just couldn't make it because I fell to my knees. I
16 told them that I can't see him on that table because room
17 one, that's where my uncle had died at, and they had him in
18 the same room.

19 And, so, that's when after -- I know it's wrong to sit
20 there and say it, but that's when I had lost my faith in
21 God, and I asked him why did he do this to me again.

22 Q Okay. Mitchell, afterwards were you approached by
23 Investigator Jordan?

24 A Yes, sir, I was approached by Mr. Wayne Jordan.

25 Q And how -- about how long after you had found out that

Mitchell Rivers - Direct examination
By Mr. Swilley

1 the, that ^{Child} had passed did Mr. Jordan approach
2 you?

3 A When ^{Child} had, ^{Child} had passed, I
4 said it's like ten or fifteen minutes Mr. Wayne Jordan came
5 in there because he asked my cousin, Eric Wilson, what is
6 you doing here in front of me, my wife, and my brother. And
7 then while me and him was walking back there, I was crying,
8 and he sat there and told me, he said you need to stay away
9 from Eric Mitchell because he's a bad person. I said well,
10 that's my cousin and he was with us when he came to the
11 hospital.

12 You know, he had asked me did I want to write a
13 statement. I told him yeah. And, so, after I had wrote the
14 statement, I had told him I was sorry about the statements
15 and stuff that I had done.

16 Q All right. Now, let me back-up.

17 Why didn't you put exactly what happened in, in your
18 first statement when Investigator Jordan gave you the paper?

19 A Cause I had told him -- I had told Mr. Wayne Jordan, he
20 asked me the same thing. I said the reason why I didn't
21 write the statement the first time because I already had
22 lost my son, and I was telling my wife that if I fell asleep
23 on my child, she's gonna get me next.

24 Q And that's what you -- was that what you were scared
25 of?

Mitchell Rivers - Direct examination
By Mr. Swilley

1 A Yes, sir.

2 Q Okay. Now, Mitchell, as was testified here today, you
3 went to the SLED place in Effingham about a month later.

4 Do you remember talking with Investigator Duff or, I'm
5 sorry, Ms. Duff and Mr. Charles that testified earlier?

6 A Yes, sir.

7 Q Okay. At anytime did you tell them that you left the
8 baby in the play pen not breathing?

9 A No, sir, I did not.

10 Q So, they misheard you?

11 A Yes, sir.

12 Q Okay. Now, now, later -- was there anytime where you
13 got, you got to see any autopsy photos of your son before
14 you gave or you spoke to anybody?

15 A Yes, sir, it was right before the video statement.
16 Mr. Wayne Jordan brought the autopsy pictures in and he laid
17 them right there cause Mr. Mike Anderson, the other sheriff,
18 was right beside him cause he told me he had lost his son
19 too, his child. They brought the autopsy pictures in, laid
20 them right there in front of me, and how my son was busted
21 open from there down there, and they had cut his head open.
22 And, so, that's when I gave the video statement.

23 And if you look on the video statement, Mr. Wayne
24 Jordan told me to raise my head back up because I was still
25 looking at the pictures in front of me.

Mitchell Rivers - Direct examination
By Mr. Swilley

1 Q Okay. Mitchell, what you told Investigator Jordan on
2 that video statement, that -- is that, is that what
3 happened?

4 A That's the God's honest truth.

5 MR. SWILLEY: Okay. Beg the Court's indulgence one
6 moment.

7 (Pause.)

8 Q Mitchell, when, when -- the second time you gave a
9 written statement at the police station, and, and I guess
10 that would of been in Chesterfield, when you went, when you
11 on that Monday after you gave the interview with the SLED
12 headquarters, can you tell me about a little bit what
13 happened then?

14 A Well, are you talking about when he took me back home?

15 Q I'm talking about when, when you went back to the, to
16 the, to the---

17 A The police station?

18 Q Yeah.

19 A After I gave the same, about the written statement,
20 what had happened was Mr. Wayne Jordan, I was asking him for
21 help, and him and Mr. Mike Anderson had told me that they
22 would try to get me some therapy because Mr. Wayne Jordan
23 had started talking to me about he's a, he play the drums at
24 his church and I should come to his church. But he told me
25 that he's sorry about how everything happened cause he about

Mitchell Rivers - Direct examination
By Mr. Swilley

1 to have -- his wife about to have a child of her own, and
2 then I had asked him, I said, all I need is some help.

3 I said if y'all don't mind, can you please, I was
4 trying to reach out to everybody, I said can you please give
5 me some help. The only help I got was when Mr. Johnny
6 Kimbrell, my reverend, came and helped me after he had
7 preached at my son funeral.

8 Q And, Mitchell, did you go to your son's funeral?

9 A Yes, sir, my heart -- see what hurts me so bad is I
10 couldn't even afford to pay for my own son's funeral. My
11 brother had to pay for my son's funeral, and Mr. Fleming
12 gave us the plot because I couldn't even afford the plot.
13 He say he couldn't do a child like that.

14 But we wound up burying him in the biological
15 grandparents, Kimberly Quick Rivers grandparents, but the
16 preacher said he don't allow -- he thought that the child
17 was in interracial. So, he say he don't allow, allow
18 interracial children or anybody buried up on the church
19 grounds.

20 Q Okay. Mitchell, and all that you just told me is true,
21 right?

22 A Everything I told you is the truth.

23 Q All right. Mitchell, please answer any questions that
24 Ms. Mayes may have for you.

25 A Yes, sir, I surely will.

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 CROSS-EXAMINATION

2 BY SOLICITOR MAYES:

3 Q Mr. Rivers, just to clarify a few things.

4 I think your testimony was that legally you are still
5 married to Kimberly Quick Rivers, correct?

6 A Yes, ma'am.

7 Q But just so we can clarify for the record, you two are
8 no longer together?

9 You are separated, correct?

10 A We been separated, we been separated for over two
11 years.

12 Q And you don't live together, correct?

13 A No, ma'am.

14 Q And, in fact, I believe you're now in a relationship
15 with someone else, Mitchell Adcock?

16 A Mitchell Adcock.

17 Q Correct?

18 A Yes, ma'am.

19 Q Now, I want to ask you about the photographs of the
20 home just so we can be straight about things.

21 This is the residence shown here in State's Exhibit 17
22 on Short Horn Drive where this incident occurred, correct?

23 A Yes, ma'am.

24 Q And this photograph here shows the play pen where
25 Child [REDACTED] slept, correct?

Mitchell Rivers - Cross-examination
By Solicitor Mayes

- 1 A Yes, ma'am.
- 2 Q And that play pen is in this room which is shown in
3 State's Exhibit 15, which is the bedroom that you slept in,
4 correct?
- 5 A Yes, ma'am.
- 6 Q So, Child [REDACTED] slept there in the same bedroom
7 ordinarily with you, correct?
- 8 A I don't understand.
9 Can you repeat that again?
- 10 Q Child [REDACTED] ordinarily slept in this play pen in the same
11 room with you, correct?
- 12 A Yes, ma'am.
- 13 Q All right. And I think there has been some testimony
14 about y'all living at another residence on I think you
15 called the Laney Mobile Home Park?
- 16 A Yes, ma'am, it's Laney Trailer Park right beside, by
17 State Road.
- 18 Q All right. But at the time of this incident, you and
19 Kimberly and Child [REDACTED] were staying here at your parent's
20 home, correct?
- 21 A Yes, ma'am.
- 22 Q And that's the home on [REDACTED] [REDACTED] [REDACTED]?
- 23 A Yes, ma'am.
- 24 Q Now, when this incident occurred, and you were at the
25 hospital, you gave a written statement to law enforcement,

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 correct?

2 A Yes, ma'am.

3 Q I'm gonna show you this statement, which is State's
4 Exhibit 14, and, Mr. Rivers, whose handwriting is that
5 statement in?

6 A This is my handwriting.

7 Q So, you wrote that out yourself, correct?

8 A Yes, ma'am.

9 Q And on that morning there at the hospital your
10 statement was that you had put the baby to bed that night?

11 A Yes, ma'am.

12 Q And there's no question that Child had been there
13 with you and Kimberly that night playing the game as you put
14 it?

15 A Yes, ma'am.

16 Q The Mortal Combat game?

17 A Yes, ma'am.

18 Q Then, according to your statement, we put him to bed?

19 A Yes, ma'am.

20 Q And that was about ten o'clock is what you stated in
21 that statement?

22 A Yes, ma'am.

23 Q Then you said in the statement this morning, around
24 6:00AM, the baby started crying. So, I changed his diaper
25 because he was wet and gave him a bottle.

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 A Yes, ma'am.

2 Q That wasn't true, was it?

3 A No, ma'am, it was not.

4 MR. SWILLEY: Objection, Your Honor. Already been,
5 already been questioned about this. Already answered.

6 THE COURT: It's her first cross. Got to allow some
7 lee-way.

8 A I'm gonna be honest with you, no, it was not.

9 Q All right. And you went on in the statement and you
10 said then I burped him and laid him on his back.

11 That wasn't true either, was it?

12 A No, ma'am.

13 Q And in this statement you never said that the baby had
14 slept with you, did you?

15 A No, ma'am, I did not.

16 Q And you never said that the baby wasn't breathing when
17 you woke up, did you?

18 A No, ma'am, I did not.

19 Q And you never said anything about having to give the
20 baby CPR---

21 A No, ma'am.

22 Q ---in the bedroom that morning, did you?

23 A No, ma'am I did not.

24 Q And you never said anything about his color having been
25 gone and coming back, correct?

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 A No, I did not.

2 Q All right. And then in September, on September 15th,
3 2005, you participated in an interview with a State Law
4 Enforcement Division officer by the name of Rick Charles,
5 that's correct?

6 A Yes, ma'am, I did.

7 Q And also Sergeant Julie Duff, correct?

8 A Yes, ma'am, I did.

9 Q And during that interview, they had advised you of your
10 Miranda rights?

11 A Yes, ma'am, they did.

12 Q I'm gonna show you here what is State's Exhibit 21.

13 This is your signature here on the waiver of Miranda
14 rights, isn't it?

15 A Yes, ma'am, it is.

16 Q Okay. So, you had agreed to talk with those two
17 officers freely and voluntarily, correct?

18 A Yes, ma'am, I did.

19 Q And at this point during the interview you admit that
20 your story changed, correct?

21 A Yes, ma'am.

22 Q And at this time you told the officers that, on that
23 morning, Alexander had, in fact, been in your bed, correct?

24 A Yes, ma'am.

25 Q And that you awoke, according to your statement, and

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 that Alexander wasn't breathing, correct?

2 A I woke up. He was up under my armpit. He wasn't
3 breathing.

4 Q Okay. And that you had attempted to do CPR?

5 A Yes, ma'am.

6 Q And during that statement you admitted that you had
7 not, in fact, given him a bottle, correct?

8 A That's correct.

9 Q And you ended by telling them that he was not breathing
10 when he was put back into the play pen?

11 A No, ma'am, I did not say that.

12 Q You deny that?

13 A I deny that because I specifically said that I did CPR
14 and his complexion and everything was coming back and his
15 stomach rising back and forth up. I did not sit there and
16 say that I placed my child in the play pen dead.

17 Q All right. So, you would deny that aspect of, of the
18 statement, correct?

19 A Yes, ma'am.

20 Q Now, following the interview with these two officers,
21 you participated in a videotaped statement, correct?

22 A Yes, ma'am.

23 Q And when you did the videotape statement, these two
24 officers were not present, correct?

25 A That's not correct. All of us being in a room and had

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 my own table. The other two was -- when they did a video
2 statement, they was right there on the other side behind the
3 camera. That is not correct.

4 Q All right. So, your testimony is that all of the
5 officers were present in the room with you?

6 A Yes, ma'am.

7 Q And during the course of this interview on videotape,
8 you said, once again, that you had not, in fact, given the
9 baby a bottle, correct?

10 A That's correct.

11 Q Now, at this point you said that you had tried to do
12 CPR?

13 A Yes, ma'am, I did everything I knew of. I tried to do
14 CPR on my child.

15 Q But at no point Kimberly woke up according to your
16 statement?

17 A She did not.

18 Q And according to your statement, you did not call 9-1-1
19 at any point after finding ^{Child} in this condition?

20 A No, ma'am, I did not.

21 Q And you did not even leave the room until ^{Child},
22 after you had put ^{Child} down into the play pen, correct?

23 A I made sure that he was breathing, breathing first, and
24 when I saw he could breath and his complexion came back, I
25 thought he was okay, that's when I put him in the play pen,

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 and then I left the room.

2 Q And this is at six o'clock in the morning?

3 A It started at six o'clock that morning when I found him
4 up under my armpit.

5 Q Not breathing?

6 A Not breathing.

7 Q And you admit that when you put ^{Child} down into the
8 play pen he was face down?

9 A His face was turned to the side right there. I had
10 placed him down. His face was like a little pillow and he
11 was turned to the side. That's how I laid him down, but he
12 was on his stomach part.

13 Q All right. So, your testimony today would be that you
14 put him down on his stomach in the play pen after you had
15 administered CPR?

16 A Yes, ma'am.

17 Q And according to your videotaped statement, Kimberly,
18 your wife, knew nothing about this, correct?

19 A No, ma'am.

20 Q And no other family members, such as your father or
21 anyone else in the house, knew anything about this, correct?

22 A Correct.

23 Q And according to that testimony, you then went outside
24 to cut the grass?

25 A Yes, ma'am.

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 Q I'm gonna show you a second written statement and this
2 is State's Exhibit 20, and you recognize your handwriting in
3 that statement?

4 A Yes, ma'am, that's my handwriting.

5 Q And you were advised of your rights prior to this
6 statement as well, correct, Mr. Rivers?

7 A Yes, ma'am.

8 Q So, there's no question that that statement was freely
9 and voluntarily given also?

10 A Can you repeat that again please?

11 Q Was that statement also freely and voluntarily given?

12 A Yes, ma'am, it's right here.

13 Q Now, in this statement, you, you talk about spending
14 the night with the baby, playing the game till about 12:00,
15 close to 1:00AM?

16 A Yes, ma'am.

17 Q And according to this statement, even though you and
18 Kimberly were up playing the game, you had put the baby, you
19 had put the baby down around 10:00, correct?

20 A Yes, ma'am, he had fell asleep around about 10:00, and
21 I placed him in our bed.

22 Q All right. And in this statement you say that night
23 our baby had slept in the same bed and I laid him on my
24 side---

25 MR. SWILLEY: Objection, Your Honor. That statement's

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 already been read in the record I believe.

2 THE COURT: It's cross-examination.

3 Q You state that night our baby had slept in the same
4 bed, and I laid him on my side between my chest and armpit,
5 and we both went to sleep?

6 A Yes, ma'am, he was on -- he was on the right side. Kim
7 was on the left side.

8 Q All right. Around 6:00AM I wake up and the baby wasn't
9 breathing?

10 A Yes, ma'am, he was up under my armpit. I had -- it was
11 like my arm was over him, and I jumped up and that's when I
12 immediately started doing CPR.

13 Q All right. And then you say I laid him down in the
14 play pen and went outside to clean off the yard.

15 Now, when is it that, according to your testimony
16 today, when is it that you heard Kimberly hollering?

17 A It was around about --.

18 Q Or where were you when you heard Kimberly hollering?

19 A I was just coming through the door. She ran out the
20 back. She he said the baby's not breathing.

21 Q All right.

22 A And I ran back there to him.

23 Q All right. So -- and she was hollering because she had
24 found the baby lifeless in the room, correct?

25 A She said he -- she said the baby's not breathing.

Mitchell Rivers - Cross-examination
By Solicitor Mayes

- 1 Q So, at that point she calls 9-1-1, correct?
- 2 A No, I told her to call 9-1-1.
- 3 Q And she called 9-1-1?
- 4 A She called 9-1-1 for me.
- 5 Q And the tape that we heard earlier of a 9-1-1 call,
6 that is the tape that was made after Kimberly found the baby
7 and 9-1-1 was called, correct?
- 8 A Yes, ma'am.
- 9 Q And in this statement you said I know I was wrong for
10 not calling 9-1-1 first when it happened?
- 11 A Yes, ma'am, that's correct. That's what I been saying
12 for six years straight.
- 13 Q And you also had a working vehicle there at the
14 residence, correct?
- 15 A My brother. He had a Cadillac.
- 16 Q All right. And you had taken the baby to the hospital
17 before. I think there's been testimony that back in June,
18 when the baby had, was ill, the baby had been taken to the
19 hospital, correct?
- 20 A There was one time, the 23rd, we went to the doctor's
21 office.
- 22 Q All right. So, you---
- 23 A Doctor Schultz.
- 24 Q So, you certainly knew that was an option?
- 25 A Yes, ma'am, I know it was an option because he had

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 like, he had like fluid and stuff in his lungs.

2 Q All right. Now, it was not uncommon for you to change
3 the baby, correct?

4 Not talking about this day. Talking about throughout
5 its, its when, y'all were at the mobile home park, and then
6 later at your parent's residence, correct?

7 A See I really didn't change the baby. Me and Kim
8 changed the baby together.

9 Q All right. Well, in your videotaped statement you
10 stated that you changed the baby.

11 So, was -- that was common or uncommon?

12 A That's common.

13 Q All right. And -- well, it's common for any parent to
14 change a baby, isn't it?

15 A That's right.

16 Q And during these times, Mr. Rivers, that you had
17 changed, that you had changed the baby, were you aware of
18 bruises to ^{Child} ?

19 A Bruises?

20 The only time that I thought about the bruises is when
21 they told me about, in court about the bruises.

22 Q All right. So, the first you heard about bruises was
23 here in court?

24 A Yes, ma'am, because they say they did an autopsy on him
25 because I had said that I fed him bottle. So, that's why I

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 wanted to be sure was they bruises to his stomach. That's
2 why they showed me the autopsy pictures.

3 Q All right. Well, your testimony here today is that you
4 were, you were with Child throughout the night, playing
5 the game, and then put him to bed --

6 A To ten o'clock, that's right.

7 Q -- ten o'clock, and he would of been there in the room
8 that you and Kimberly shared together?

9 A Yes, ma'am.

10 Q And then that you were with him the next morning when
11 you woke up and found him not breathing, correct?

12 A Yes, ma'am, up underneath up under my armpit.

13 Q All right. And, Mr. Rivers, the, the bruise to the
14 back of Child head --

15 A Yes, ma'am.

16 Q -- how did he get that bruise?

17 A I have no idea.

18 Q The laceration on the side to the torso area, how did
19 he get that laceration?

20 A I have no idea.

21 Q The bruising to the back of Child ear, to the
22 back of the ear lobe, how did he get that bruise?

23 A I have no idea, ma'am.

24 Q The cut here to Child lip, above the top lip, how
25 did he get that?

Mitchell Rivers - Cross-examination
By Solicitor Mayes

- 1 A I have no idea.
- 2 Q The bruise here on the inside of Child ear, how
- 3 did he get that?
- 4 A I have no idea, ma'am, because, like I said, I was
- 5 never alone with my child.
- 6 Q You were never alone with your child?
- 7 A No, ma'am.
- 8 Q At any point in his whole life?
- 9 A No, I was -- I worked through the days from 5:00 to
- 10 6:00. Me and Kim was with our child. Like weekends I be
- 11 off, we like went to a store and I'd buy him some outfits.
- 12 But I was never home alone with my own child, and I would
- 13 never hurt a child.
- 14 Q So, there's never been a time, throughout your role as
- 15 a foster parent to Child, that you were ever alone with
- 16 him?
- 17 A No, ma'am.
- 18 Q So, on this particular night or on this particular
- 19 morning, when you talk about waking up and finding the baby
- 20 not breathing, Kimberly's asleep, correct?
- 21 A That's right. She's asleep.
- 22 Q All right. So, when you say you weren't alone, what
- 23 you're saying is---
- 24 A She was in the bed right there beside me.
- 25 Q But the only person, people awake -- the only person

Mitchell Rivers - Cross-examination
By Solicitor Mayes

1 awake was you, correct?

2 A Was me doing CPR, that's right.

3 SOLICITOR MAYES: Nothing further.

4 • THE COURT: Mr. Swilley.

5 MR. SWILLEY: No redirect, Your Honor.

6 THE COURT: You may step down. Thank you.

7 MR. SWILLEY: Call Charles Rivers.

8 CHARLES RIVERS, having been first duly
9 sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SWILLEY:

12 Q Afternoon, sir.

13 You're Charles Rivers?

14 A Right. Yes. Yes, sir.

15 Q Mr. Rivers, what is your relation to Mitchell Rivers?

16 A Mitchell Rivers is my son.

17 Q Mr. Rivers, can I get you to talk in the microphone
18 please?

19 Mr., Mr. Rivers, how many children -- Mr. Rivers, how
20 many children do y'all have?

21 A Me and my wife, we had, excuse me, five boys and we
22 raised four kids. Two of them back there, the two girls.

23 Q Okay. Charles, where, where are you from?

24 A I'm from Chesterfield County.

25 Q Okay. And, Mr. Rivers, where -- and where, where do

Charles Rivers - Direct examination
by Mr. Swilley

1 you currently reside now?

2 A Cheraw, South Carolina, which is about 25, 20 feet from
3 my local home.

4 Q Okay. And do you -- were you there when -- were you
5 at, at the [REDACTED] [REDACTED] residence on August the 7th of
6 2005?

7 A No, sir, I was -- I lived -- I was employed at Culley
8 Farms for 35 years, and Mitchell and them also worked for
9 me, and I was employed in Willie Bayes house at the time in
10 Waynesboro, North Carolina. And, so, he was living at my
11 address to my house.

12 Q Did you own that---

13 A That be [REDACTED] [REDACTED]. Yes, I did.

14 Q Did you own that business?

15 A It's my residence alone, yes, sir.

16 Q All right. Mr. Rivers, did you ever have a chance to
17 be around Mitchell and Kim and the baby at one, at the same
18 time?

19 A Yes, sir.

20 Q Was this on more than one occasion?

21 A Yes, sir, I use to -- I worked for B&B too, also for
22 18, 18 years. John Davis, Lawyer Bailey in Chesterfield,
23 part-time, and I would go home on weekends. Me and my wife
24 was separated, but I still kept her and the kids, and I gave
25 her a place to stay with her.

Charles Rivers - Direct examination
by Mr. Swilley

1 Q And this is -- is this Willie Bell Rivers?

2 A Willie Bell, yeah, she passed now, yes, sir. And
3 Mitchell and Kim, I had got them down and talked to both of
4 them. I told them I said, now, y'all not gonna locate this
5 kid in this house and sit -- I think been to the doctor
6 twice as I recall. My wife was already sick, and you just
7 can't take care of her. Don't need no sick baby being in
8 here.

9 Q Okay. And, Mr. Rivers, let me ask you.

10 Did anytime ever, when you were around Mitchell, Kim,
11 and the baby, did you ever see Mitchell mistreat this child?

12 A No, he really loved him because he was employed for me.
13 He use to get off maybe a couple hours early to go home
14 cause he was working from 5:00 to 6:00 in the morning or
15 something, I mean in the afternoons, and sometimes he put in
16 14 hours a day.

17 Q Was there ever, at anytime, or did you ever observe
18 Mitchell or anyone else mistreat the baby?

19 A No, sir.

20 Q Physically?

21 A No, sir.

22 Q Did you ever observe anything unusual about the baby
23 when you, when you were there?

24 A No, he have -- it was, it was a sick baby. I know
25 that.

Charles Rivers - Direct examination
by Mr. Swilley

1 Q Okay. Thank you, Mr. Rivers. Please answer any
2 questions that---

3 A Yes.

4 Q ---Ms. Mayes may have.

5 A Be glad to.

6 CROSS-EXAMINATION

7 BY SOLICITOR MAYES:

8 Q Good morning, Mr. Rivers. Just a few questions.

9 I think, on this particular incident date, the day that
10 the baby passed away, was is -- is it your testimony that
11 you were not home that day?

12 A No, ma'am, I was, I was -- I came home every weekend to
13 check on the house, and this particular day I called. I go
14 to my farm, I check my farm out about six o'clock, and I go
15 home to Cheraw, and I did do that. So, I called Mitchell.
16 I called my house about quarter till 7:00 and I asked, asked
17 him was everybody all right now. He say yeah, and I -- he
18 said, he said he was out there in the yard or somewhere
19 cutting grass or something.

20 So, so, I go down there -- so, I went down there to
21 check on my wife, you know, that she -- she kind of sick.
22 She -- I went down there to clean the house for her and my
23 sons, and I go back to North Carolina.

24 But this particular day that you talking about, yes,
25 ma'am, I did go down there. Also I believed I talked to

Charles Rivers - Cross-examination
by Solicitor Mayes

1 Mr. George. I believe he came in -- when I got there, I got
2 there about 9:00 something, might of been a little later,
3 but the call come from Cheraw Hospital when I got there
4 that, from Kimberly, that she told me, stay there to taking
5 care of my wife at the time, to move the pillow out the crib
6 and I don't know why.

7 Q All right. Now -- well, let me ask you, let me ask you
8 this. Let me, let me go back and ask you this.

9 you're talking about -- you weren't there, correct?

10 A Yeah.

11 Q You weren't there that morning?

12 A Yeah, I was there. No, I got there about 9:15, yes,
13 ma'am, I was there.

14 Q But when the baby was sick and left in the ambulance?

15 A When, when it, when it happened I wasn't there, but I
16 did call a quarter till 7:00 to check on, to see how
17 everybody was doing before I left my farm that Sunday
18 morning.

19 Q All right. So, what you're saying is you called on the
20 telephone to find out what was going on?

21 A No, ma'am, I just call every Sunday morning to make
22 sure everybody was fine before I left my farm and go down
23 there, and then I go check my farm out, leave my farm, and
24 go straight to my house, and got there about a quarter after
25 9:00, somewhere along in there, long in there about ten

Charles Rivers - Cross-examination
by Solicitor Mayes

1 after 9:00.

2 Q All right. Well, the baby wasn't there when you got
3 there, is that correct?

4 A No, ma'am, the baby was not there.

5 Q Because the baby had been taken to the hospital, is
6 that right?

7 A The baby had been taken to the hospital.

8 Q And your son, Mitchell, was at the hospital along with
9 Kimberly, correct?

10 A With Kimberly and them.

11 Q All right. So, they were at the hospital?

12 A Yes, ma'am.

13 Q And then you were home when Wayne Jordan got there to
14 take photographs?

15 A When I got home, like I said, I got there about a
16 quarter after 9:00. I remember it and I got home. About
17 that time the phone ring from the hospital.

18 Q All right. I'm not asking you for any hearsay. Okay.

19 A No.

20 Q What, what I'm asking is were you there when the
21 officer got there to take pictures?

22 A I been there -- I came home -- I don't know if he had
23 been before I got there, but I was there when he done --
24 when he come, I was there when he -- he seen me there if he
25 can remember. I don't know if he remember or not because,

Charles Rivers - Cross-examination
by Solicitor Mayes

1 you know, you're asking me was I, where the pillow was, and
2 I told him that I don't know. I say I come down here and I
3 clean up and I don't know where the pillow at.

4 Q All right.

5 A He asked me that.

6 Q All right.

7 A I don't know if he remembers or not, but he asked me
8 that.

9 Q All right. So, you then next spoke with your son,
10 Mitchell, correct, on that same day?

11 A I -- it was in the afternoon.

12 Q All right. And your son, Mitchell, he didn't tell you
13 anything about the baby not breathing or being smothered
14 during the night?

15 A I -- well, I know the baby had passed, ma'am. But he
16 didn't say anything about the baby breathing, breathing or
17 not.

18 SOLICITOR MAYES: All right. Nothing further.

19 MR. SWILLEY: No redirect, Your Honor.

20 THE COURT: Okay. Thank you, sir. You may step down.
21 Be careful of that step.

22 MR. SWILLEY: Your Honor, defense calls Mr. Terry
23 Johnson.

24 (WHEREUPON, a short recess was taken at this time.)

25 THE COURT: All right. Mr. Swilley, I believe they're

Terry Johnson - Direct examination
by Mr. Swilley

1 ready.

2 MR. SWILLEY: Thank you, Your Honor.

3 Defense calls Mr. Terry Johnson at this time.

4 TERRY JOHNSON, having been first duly
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. SWILLEY:

8 Q Are you Terry Johnson?

9 A Yes, sir.

10 Q Mr. Johnson, what is your relation to Mitchell C.
11 Rivers?

12 A Mitchell's my baby brother.

13 Q Okay. And I notice you have a different last name.
14 Are y'all half brothers?

15 A No, we full brothers. I was just born before my mother
16 and father got married.

17 Q I understand.

18 How much older than Mitchell are you?

19 A I'm 41 and Mitchell's 33. So, I'd say seven years.

20 Q Terry, were you living at the house on [REDACTED] [REDACTED] [REDACTED]
21 [REDACTED] on August the 7th of 2005?

22 A Yes, sir.

23 Q How long had you been living there before that date?

24 A I been living -- I had been living there probably,
25 maybe a year and a half.

Terry Johnson - Direct examination
by Mr. Swilley

1 Q Okay. Terry, did you -- first let me ask you, is this
2 a big house or a small house?

3 A Well, it's a four bedroom mobile home.

4 Q Okay. Was there -- is there a common area in the
5 house?

6 A Yeah, they got a dining room, a living room, and a
7 kitchen, and two baths, two full baths.

8 Q Okay. During the time that Mitchell and Kim had
9 Child I think is what he's called, did
10 you ever see Mitchell do anything wrong to the child?

11 A No, sir.

12 Q Did you ever see Mitchell be careless with the child?

13 A No, sir.

14 Q Did you ever see Mitchell harm the child, whether
15 intentionally or unintentionally?

16 A No, sir.

17 Q Okay. And, Terry, were you living at this house
18 full-time?

19 A Yes, sir, I was taking care of my mom because she been
20 emphysema. I was working at Palmetto Brick too. But I
21 was -- I would get home around 3:30, four o'clock. But Kim
22 was there with her during the day cause everybody else in
23 the house would, would be working.

24 Q Okay. So, what hours did you usually work during the
25 day?

Terry Johnson - Direct examination
by Mr. Swilley

- 1 A I worked from 5:30 until 3:30 at Palmetto Brick.
- 2 Q Is that 5:30AM to 3:30PM?
- 3 A 5:30AM to 3:30PM.
- 4 Q Okay. What -- about what time did you get home in the
- 5 evening, about that time?
- 6 A Well, it depends on the job. Most of the time I would
- 7 get home around a quarter till 4:00, something like that.
- 8 That's probably about, probably about seven miles for
- 9 Palmetto Brick to my mother's house.
- 10 Q Okay. Terry, did you, did you have a chance to be
- 11 around Mitchell and Kim and the baby every day?
- 12 A Every day cause I seen him.
- 13 Q Okay. And did you ever see Mitchell alone with the
- 14 child?
- 15 A No, sir.
- 16 MR. SWILLEY: Okay. Beg the Court's indulgence.
- 17 (Pause.)
- 18 Q Terry, were you, were you at -- I'm sorry.
- 19 Were you -- you said you were at [REDACTED] [REDACTED] [REDACTED] [REDACTED]
- 20 on the morning of August 7th, 2005.
- 21 Do you remember about -- can you, from your memory, can
- 22 you tell me what you remember from that morning?
- 23 A Well, that morning I got up. It was getting up. It
- 24 was around six o'clock, and I was getting up getting ready
- 25 to fix my mom some breakfast, some coffee and toast, and I

Terry Johnson - Direct examination
by Mr. Swilley

1 heard the baby crying. And, so, I came out the room and
2 asked my mom, I said, that baby crying, ain't nobody gonna
3 get the baby.

4 She said well, Mitchell's outside. She was sick to --
5 she was sitting on the chair. She look out the window and
6 look down across the yard between my father's place and the
7 place she was staying at, and she said well, Mitchell
8 outside. I said okay.

9 So, I went on to the bathroom and washed my face,
10 washed my hands, and I come back, I didn't hear no crying.
11 You know, but I ain't hear no baby crying. And, so, I saw
12 Kim walk in the room and walked outside to get Mitchell, and
13 he ran back inside. And when he came back, he come out the
14 room with the baby in his hand, laid the baby on the table.
15 Nobody ain't made the call yet cause he laid the baby on the
16 table doing CPR, and then they called 9-1-1, and I was --
17 what I told Mitchell, I said, I, I---

18 Q I, I don't -- I ain't asking for, excuse not, I'm not
19 asking for any hearsay. But please.

20 A No, this is no hearsay. This is just what---

21 Q Well, I---

22 A Okay.

23 Q Just, just -- can you give me what happened from then
24 out?

25 A Well, he, he performed CPR on the baby laying on the

Terry Johnson - Direct examination
by Mr. Swilley

1 kitchen table, and I was telling him do not mash too hard on
2 the baby cause the baby is just four months old, and maybe
3 the baby's bones is not, you know, completely, you know,
4 just, just as strong as, you know, any others.

5 Q Did it appear that Mitchell was doing it too hard?

6 A No, I, to me, I just -- I was just being cautious, you
7 know, the way he was doing it. I was just telling him.

8 Q Okay. Were you just trying to help?

9 A I was trying to help.

10 Q Okay. And you remember -- you mentioned -- do you
11 remember Kim calling 9-1-1?

12 A Yes, sir.

13 Q Okay. Was that upon Mitchell's order to do so?

14 A Yes, sir.

15 Q Okay. Do you remember when the ambulance arrived?

16 A Yes, sir, I was outside waiting on the ambulance. When
17 the ambulance -- when they, when they made the call, the
18 ambulance started -- I could hear the sirens, but never saw
19 it. So, I walked to, to the mailbox to make sure that they
20 didn't make the wrong turn. If they go on the other road, I
21 could see, and I could just flag them down. So, I was
22 standing to the mailbox and the ambulance pulled up.

23 When we got out, we pulled up and got in the house,
24 then I stayed outside. I stayed outside till the
25 ambulance -- but everybody else was in the house. And, so,

Terry Johnson - Direct examination
by Mr. Swilley

1 when he brought the baby outside, and Mitchell was standing
2 behind the ambulance and all -- we was standing behind the
3 ambulance, and he asked him could he ride, and he said no,
4 cause some, like the sheriff, something against insurance
5 where nobody can ride in the ambulance.

6 Q And, Terry, do you remember riding to the hospital that
7 morning?

8 A Yes, sir.

9 Q Okay. And whose car did you ride to the hospital in?

10 A I drove with my uncle.

11 Q Okay. What car did Mitchell go in?

12 A Mitchell went in the Cadillac.

13 Q And whose, whose Cadillac was that?

14 A My brother's.

15 Q Okay. And about -- can you remember about how long
16 after the ambulance left y'all got in the car?

17 A We was right behind the ambulance.

18 Q Okay.

19 A When the ambulance pulled up to the hospital, to the
20 emergency room, we were maybe 30 or 45 seconds behind.

21 Q Okay. And did you -- were you at the hospital that day
22 with the family?

23 A Yes, sir, I was there.

24 Q Okay. Were you there later on that afternoon when
25 Investigator Jordan was there?

Terry Johnson - Cross-examination.
by Solicitor Mayes

1 A Yes, sir.

2 MR. SWILLEY: Beg the Court's indulgence again.

3 (Pause.)

4 Q Terry, please answer any questions Ms. Mayes may have
5 for you.

6 A Yes, sir.

7 CROSS-EXAMINATION

8 BY SOLICITOR MAYES:

9 Q Now, Mr. Johnson, your testimony is today that you were
10 in the house when this event occurred?

11 A Yes, ma'am.

12 Q All right. Now, people who are known to have been in
13 the house are Kimberly Rivers and Mitchell Rivers, correct?

14 A Yes. Yes, ma'am.

15 Q And the baby, ^{Child} ?

16 A Yes, ma'am.

17 Q All right. And also Charles Rivers, Senior?
18 That would be your father?

19 A Charles Rivers, Senior was not staying there.

20 Q Charles Rivers, Senior?

21 A My father---

22 Q He owned the house, correct?

23 A He owned the house.

24 Q And your mother was Willie Bell Rivers, correct?

25 A Yes, ma'am.

Terry Johnson - Cross-examination
by Solicitor Mayes

1 Q All right. And where were you staying on that
2 particular day?

3 A I was staying in the house, [REDACTED] [REDACTED] [REDACTED].

4 Q All right. Do you recall an investigator, Wayne
5 Jordan, getting information about who all was in the house
6 and who had any information relevant to this case and asking
7 for statements?

8 A No, ma'am, he never asked me. I, I had -- I did not
9 see him at the house. I was at the hospital, but I saw
10 him -- one, he got Mitchell, and one got Kim. I ain't know
11 who he was cause I ain't really know Detective Jordan at the
12 time.

13 Q All right. So, you're not aware that he spoke with
14 other family members in the house?

15 A He did not speak with other family members cause we was
16 'all at the house when the coroner came and he came.

17 Q Well, he was there with -- he was in the house when you
18 were there, correct?

19 A Yes, ma'am.

20 Q All right. And at no point during that day or at any
21 other time during the last five years have you ever informed
22 Investigator Jordan or any other police officer of this
23 testimony today where you say that you heard the baby
24 crying?

25 A No, ma'am, never talked with Detective Jordan or any of

Terry Johnson - Cross-examination
by Solicitor Mayes

1 them.

2 Q So, the first time you've ever informed anyone of that
3 connected with law enforcement would be today?

4 A Yes, ma'am.

5 SOLICITOR MAYES: Nothing further.

6 MR. SWILLEY: No redirect.

7 THE COURT: You may step down. Thank you. Be careful
8 of that step over there.

9 MR. SWILLEY: Your Honor, the State (sic), at this
10 time, calls Miss T.R.

11 THE COURT: Come around and be sworn please.

12 T.R. , having been first
13 duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. SWILLEY:

16 Q Are you T.R. ?

17 A Yes, ma'am. Yes, sir.

18 Q All right. T.R. , can you speak into the microphone
19 kind of loud?

20 You got a soft voice.

21 A Yes, sir.

22 Q okay. T.R. , what is your relation to Mitchell
23 Rivers?

24 A He's my uncle.

25 Q He's your uncle?

T.R. - Direct examination
by Mr. Swilley

- 1 A Uh-huh. (Affirmative).
- 2 Q Okay.
- 3 A But he's like a brother to me.
- 4 Q All right. Say that again now.
- 5 A He's like a brother to me now.
- 6 Q He's like a brother to you?
- 7 A Yes.
- 8 Q Okay. Who, who is your father?
- 9 A Frederick Rivers.
- 10 Q Frederick Rivers?
- 11 A Yes.
- 12 Q Okay. T.R. , were you -- where, where do you live
- 13 now?
- 14 A Cheraw.
- 15 Q What's your address?
- 16 A [REDACTED].
- 17 Q One more time?
- 18 A [REDACTED].
- 19 Q Okay. Is, is -- did you say Hickory Lane?
- 20 A Heford.
- 21 Q Heford Lane?
- 22 A Yes, sir.
- 23 Q Okay. T.R. , did you ever have an -- did you ever
- 24 have a chance or where, where did you -- do you, do you
- 25 recall the date of August the 7th, 2005?

T.R. - Direct examination
by Mr. Swilley

- 1 A Some of it.
- 2 Q August 7th of 2005?
- 3 A Some of it I can't remember, but most of the day.
- 4 Q Okay. T.R. , did you ever have -- let me ask you.
- 5 Do you remember when Mitchell and Rivers, Mitchell and
- 6 Kim got the baby?
- 7 You don't remember?
- 8 A I can't remember it.
- 9 Q Okay. Do you, do you remember them ever having the
- 10 baby?
- 11 A Uh-huh. (Affirmative).
- 12 Q Were you around them when they, when they, when they
- 13 had the baby?
- 14 A Yes, sir.
- 15 Q Okay. Did you live at [REDACTED] [REDACTED] [REDACTED] [REDACTED] ever?
- 16 A [REDACTED].
- 17 Q I'm sorry. I'm sorry. [REDACTED].
- 18 Did you ever live there?
- 19 A Yes, sir.
- 20 Q Were you living there at the time that they have the
- 21 baby?
- 22 A Yes, sir.
- 23 Q Okay. And, I'm sorry, T.R. , how old are you?
- 24 A Seventeen.
- 25 Q You're 17 now?

T.R. - Direct examination
by Mr. Swilley

- 1 A Uh-huh. (Affirmative).
- 2 Q And how old were you at the time?
- 3 A Eleven.
- 4 Q Okay. So, so, you were a child when this happened?
- 5 A Yes, sir.
- 6 Q Okay. Did you ever see Mitchell -- did you ever see
- 7 Mitchell or anybody else mistreat the baby from what you
- 8 remember as a child?
- 9 A No, sir.
- 10 Q Okay. Were you around them a lot since you lived
- 11 there?
- 12 A Yes, sir.
- 13 Q Okay. Did you ever remember seeing the baby ever get
- 14 hurt?
- 15 A I never seen the baby get hurt.
- 16 Q Okay. T.R. , do you -- were you in the house or do
- 17 you remember that morning, August the 7th of 2005?
- 18 A Some of it's a blur.
- 19 Q Say that one more time.
- 20 A Some of it's a blur. I can't remember some of it.
- 21 Q Okay. Do you remember parts of it.
- 22 A Uh-huh. (Affirmative).
- 23 Q Can you tell me the parts that you remember?
- 24 A I was laying on the couch. I woke up and saw Mitchell
- 25 giving CPR to the baby and after that it's a blur.

T.R. - Direct examination
by Mr. SWILLEY

1 Q Okay. Do you remember going to the hospital that
2 morning?

3 A I didn't go, go to the hospital.

4 Q Okay. Were you upset at the time?

5 A Uh-huh. (Affirmative).

6 Yes, sir.

7 Q Okay. T.R. , do you remember anybody coming to the
8 house later that day, any policemen, coming to the house
9 that day, that afternoon?

10 A I think it was one. I can't remember.

11 Q Did anybody talk to you about what you might have seen
12 at the time?

13 A No, sir.

14 MR. SWILLEY: Beg the Court's indulgence.

15 (Pause.)

16 MR. SWILLEY: Your Honor, no more questions.

17 Please answer any questions Ms. Mayes has.

18 CROSS-EXAMINATION

19 BY SOLICITOR MAYES:

20 Q So, Miss T.R. , you're, you're 17 now?

21 A Yes, ma'am.

22 Q So, we're talking about events that you would of
23 witnessed as a child, correct?

24 A Yes, ma'am.

25 Q And events that, that are still a blur to you today,

T.R. - Cross-examination
by Solicitor Mayes

1 correct?

2 A Yes, ma'am.

3 Q But you do remember, after y'all got word that the baby
4 Child had, had died, that some police came to the house
5 that day, correct?

6 A Yes, ma'am.

7 Q All right. And when the police came to the house,
8 there was you and there was Stephanie who lived in the
9 house, also Charles Rivers, Senior.

10 would he be your great uncle?

11 A He's my grandfather.

12 Q Okay. Your grandfather.

13 So, Mrs. Willie Bell would be your grandmama?

14 A Yes, ma'am.

15 Q She was there too?

16 A Yes, ma'am.

17 Q And also Mitchell Rivers and Kimberly Rivers, who lived
18 in the house?

19 Do you remember if they were there when the police
20 came?

21 A I think so.

22 Q Okay. All right. So, all of y'all would of been
23 together there when the police came, right?

24 A Some amounts of it.

25 Q Okay. Now, from what, from what you do remember, you

T.R. - Cross-examination
by Solicitor Mayes

1 had been sleeping on the couch and is that the couch in the
2 living room?

3 A Yes, ma'am.

4 Q All right. So, you were right there in the living room
5 where people kind of come and go during the day, correct?

6 A Yes, ma'am.

7 Q And you never got woken up that morning by hearing
8 anybody go outside, did you?

9 A Can't remember.

10 Q Okay. And you never got woken up that morning by the
11 sound of a lawn mower, did you?

12 A I can't remember.

13 Q Okay. And, in fact, I think your testimony is that the
14 first thing you remember was waking up and Mitchell Rivers
15 was giving the baby CPR, correct?

16 A Yes, ma'am.

17 Q And that's when they were waiting on the ambulance to
18 get there?

19 A Yes, ma'am.

20 Q All right. And could you then hear the sounds of the
21 sirens soon after that?

22 A Yes, ma'am.

23 Q All right. And you remember the EMS people who got
24 there to take the baby to the hospital, correct?

25 A Yes, ma'am.

T.R. - Cross-examination
by Solicitor Mayes

1 Q And you had never been woken up that morning by the
2 sound of the baby crying, had you?

3 A No, ma'am.

4 SOLICITOR MAYES: All right. Nothing further.

5 MR. SWILLEY: No redirect.

6 THE COURT: You may step down. Thank you.

7 MR. SWILLEY: Your Honor, the defense calls T.C.

8

9 THE COURT: Come around and be sworn please.

10 T.C. , having been first duly

11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. SWILLEY:

14 Q Are you T.C. ?

15 A Yes, sir.

16 Q okay. okay. T.C. , I need you to speak into the
17 microphone loud please.

18 A Yes, sir.

19 Q Like that.

20 T.C. , what is your relation to Mrs., to Mitchell
21 Rivers?

22 A He's my brother.

23 Q okay. How old are you, T.C. ?

24 A Eighteen.

25 Q okay. T.C. , how old were you -- do you remember how

T.C. - Direct examination
by Mr. Swilley

- 1 old you were at the time this happened?
- 2 A Thirteen.
- 3 Q Okay. Were you still in middle school?
- 4 A Yes, sir.
- 5 Q Okay. T.C. , were you living at [REDACTED] [REDACTED] [REDACTED] when
- 6 this happened?
- 7 A Yes, sir.
- 8 Q How long, how long had you been living at that house
- 9 before then?
- 10 A When I was born.
- 11 Q Since you're five years old?
- 12 A I said born. Ever since I was two weeks old.
- 13 Q Okay. So, was that as long as you can remember?
- 14 A Uh-huh. (Affirmative).
- 15 Q Okay. T.C. , did you ever have a chance to see or do
- 16 you remember when Mitchell and Kim got their nephew,
- 17 Child ?
- 18 A Yes, sir.
- 19 Q Okay. Do you remember when they brought him home?
- 20 A Yes, sir.
- 21 Q Okay. Did you have a chance ever to be around them and
- 22 the baby?
- 23 A Yes, sir.
- 24 Q Okay. And did you -- and you were staying at this
- 25 house full-time, right?

T.C. - Direct examination
by Mr. Swilley

- 1 A Yes, sir.
- 2 Q Did you have a chance -- did you see Mitchell and Kim
3 and the baby every day?
- 4 A Yes, sir.
- 5 Q Okay. Yes.
6 was this in the mornings?
- 7 A Yes, sir.
- 8 Q And when you got -- was it -- did you see them when you
9 got home from school?
- 10 A Yes, sir.
- 11 Q Okay. Did you ever see Mitchell or anybody else
12 mistreat the baby?
- 13 A No, sir.
- 14 Q Did you ever see the baby get hurt?
- 15 A No, sir.
- 16 Q Okay. T.C. , did Mitchell, from what you saw, did
17 Mitchell treat the baby well?
- 18 A Yes, sir.
- 19 Q Okay. T.C. , can you tell me what you remember from
20 the morning of August the 7th of 2005?
- 21 A I was asleep. I don't remember.
- 22 Q You don't remember anything?
- 23 A No, sir, cause I was asleep.
- 24 Q Do you remember what happened later that day?
- 25 A No, all I know is that he was crying and I tried to---

T.C. - Direct examination
by Mr. Swilley

1 Q who, who was crying?

2 A Mitchell.

3 Q Okay.

4 A He was crying and I was trying to figure out what was
5 going on and that's when the police came to the house.

6 Q And that's all -- is that all you can recall?

7 A Yes, sir.

8 Q Okay. And do you remember what time you had gone to
9 bed the night before?

10 A No, sir.

11 Q Okay. All right. Thank you, Tracy. Answer any
12 questions Ms. Mayes may have.

13 CROSS-EXAMINATION

14 BY SOLICITOR MAYES:

15 Q Miss Chambers, just a few questions.

16 You weren't in the bedroom on, on the morning that this
17 happened, were you?

18 You weren't in the baby's bedroom?

19 A No, sir. No, ma'am.

20 Q Okay. And you hadn't been in the baby's bedroom that
21 night before either when he was put down to bed?

22 A No, ma'am.

23 Q Okay. And after this happened, Mitchell Rivers never
24 told you anything about the baby being smothered, did he?

25 A No, ma'am.

Wayne Jordan - Direct examination
by Solicitor Mayes

1 Q Nothing further.

2 MR. SWILLEY: No redirect.

3 THE COURT: You may step down. Thank you.

4 MR. SWILLEY: Your Honor, the defense would rest at
5 this time.

6 THE COURT: All right. Anything?

7 SOLICITOR MAYES: We would have rebuttal, Your Honor.

8 THE COURT: Ma'am?

9 SOLICITOR MAYES: The State would have rebuttable.

10 THE COURT: All right.

11 WAYNE JORDAN, having been first
12 duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY SOLICITOR MAYES:

15 Q I want to start out by asking you, Investigator Jordan,
16 at the time that your interview was done on
17 September 15th of 2005, on the same day that the SLED
18 agents interviewed Mitchell Rivers, did you have copies of
19 autopsy photographs on that day?

20 A No, ma'am, we didn't have any autopsy photos at all.

21 Q All right. Now, the people present for the videotaped
22 statement that you did, which is the videotaped statement
23 which is in evidence, who was present for that videotaped
24 interview?

25 A The only folks I remember being at that interview at

Wayne Jordan - Direct examination
by Solicitor Mayes

1 that table in that conference room was myself, Agent Mike
2 Anderson, and Mitchell Charles Rivers.

3 Q All right. How do you go about identifying any people
4 who were present for that videotaping?

5 A You recall on the video statement, statement, the video
6 statement, you will see the camera on myself as I read
7 Miranda warning. You will see the camera on Mitchell
8 Charles Rivers as he talked and gave a statement. And you
9 would see Mike Anderson, which is the special agent with
10 SLED, you saw him hand the camera over and put the camera on
11 there to show who's in the room.

12 Now, Rick Charles and Julie Duff, if they were in the
13 room, they were walking back and forth from the, their
14 interview room to Rick Charles' office. They were never, to
15 my knowledge, sitting in that interview room.

16 Q All right. And were they ever, at any point, shown a
17 videotape or included in the videotape?

18 A No, they were not.

19 Q Now, I want to go back and ask you about your visit to
20 the residence at Short Horn Road following your information
21 about the child being deceased at the hospital.

22 A Yes, ma'am.

23 Q What do you recall about when you arrived back at the
24 home and who was present and what, if any, attempts were
25 made to talk with individuals?

Wayne Jordan - Direct examination
by Solicitor Mayes

1 A Again, I recall -- I was the first one in the door.
2 Coroner Baker were behind me. Excuse me. There was, there
3 was some gentleman sitting on the, standing on the porch
4 cause you have the picture -- you, you walk on the porch,
5 you walk into the trailer, the trailer.

6 I do recall a couple, a couple of gentlemen standing on
7 the front porch. I did not say much to them other than how
8 you doing. I just acknowledged them, walked in the front
9 door, and that's where the family was gathering. When I say
10 gather, Mitchell Rivers, Kimberly, I remember Mrs. Willie
11 Bell, and the reason I remember her because she was on
12 oxygen that day, and I believe she's on, she was on oxygen
13 the whole time.

14 I remember -- I do remember small children. I didn't
15 at the time -- I didn't take a statement from them cause
16 there were minor children. I do remember another gentleman.
17 I remember Mr. Charles Rivers. I do remember him. And we
18 were all in the living room portion.

19 As I stated, when you walk in that front door, they're,
20 they're been a couch along the wall that the door would
21 swing out and, and hit. There would be a couch right there
22 on that door. When you walk into the living room area, and
23 then you can see the kitchen area, and then you can see the
24 dining room area.

25 Q All right. What is, what is your understanding of who

Wayne Jordan - Direct examination
by Solicitor Mayes

1 was residing in the home?

2 A I did know that Mr. Charles Rivers did not live there.
3 I did know he did live in Waynesboro due to his farm
4 situation with his other work. I did know that Mrs. Willie
5 Bell lived there, resided there, and I knew she had a
6 caretaker. I know she lived there. Kimberly Rivers was
7 part of her caretaker.

8 I knew there was five children in the room, I mean in
9 the home. I knew that a Mr. Jack Flynn lived in the home as
10 well, and, of course, Mitchell and Kim along with the Baby
11 Rivers.

12 Q Now, an individual by the name of Terry Johnson, at any
13 point did he speak with you that day?

14 A I do not take a statement from him. I don't recall
15 talking to him. I do recall Mr. Charles Rivers there, and I
16 do recall another gentleman in the residence. I'm not gonna
17 sit here and tell you it was or wasn't him, but I do not
18 know. I did not take a statement from him, and the deal
19 with the statements are everybody was in the room, and I
20 asked everybody in the room if they had any knowledge or if
21 they had anything pertaining to this event to please tell me
22 so we could get a written statement and put it on paper to
23 assist me in my investigation. And, to my knowledge, the
24 only statement I took was from Stephanie Jackson.

25 Q All right. Was there ever any indication from

Wayne Jordan - Direct examination
by Solicitor Mayes

1 Mr. Johnson on that date that he had information pertinent
2 to the facts of that morning?

3 A Again, I mean I did not talk with a Terry Johnson. I
4 did not identify Mr. Johnson. If I would have identified
5 him, I would of had him write me a statement. I would have
6 put him in my investigation notes. He is nowhere -- a
7 Mr. Johnson's nowhere in my investigation notes nor do I
8 have a statement from Mr. Johnson.

9 Q All right. And since that date, on August 7th of
10 2005, has Mr. Johnson ever approached you or any of the
11 other investigators connected with this case regarding any
12 relevant facts?

13 A No, the only person I talked with is yourself and no
14 other -- nobody in the family. I talked with nobody related
15 to this.

16 SOLICITOR MAYES: Beg the Court's indulgence.

17 (Pause.)

18 SOLICITOR MAYES: Nothing further.

19 MR. SWILLEY: Briefly.

20 CROSS-EXAMINATION

21 BY MR. SWILLEY:

22 Q Investigator Jordan, the day y'all were at SLED
23 headquarters in Effingham---

24 A Uh-huh. (Affirmative).

25 Q ---did you have any photos with you that day?

Wayne Jordan - Cross-examination
by Mr. Swilley

1 A If I would of had photos I would of had these photos
2 that are State's Exhibits.

3 Q You're talking, you're talking about the house photos?
4 Are you talking about photos right here?

5 A well, they would of been house photos. They would have
6 been the bedroom photos, and they would of been the baby
7 photos, yes, sir.

8 Q Okay. So, so, you, you think you had them in your
9 possession?

10 A Because I took those photos. Those are, those are my
11 evidence photos. I did not, did not receive any photos from
12 Newberry who did the autopsy.

13 Q Okay. And, again, you don't recall showing Mitchell
14 any photos -- do you recall showing him these photos?

15 A I don't recall showing him the photos.

16 Did I do it?

17 I don't know. I can't say I did. I can't say I
18 didn't. I don't recall showing him photos.

19 Q Okay. And when you do investigations, do you usually
20 have family members of the people you're investigating
21 charged with crimes trying to talk to you and give you facts
22 on their own accord?

23 A I, I have family members coming back and giving
24 information to as we might need to look at another family
25 member, another person. I do have that occasionally. A

Wayne Jordan - Cross-examination
by Mr. Swilley

1 bunch of times I had that.

2 Q Okay.

3 A And they will come back to me and I even have the
4 suspects even call me or wanting to take them another
5 recollection of the, of the incident and give me another
6 shot at it.

7 Q Okay. All right. Nothing further.

8 THE COURT: You may step down.

9 SOLICITOR MAYES: Nothing further, Your Honor.

10 THE COURT: You may step down.

11 SOLICITOR MAYES: Nothing further, Your Honor.

12 THE COURT: All right. That completes the evidentiary
13 portion of this case. We'll be ready to move onto closing
14 arguments, and I would assume counsel would like to have
15 overnight to do that.

16 Are you---

17 MR. SWILLEY: I would request that, Your Honor.

18 SOLICITOR MAYES: Whatever the Court deems appropriate,
19 Your Honor.

20 THE COURT: Okay. Well, it's four o'clock. We don't
21 like to split the arguments and the charge. So, we do that,
22 we're gonna be here late in the evening. So, let's plan to
23 be here at 9:30 in the morning. Should have it to you
24 before lunch, and you can begin your deliberations. Sure as
25 I say that something will interfere. Should have it to you

1 by lunchtime.

2 Okay. Remember all my instructions. Y'all have a good
3 night.

4 Everybody else remain in the courtroom while the jury
5 departs for the evening.

6 (WHEREUPON, Court was in recess for the evening.)

7

8 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

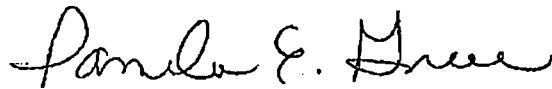
25

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh 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 Chesterfield County, South Carolina, on the 8th, 9th, and 10th day of February, 2011, as reported by Hattie Gordon and transcribed by myself to the best of my ability.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 22nd, 2004



PAMELA E. GREEN, Court Reporter

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHESTERFIELD	)	
	)	
THE STATE	)	February 15, 2011
	)	
PLAINTIFF,	)	
	)	
VERSUS	)	
	)	
MITCHELL RIVERS,	)	2010-GS-13-1072
	)	
DEFENDANT.	)	

BEFORE

THE HONORABLE PAUL M. BURCH

APPEARANCES

LAURA SUZANNE MAYES, ESQUIRE
SOUTH CAROLINA COMMISSION ON
PROSECUTION COORDINATION
ATTORNEYS FOR THE STATE

MATTHEW S. SWILLEY, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

Pamela Ozment-Cartee
Circuit Court Reporter

Motion Hearings	Page 03
Ruling of the Court	Page 07
Closing Arguments by Mr. Swilley	Page 08
Closing Arguments by Ms. Mayes	Page 21
Charge on the law	Page 28
Jury begins deliberations at 12:02 p.m.	Page 44
Jury reaches a verdict at 2:37 p.m.	Page 49
Publishing of the Verdict	Page 49
Polling of the jury	Page 50
Sentencing Hearing	Page 52
Presentation of Prior Record	Page 53
Statement by Mr. Swilley on behalf of Defendant	Page 55
Statement by Mr. Rivers	Page 56
Sentence of The Court	Page 59
Certificate of Reporter	Page 61

COURT EXHIBIT

Court's 1 - Note from the jury	Page 45

THE STATE VERSUS MITCHELL RIVERS

3

1 THE COURT: You haven't made your final Motions have
2 you?

3 MR. SWILLEY: I was going to make those when you are
4 ready.

5 THE COURT: Ms. Pam, let us know when you are ready?

6 MADAME COURT REPORTER: I am ready, Judge.

7 THE COURT: All right. Fire away.

8 MR. SWILLEY: Your Honor, I would renew my Motion for
9 a directed verdict on the grounds that there has been no
10 competent evidence proffered by the state that suggest that
11 the defendant Mr. Wright --- that the death resulted in the
12 abuse or neglect of the defendant, that there has been no
13 testimony proffered by the state to reveal that the death
14 occurred under circumstances that would manifest extreme
15 indifference to human life.

16 THE COURT: Anything from the state?

17 MS. MAYES: Your Honor, specific to the facts that
18 there is an omission in that The Commission of Child Abuse
19 and Neglect, and Mental Health Care, we do feel that we have
20 met --- the burden has been met.

21 THE COURT: Once again, in rereading that statute, I
22 will have to deny the motion.

23 MR. SWILLEY: Your Honor, briefly, I have a jury
24 charge for accident. I have copies for Ms. Mayes. And also
25 I don't know if you want to take them up now or whatever.

THE STATE VERSUS MITCHELL RIVERS

4

1 THE COURT: Yeah. Let's take it up now, because you
2 may want to include it in your arguments.

3 MR. SWILLEY: I think I've got that. I pulled it out
4 of Ralph King Anderson's book.

5 (PAUSE.)

6 THE COURT: Yes, this is the standard charge. I will
7 be glad to hear --- The State is probably going to --- Well,
8 I will hear from you first and then I will make a comment.

9 MR. SWILLEY: You will hear from me?

10 THE COURT: I think he is entitled to a charge. That
11 is going to put it on the state to make it mesh with that
12 statute that you just quoted that covers this crime, child
13 homicide. But I will be glad to hear from you if you see
14 something that I don't see?

15 MS. MAYES: We will go with the Court's discretion in
16 this matter, Your Honor.

17 THE COURT: All right. Are we ready to argue?

18 MR. SWILLEY: I am, Your Honor.

19 MS. MAYES: We have another matter, Your Honor.

20 THE COURT: Okay.

21 MS. MAYES: Your Honor, one of the cases that was
22 previously presented to the Court, it is the State versus
23 Smith, this is from 2011. January 26, 2011.

24 THE COURT: This is Smith?

25 MS. MAYES: Yes, sir, Your Honor.

THE STATE VERSUS MITCHELL RIVERS

5

1 THE COURT: I've got it right here.

2 MS. MAYES: In this case the defendant was charged
3 under subsection (A)(1) for homicide by child abuse. And
4 ultimately, a charge was submitted to the jury concerning
5 subsection (A)(2), aiding and abetting. Here the Court of
6 Appeals has upheld the defendant's conviction on that
7 particular charge. In light of this case, Your Honor, it
8 does seem that the state would be entitled to submit
9 subsection (A)(2) to the jury for consideration as well.
10 That discussion begins on page six.

11 THE COURT: Anything from the defense on the request
12 to charge under the Smith case?

13 MR. SWILLEY: I do, Your Honor. I believe in this
14 case, it was --- the factual scenario was that the defendant
15 had administered an illegal amount of some type of medicine
16 to a child.

17 I don't think there has been any evidence in this case
18 that warrant the charge under the (B) subsection due to
19 aiding and abetting, because I don't think there has been
20 any evidence that anyone else would have --- would have done
21 a principle of smothering of a child.

22 Therefore, I don't see how with --- I just don't see
23 any competent evidence that would show my client is guilty
24 or aided and abetted anyone, and do anything to this child,
25 let alone asphyxiated him.

THE STATE VERSUS MITCHELL RIVERS

6

1 So, I would respectfully request the Court would charge
2 under the (B) subsection of that.

3 **THE COURT:** What saith the state to that point?

4 **MS. MAYES:** Your Honor, actually the case is very
5 very similar. In this particular case, State versus Smith,
6 the child suffered an overdose of pseudoephedrine and blunt
7 force trauma to the chest. In addition, there was evidence
8 of ongoing abuse for approximately four months, including
9 rib fractures. So there was a consolation injury very
10 similar to this case. In Smith, he denied any affiliation
11 to the injury, including the administration of
12 pseudoephedrine or the chest injuries. So, with that
13 particular case as well, he was denying knowledge of any of
14 the other injuries. And that is one of the reasons this
15 aiding and abetting was submitted to the jury.

16 In this particular case the defense --- the case at bar
17 --- the defense has put up evidence that he smothered the
18 child. And in accordance to what the defendant claims to be
19 the truth, the child was breathing again once he went
20 outside. Therefore, someone else would have been the
21 principle or the ultimate cause of death.

22 **MS. MAYES:** Your Honor, I would disagree with that
23 assessment of the facts. I don't think there was any
24 testimony by my client that put the blame on anybody else or
25 anything.

THE STATE VERSUS MITCHELL RIVERS

7

1 I also believe this case is distinguishable, because I
2 don't believe the defense in this case challenged the
3 admission of the other injuries, It only challenged one
4 admission of a broken femur in which there was other
5 evidence through testimony that --- that the defendant had
6 caused the broken femur. So, I think this case is
7 distinguishable in that aspect. I just don't think there is
8 any evidence of aiding and abetting in the record thus far.

9 THE COURT: Well, I think the jury can sort it out.
10 This is not a case where this is a lone person that was
11 within the home or residence. There is testimony that the
12 mother is in the bed, and also other people resided in the
13 house.

14 I am going to charge the jury. You can certainly argue
15 the point.

16 Okay. Are we ready?

17 MS. MAYES: The state is ready, Your Honor.

18 MR. SWILLEY: Ready to proceed, Your Honor.

19 THE COURT: All right. Bring in the jury.

20 (Whereupon, the jury enters the courtroom at 9:58
21 a.m..)

22 THE COURT: Good morning.

23 JURY: Good morning.

24 THE COURT: Counsel, does the state waives?

25 MS. MAYES: The state waives, Your Honor.

CLOSING ARGUMENTS BY MR. SWILLEY

8

1 MR. SWILLEY: We waive as well.

2 THE COURT: All right. It is argument time. You may
3 proceed.

4 CLOSING ARGUMENTS BY MR. SWILLEY

5 MR. SWILLEY: Thank you, Your Honor. Good morning,
6 ladies and gentlemen. I appreciate your presence here
7 today. I know that it has been a long week for everyone.

8 When I do these closings, I always try to find a story
9 that I can kind of compare to the present case, and the
10 present situation. But, it is kind of hard in this case,
11 because I don't have anything to compare to Mitchell. My
12 life has been much easier than his. But I did find a story
13 that I could use here today.

14 A couple of years ago --- a while back in law school, I
15 had a very good manly friend who was still in undergraduate
16 school, who along with a bunch of other young people went to
17 the beach in October of 07, at the beach at the Outer Banks
18 of North Carolina, and they were staying in a big old beach
19 house, having a good old time, and the house caught on fire,
20 and everybody died; everybody burned to death. It was a
21 horrible tragedy. You may even remember it on the news. I
22 don't know if it got up here or not, but it was awful. I
23 was upset. A lot of people were upset. And in weeks to
24 come, the fire investigator went up there and they were
25 never able to find a cause --- an official cause of the

CLOSING ARGUMENTS BY MR. SWILLEY

9

1 fire. They knew that it was man made, meaning that some
2 person had --- the actions of some person had resulted in
3 the fire happening, but they really couldn't pinpoint how or
4 really anything beyond that. I think the leading theory was
5 that somebody forgot to put out a cigarette butt. At the
6 time I was very very dissatisfied with this. I was angry.
7 I was indigent. I was just --- I was just very dissatisfied
8 with the results of that. But eventually, I had to come to
9 terms with the fact that from what I knew, and probably from
10 what I would ever know, is that nobody --- no one would be
11 held criminally responsible --- really no one was held
12 responsible at all. And that was very very hard for me to
13 come to terms with.

14 And I think that this situation is very very similar to
15 that. The state hasn't proven beyond a reasonable doubt
16 that Mitchell Rivers is guilty of the crime for which he is
17 charged, homicide by child abuse, that is, the state hasn't
18 proven that Mitchell Rivers through abuse or neglect, caused
19 the death of his son, under circumstances that manifest
20 extreme indifference to human life. It hasn't been proven,
21 and several reasonable doubts still remain.

22 Now, what you have seen, and I am sure what you have
23 observed through the course of this trial, is that Mitchell
24 Charles Rivers loved his son. There can't be any doubt
25 about that. With all of his heart. He would never have

CLOSING ARGUMENTS BY MR. SWILLEY

10

1 done anything to that child to harm that child. And he
2 would have never done --- he would have never allowed any
3 harm to be done to that child, ever.

4 Now, the child was named Child . I
5 know that Ms. Mayes keeps referring to the child as
6 Child , that baby's name was Child
7 , as he testified, Child , Child That child
8 was Child , named after the father, not the
9 biological father, and everybody would have known that. The
10 child wasn't even the same race as him. He was not his
11 child, Child .

12 Now, what the state has tried to do during the course
13 of this trial is to show you the same things over and over
14 again, you know, bad things. Things that would upset you,
15 and they would upset anybody. This upsets me. Okay?
16 That's bad. All right, that is awful. Nobody is denying
17 that.

18 Well, I am telling you what I am denying, and what I
19 submit to you is that Mitchell Rivers did not cause any
20 injuries to that child. He would not have allowed any of
21 those injuries to be caused to that child. And there is no
22 evidence in the record of that.

23 Now, you have heard the state put up its case. They
24 put up several medical experts. And they put up several
25 members of law enforcement, EMS, and you kind of heard the

CLOSING ARGUMENTS BY MR. SWILLEY

11

1 same thing over and over again. These injuries are abuse.
2 There was abuse. There was abuse in the house on the child.
3 Mitchell Rivers changed the statement, and they even tried
4 to say that he changed his statement twice. The fact that
5 he changed his statement --- Yes, it makes Mitchell look
6 bad, but it doesn't prove he is guilty of anything. It
7 proves he changed his statement. It proves he had poor
8 judgment in dealing with the after effects of this matter,
9 but it doesn't prove that he is guilty of anything. And
10 they tried to show it over and over again, so that it just
11 gets ingrained in your brain. Somebody testified, and Ms.
12 Mayes would write on a posterboard so you could see it
13 twice, time and time again. And that is a smart strategy by
14 the state. It is a good idea, because you hear it over and
15 over again. And the more you hear it, the more you start to
16 think that this is awful. The more you see it, the more you
17 equate it with my client. The fact of the matter is, you
18 can't do that. Nothing puts anything happening to that
19 child on Mitchell Rivers. And you know if there was
20 something that did, you would have heard it. It was a very
21 extensive investigation in this matter. It has been almost
22 six years since this happened. If there was something else,
23 against Mitchell Rivers, you would have heard it. And you
24 probably would have heard it over and over again. Like I
25 told you during my opening, there is not one single shred of

CLOSING ARGUMENTS BY MR. SWILLEY

12

1 evidence offered to show that Mitchell caused any of those
2 injuries.

3 Now, you heard experts say well, we believe that it
4 happened about the same time. They couldn't pinpoint
5 anything. They couldn't --- they couldn't say that it
6 happened contemporaneous with an accidental smothering of
7 the baby.

8 Now, I am not putting the blame --- Please be clear, I
9 am not putting the blame on anybody else for anything, okay?
10 That is not my job. I am not trying to play the blaming
11 game here. I am not trying to prove that anybody else did
12 anything wrong. My job is to show y'all that Mitchell
13 didn't do any of that.

14 Now, be it known that Kim Rivers had anything bad to
15 say about Mitchell rivers, and keep in mind that Mitchell
16 and Kim have been separated for years. Now they are still
17 legally married, but they have gone their separate ways. If
18 she had seen, or known, or even heard anything that would
19 indicate she would have been there. She would have told
20 you. She has no reason to protect him. They ain't together
21 anymore. She's next. In fact, if she did have something,
22 you would have heard her, but you didn't. And I ask you to
23 think about that. If Mitchell would have told the police
24 that he --- that he had caused these injuries, you would
25 have heard it. If Mitchell had caused these injuries, he

CLOSING ARGUMENTS BY MR. SWILLEY

13

1 would have told the police. He told the police everything
2 that happened. He came clean. He spilled his guts. And
3 what happened isn't homicide by child abuse. It is an awful
4 awful mistake. It is an awful accident, but not a crime.

5 Now, briefly, I want to go over what some of the
6 witnesses said. First we heard from Mr. Ron Martin with the
7 EMS. Y'all remember him. The EMS guy, has a goatee. He
8 said that when he went in, he grabbed the baby, took the
9 child, put him in the ambulance, and went to the hospital.
10 Talked about stuff that happened to the baby, talked about
11 how the baby was pronounced dead at 7:30 that morning.
12 Approximately about forty minutes from when Mitchell and Kim
13 called 911 and started performing CPR on the baby. That
14 baby would not have lived that long that morning without
15 them doing that. Okay, that is not circumstances that
16 manifest an extreme indifference too human live. It
17 manifests anything but. And you also heard Mr. Martin say
18 it was strange because nobody followed me to the hospital.
19 Well, you heard testimony from the state's witnesses and all
20 the witnesses that they went to the hospital. They went to
21 the hospital right after that. They went to the hospital
22 and Mitchell was there when his son was pronounced dead, and
23 was sobbing. So he had to have been there at 7:30, or a
24 little before. He had to have.

25 You also heard from Dr. Ross from Newberry. You will

CLOSING ARGUMENTS BY MR. SWILLEY

14

1 remember the petit lady that sat up there, Newberry
2 Pathological. Now, keep in mind Newberry is two and a half
3 hours from Chesterfield. The only thing that is in Newberry
4 is Newberry College and The Opera House, and from what I
5 know, Newberry Pathological Associates. Why would the
6 Sheriff's Office want to use Newberry Pathological
7 Associates, somewhere that far away, when you've got
8 Florence, Charlotte, Columbia that is closer unless they
9 were very very pleased with what they got from Newberry
10 Pathological Associates. And if they are very very pleased
11 with Newberry Pathological Associates, Newberry Pathological
12 Associates does what they want them to do. That is customer
13 satisfaction. That makes sense.

14 Now, another thing that I would like to call to y'all's
15 attention. The autopsy report is amended twice, so there
16 are three issuances --- they put out the autopsy report
17 three times. The first time in 05, right after the death of
18 the baby. Again in 06, and again --- another amended
19 version in 2010, after Dr. Ross is working with the
20 prosecution team. I'm not accusing them --- I am not
21 accusing anybody of any wrong doing, or anything wrong or
22 unethical. I am not doing that. I promise you. But, the
23 first time said, manner of death pending. Later it said,
24 after Dr. Ross communicated with law enforcement and
25 prosecution personnel, changed the manner of death to

CLOSING ARGUMENTS BY MR. SWILLEY

15

1 homicide. She heard me say it, so you just basically just
2 put down --- you just basically take the manner of death
3 from whomever you speak with? Yes. So, if I would have
4 called you and told you something different, you would have
5 changed it? Yes. Well, no. Now it is important that that
6 --- that homicide is a finding of her that is not a legal
7 conclusion by her. That is just her theory. It is not
8 really even her theory. It is somebody else's theory that
9 they told her. Okay? That is for y'all to decide. Y'all
10 are the finders of fact. Y'all are to listen to what Judge
11 Burch tells you, apply the law, and decide what the facts
12 are, and decide the ultimate issue of fact. So don't let
13 that cloud your judgment.

14 And you saw another expert after that. A real quiet
15 guy, a real friendly guy, I can't remember his name, but he
16 was very qualified. I think he worked up in North Carolina,
17 and said, oh yes, oh yes, the baby had been abused. This
18 shows signs of back child syndrome. Okay? All right. That
19 has already been established. We already know that. That
20 is the state giving it to you again, and again, and again,
21 okay? But again, like he admitted. I asked him one
22 question. Have you met Mitchell Rivers? No. Can't do it.
23 Then, after we heard from that gentlemen, we heard from
24 Investigator Jordan, the lead investigator in the case,
25 talked about Mitchell's interview, both written and on

CLOSING ARGUMENTS BY MR. SWILLEY

16

1 video. And he testified that they changed. Okay?
2 Mitchell, the first time he was scared. He admitted it. He
3 came clean in front of y'all. Told what happened. Yes,
4 that makes Mitchell look bad. Anytime you say two mutually
5 exclusive things, a person looks bad. But you know, that
6 doesn't indicate that he is guilty of anything. It just
7 indicates, like I said, he made a poor judgment call to wait
8 to tell the truth when he should have just told it right
9 then. And you have got to remember, the first time ---
10 I'm not making excuses for anybody. The first time he is an
11 emotional wreck. I mean, anytime you have got to deal with
12 something like this you are an emotional wreck. I can't
13 imagine. Like I said, he has had a lot tougher of a life
14 than I have, or really anybody else that I would know.

15 Now, I would just like for you to bear in mind if there
16 was anything else that they could have gotten out of
17 Mitchell Rivers had they would have got him, okay? He would
18 have got it, and you would have seen it, and you would have
19 heard it. Then later on, Ms. Mayes put up Rick Charles and
20 Julie Duff, who had a small role in this matter, and said
21 that Mitchell admitted to putting the baby in the playpen
22 while it wasn't breathing. Well, bear in mind Mitchell
23 didn't write that statement. He didn't say it on video.
24 That's their notes that they took, after they talked to him.
25 And I am not calling them liars. I am not saying that they

CLOSING ARGUMENTS BY MR. SWILLEY

17

1 lied, but I am telling you they misquoted that as well. But
2 I am telling you that they misheard, and that is wrong,
3 okay, the fact that the baby died at 7:30 that morning,
4 okay. If he had laid out there in the playpen sick, not
5 breathing, it would have been dead by the time they got
6 there. You don't have to be a doctor or have a master's
7 degree in anything to realize that, or to come to that
8 conclusion, okay? I am not calling anybody a liar, I am
9 just saying that they got that wrong. I'm saying they
10 misunderstood him. That is what I am saying.

11 And then, there is Mitchell himself. He got up on the
12 stand, answered every question that was posed to him. Now,
13 I always tell my clients, don't get up there. You've got a
14 right to remain silent. You ain't gonna --- you know, you
15 ain't gonna do well. A lot of times people I represent have
16 real bad records that are going to come out, and the jury is
17 going to hear. This is an exception. He needed to get up
18 there and testify. He needed to get up there and show
19 y'all he's got nothing to hide, and he did that. He
20 answered every question that Ms. Mayes threw at him. He got
21 up there, answered questions from somebody that is more
22 sophisticated than him, and exponentially better educated
23 than he is. He answered every single question she had.
24 Didn't stray, didn't pause, got up there and told the truth.

25 Now, what the state is going to argue to you is that

CLOSING ARGUMENTS BY MR. SWILLEY

18

1 because he failed to render medical care that morning when
2 he performed CPR on the baby, and the baby started breathing
3 again, that that resulted in his death, that is homicide by
4 child abuse. Ladies and gentlemen, I submit to you,
5 Mitchell did render appropriate medical care when he thought
6 it was time. Looking back in retrospect yeah he should have
7 called the police, called 911 right then. He didn't do it,
8 and that was a mistake. But that is not circumstances that
9 manifest an extreme indifference to human life. Because
10 ultimately he did what he was suppose to do. Now he waited
11 too long, and I am sure if there is anything in his life
12 that he could change, he would have done that. But he
13 didn't lay that baby in that playpen not breathing. That
14 didn't happen. Okay? And if he couldn't have gotten that
15 baby breathing again, he would have done whatever he could
16 to save him.

17 Now, when you look at what you have seen during the
18 whole trial for this whole week, you have got to realize
19 that you just don't know enough or have seen enough to find
20 Mitchell Rivers guilty of this crime. And that is because
21 he is not guilty. Anything else, you have just seen it.. If
22 he concocted this story about what had happened on the
23 video, performing CPR, he would have been able to stick to
24 it. Not for five and a half years, almost six years. He
25 couldn't have done it.

CLOSING ARGUMENTS BY MR. SWILLEY

19

1 What I am asking you to do here today, is to decide
2 this case with what I call your collective common sense, not
3 your emotions. Okay? This requires an analytical burden on
4 your behalf, a lot of attention to --- a lot of attention to
5 details. And I know that everybody has a soft spot for
6 children. I don't have any, but I do too. But you have to
7 look at this case from an objective standpoint, not from the
8 standpoint of the state, and not the standpoint of the
9 defendant, but from your own standpoint. Judge the facts
10 according to what you have seen, from a non bias
11 prospective. That is really all that we can ask of you,
12 you know, I would ask that you take into consideration the
13 fact that you didn't --- the state didn't put up testimony
14 from Dr. Shoals, the baby's doctor, that the baby was
15 bronchial, that he had been to the hospital --- taken by
16 Mitchell and Kim several times preceding his death to get
17 treated for breathing issues. They don't want you to think
18 about that, because that does not show circumstances that
19 manifest extreme indifference to human life. It shows
20 anything but, okay?

21 This statute that Mitchell has been charged under is a
22 statute meant to convict, to punish people who abuse
23 children, okay? It is not for this situation.

24 Now, you will probably remember during my opening, I
25 asked --- do you remember, keep in mind three principles

CLOSING ARGUMENTS BY MR. SWILLEY

20

1 that are very important in our criminal justice system.

2 Number one. The defendant is presumed innocent at all
3 times. Mitchell is presumed innocent until it can be proven
4 otherwise. We don't have to prove anything. That is not
5 the way it is.

6 Number two. The burden of proof always lies upon the
7 state. They are the ones that have to prove it, not us.

8 And number three, and most importantly. That burden of
9 proof is beyond a reasonable doubt. And I submit to you it
10 hasn't gone that far, it can't go that far, because those
11 aren't the facts. It hasn't been proven beyond a reasonable
12 doubt.

13 Now, in a second, I've got to sit down, and Ms. Mayes
14 gets to get up here and give her presentation. She is going
15 to go through everything. All the injuries of the child.
16 Again, it can't be put on Mitchell. She is going to go
17 through all --- everything that he said. She is going to
18 present her argument that counters everything that I have
19 said. And I wish the order didn't go that way, but there is
20 nothing I can do about that. It is what it is. Okay?

21 But, before I sit down, I would just like to say that
22 if there has been anything this week that I have said that
23 has offended you, or irritated you, or angered you, let me
24 apologize right now on behalf of myself. It wouldn't be
25 fair, and it would be awful, if you held something that I

CLOSING ARGUMENTS BY MS. MAYES

21

1 said against this man..That wouldn't be fair at all. So,
2 let me apologize right now if there 'has been anything that
3 has come out of my face that has offended you. I sincerely
4 apologize, okay?

5 Now, right now y'all hold the power over a man's life,
6 and over his future. And I would just ask that you remain
7 mindful that that is what you have, and it is probably the
8 most power you are ever going to have. And that is a whole
9 lot of power. Please do the best job that you can.

10 Thank you for your service.

11 **THE COURT:** Thank you, Mr. Swilley. Ms. Mayes.

12 **MS. MAYES:** Beg the Court's indulgence.

13 **THE COURT:** Yes, ma'am.

14 **MS. MAYES:** May it please, the Court?

15 **THE COURT:** Yes.

CLOSING ARGUMENTS BY MS. MAYES

16
17 **MS. MAYES:** Ladies and gentlemen, we thank you for
18 your attention throughout this case. As I said when I first
19 got up here the other day, what this case is about is child
20 abuse, plain and simply. As hard as it is to recognize,
21 conduct like this happens, even here in Chesterfield County,
22 they do. It is real. Child abuse, I submit is a secret
23 crime. Crimes like this are not like other crimes that we
24 might prosecute. It is not like an armed robbery where
25 somebody goes into a convenient store, and they commit a

CLOSING ARGUMENTS BY MS. MAYES

22

1 crime, and there is a video right up there above the door
2 playing the whole time. And then we come into court and we
3 show you the video tape where the person goes in and commits
4 the robbery. We have it right there for you to see. That
5 is not how child abuse happens. Child abuse is different.
6 And it is not like a burglar where somebody breaks into a
7 home, and they commit a crime and leave fingerprints behind,
8 when we come into court and have those fingerprints to show
9 you. Child abuse is different. It is a crime of silence.
10 You hear this baby suffered in silence, for days. This was
11 not an event that culminated in some kind of accident that
12 morning. The testimony that you heard from Dr. Ross is that
13 when she found the broken ribs, it was callous formation
14 around the ribs, telling her that they had begun to heal.
15 The estimation for that callous formation was ten to
16 fourteen days, his ribs had been broken long before that
17 morning.

18 The bruises that Child had, these bruises have
19 nothing to do with how this happened. Bruises to the back
20 of his head, bruising to the back of the ear, bruising to
21 the inside of the ear, the baby was three months, twenty-
22 five days, almost four months. He is not crawling, he is
23 not scooting, he is completely helpless and dependent on his
24 parents. None of these injuries could have happened except
25 by infliction from another person. The facial petechia, the

CLOSING ARGUMENTS BY MS. MAYES

23

1 little pin point dots all over his face, this is from
2 pressure and force while being asphyxiated. Extreme
3 pressure and force to produce that facial petechia. The cut
4 on his lip, the testimony was that it was healing. Dr. Ross
5 can determine that by looking at the scalp formation. As
6 well as the laceration on his torso, it is healing. This
7 didn't happen that morning. As was explained, this was
8 repetitive injury.

9 When we talk about the contusions, perhaps the most
10 significant finding of all at autopsy, because the
11 contusions were of varying age. When they pulled back the
12 scalp, they could see that they were red, and some were
13 yellow. The yellow one that happened earlier, consistent
14 with knuckle marks. He had been beaten and beaten again,
15 and the testimony from both pathologist including the Deputy
16 Medical Examiner for the State of North Carolina, Dr. Clay
17 Nichols, said these raised contusions are contemporaneous
18 with a fatal injury. He is held down. He is smothered. He
19 is beaten in the head. And when an adult is grabbing a
20 child and holding them down, where would they hold that
21 child, they would hold that child across the back of his
22 head. Holding him across the back of the head, and as the
23 fingers reach around the back of the head, the fingers go
24 into the ear. As he is held down from the back, consistent
25 with his ear bruise.

CLOSING ARGUMENTS BY MS. MAYES

24

1 The difference between this type of crime and a crime
2 that would be an accident for example, is that here even by
3 Mitchell Rivers own admission, he finds the child not
4 breathing and he does nothing. He said he blew some breath
5 into the child even though he didn't know CPR. And then he
6 left the room. He didn't wake up his wife. He didn't call
7 911. The difference would be in an accidental situation for
8 example, a house is on fire, and you know that a child is
9 inside. And you know that the child is in danger. Any
10 reasonable person would call 911. You wouldn't just walk
11 away. You wouldn't walk away leaving a house on fire with a
12 child inside. And that is the difference here, and that is
13 what Mitchell Rivers did. And I submit that not even a
14 parent --- it wouldn't even have to be a parent to care
15 enough about another human life to call 911, or to seek
16 help. I submit that if anyone here found a child not
17 breathing, without color, on the brink of death, you would
18 seek help. You would call 911. You wouldn't just walk out
19 of the room and leave him there to die.

20 The law in this case is actually very simple. The law
21 of homicide by child abuse as I said at the beginning, this
22 is not a murder case. This is not a case where the state is
23 required to prove some type of premeditation, or even
24 malice. The element is extreme indifference to human life.
25 It is when a person is guilty of homicide by child abuse

CLOSING ARGUMENTS BY MS. MAYES

25

1 pursuant to the statute. When the cause of death of a child
2 under the age of eleven, while committing child abuse
3 neglect, under circumstances manifesting an extreme
4 indifference to human life.

5 Now the judge will charge you momentarily, and he will
6 give you more detail than I am now. But when we talk about
7 what is child abuse or neglect, we will take a look at that
8 now.

9 Child abuse or neglect is defined under South Carolina
10 law as an act or omission by any person which causes harm to
11 the child's physical health or welfare. An act or omission.
12 And let's keep in mind an omission is the failure to act.
13 It is the failure to do something. Which by Mitchell
14 Rivers' own admission, he has committed a grave omission in
15 this case.

16 The next portion of the statute covers the definition
17 of the word harm. Harm occurs when a person fails to supply
18 the child with adequate food, clothing, shelter, or health
19 care, and the failure to do so causes a physical injury or a
20 condition resulting in death. There is no question that in
21 this case the state has proven beyond a reasonable doubt
22 that Mitchell Rivers failed to provide adequate health care.
23 And we know that Baby Child died that morning as a
24 result of asphyxiation. We know that he had a multitude of
25 other injuries. That amounts to extreme indifference to

CLOSING ARGUMENTS BY MS. MAYES

26

1 human life.

2 I do want to talk briefly about the different
3 statements that occurred from Mitchell Rivers, in evaluating
4 which one may be true. I submit, no one here will ever know
5 what is true and what is not true, because so many different
6 stories have been told. And none of those stories are
7 completely forthcoming. None of those stories explain the
8 multitude of injuries, the bruises, the repetitive injuries
9 that Dr. Nichols referred to as battered child. He said
10 that he had never seen these bruises. He said that he had
11 never seen the lacerations. Even though some of them were
12 preexisting and already healing. He says he would feed the
13 baby. He would change the baby. He says he had been with
14 the baby the whole night before and during the night. And
15 yet claims --- comes in this courtroom and claims he knows
16 nothing about any of the bruises or lacerations to
17 Child

18 When we look at the first statement at the hospital,
19 here he had the opportunity --- he had the opportunity --

20 MADAME COURT REPORTER: Judge Burch, I can't hear her
21 with that paper folding back. I can't hear over those
22 papers.

23 MS. MAYES: He had the opportunity to tell them if
24 anything had happened with Child that was out of the
25 way. Instead, he tells the EMS workers and the emergency

CLOSING ARGUMENTS BY MS. MAYES

27

1 room doctor that at 6:15 he went to change his diaper. He
2 doesn't say anything about the baby being smothered, or
3 being injured, or having breathing difficulties. These are
4 doctors who are there to try to save Child life.
5 These are doctors trying to get a pulse on the baby.

6 THE COURT: Ms. Mayes, you are rattling, and she
7 can't hear what you say.. If you could switch sides that
8 would help too, if that is not too uncomfortable.

9 MS. MAYES: All right. We know that there are a
10 multitude of other statements. In the first statement, he
11 reported again nothing about any knowledge of asphyxiation
12 to Child . Then he gives a statement to SLED, and you
13 heard the testimony from the SLED agent that what he told
14 them is still different than what he ended up saying on the
15 video tape. The SLED agent reported that he told them that
16 he found the baby not breathing. He attempted CPR. He had
17 never fed the baby, even though he originally said that he
18 did. He told the SLED agents that he knew Child was not
19 breathing when he put him in the playpen and went outside.
20 Then when he gets on the video tape, he minimizes that,
21 because those two officers aren't in the room for the
22 duration of the videotape, so he tells yet another story.
23 And ultimately, as I submit --- submitted before, we will
24 never really know exactly what happened to Child . But
25 we do know that he suffered in silence for quite a while.

CHARGE ON THE LAW

1 I will end by saying that in a case like this, it is
2 hard to comprehend how a crime like this can happen. How a
3 child can suffer for so long, and no one acts. No one did
4 something on his behalf. And even as he is laying in the
5 hospital fighting for his life, still the people who are
6 responsible for parenting him, his father still won't tell
7 what he really knows, or what has happened that morning.
8 That is unacceptable to have a child beaten, smothered to
9 death in Chesterfield County, that is unacceptable.

10 You have before you the most noble of opportunities.
11 The chance to strike back against injustice, and deliver a
12 verdict that speaks the truth. .

13 In this case, the truth is that Child was battered.
14 Child was beaten. That Child was smothered to
15 death. Mitchell is guilty as charged with failure to act
16 with the omission and omissions that lead to the death of
17 Child .

18 Thank you.

CHARGE ON THE LAW

19
20 **THE COURT:** Thank you, counsel. The next phase of
21 the trial is the judge's charge to you, the law. In the
22 last day or two the bailiff staff said some of you had
23 inquired as to who this gentleman is. I think that is the
24 first time I have had a jury to ask that. That is a

CHARGE ON THE LAW

1 reasonable question. That is my law clerk. Some judges
2 leave their clerks in the office to coordinate things, but
3 with the advent of the computer, the internet, I like having
4 him close by so we can work together with other judges to
5 get the scheduling done, and keep up with things that are
6 going on. Plus, with the present situation with this air
7 cast on my foot, it is a little difficult to drive, so he is
8 helping me out with that. In other words, he is my
9 attorney. He keeps me out of trouble.

10 Now is everybody okay? This charge is probably going
11 to take about thirty minutes. All right.

12 First of all, I want to thank both counsel for the
13 state and for the defense for their excellent presentations,
14 and their professional manner in which they presented their
15 cases. It makes a judge's duties easier when you have such
16 professional help before you.

17 Now it is my duty as the trial judge, under the
18 constitution of this state, to charge and instruct you the
19 law applicable to the case. And it is your duty as jurors,
20 to accept and apply the law as I state it to you. As
21 jurors, it is your exclusive duty to decide all the issues
22 of fact in this case, and for that purpose to determine the
23 effect, the value, the weight, and the truth of the
24 evidence. Both the state and the defendant have a right to

CHARGE ON THE LAW

1 expect that you will consciously consider and evaluate the
2 evidence, and apply the law of the case thereto, to the end
3 that both the state of South Carolina and the defendant will
4 receive and obtain a fair and impartial trial in this case.

5 To the charges in the Indictment, which you have heard
6 read to you numerous times, the defendant has entered a plea
7 of not guilty. A plea of not guilty by the defendant places
8 the burden of proof on the state to prove by evidence the
9 guilt of the defendant beyond a reasonable doubt, before you
10 the jury, can find the defendant guilty.

11 A defendant is presumed in law innocent of the charges
12 contained in an Indictment. It is a cardinal and
13 fundamental rule of the law of evidence that a defendant
14 irrespective of the enormity of the charge against him will
15 always be presumed innocent of the crime for which he is
16 indicted, unless and until the guilt of the defendant has
17 been proved by evidence that satisfies you the jury, of his
18 guilt beyond a reasonable doubt. The presumption of
19 innocence is not a mere legal theory, and it is not just a
20 legal phrase. The presumption of innocence is a substantial
21 right for which every accused is entitled. Our Supreme
22 Court has declared that the presumption of innocence is like
23 a robe of righteousness placed upon the shoulders of a
24 defendant, and it remains with him and assigns him to that

CHARGE ON THE LAW

1 class, the innocent, until that presumptive robe of
2 righteousness has been stripped from his person by evidence
3 satisfying you the jury, of the guilt of the defendant
4 beyond a reasonable doubt.

5 The presumption of innocence accompanies a defendant
6 from the time of his arraignment and appearance in the
7 Court, and continues with the defendant throughout every
8 stage of the trial, and continues with the defendant after
9 you retire to the jury room to deliberate your verdict. The
10 presumption of innocence continues in existence to the
11 benefit of the defendant until you the jury, reach the
12 conclusion that the state has proved the guilt of the
13 defendant beyond a reasonable doubt.

14 The state is not required to prove the guilt of a
15 defendant beyond all doubt, or beyond every doubt, but
16 beyond a reasonable doubt. Proof beyond a reasonable doubt
17 is proof that leaves you firmly convinced of the defendant's
18 guilt. There are very few things in this world that we know
19 with absolute certainty, and in criminal cases the law does
20 not require proof that overcomes every possible doubt. If
21 based on your consideration of the evidence you are firmly
22 convinced that the defendant is guilty of the crime charged,
23 you must find him guilty. If, on the other hand, you think
24 there is a possibility that he is not guilty, you must give

CHARGE ON THE LAW

1 him the benefit of the doubt, and find him not guilty. I
2 charge you that the defendant is entitled to every
3 reasonable doubt arising in a case. If upon any issue of
4 fact essential to conviction and a verdict of guilty and you
5 have a reasonable doubt as to how that issue should be
6 resolved, it would be your duty to resolve that reasonable
7 doubt in favor of the defendant.

8 Now, ladies and gentlemen, a defendant is not required
9 to prove his innocence. Once again the state is required in
10 law to prove every essential element of the offense charged
11 against a defendant by evidence that satisfies you the jury,
12 of the guilt of the defendant beyond a reasonable doubt,
13 before you could convict the defendant and find him guilty.
14 If then upon the whole case you have a reasonable doubt as
15 to the guilt or the innocence of the defendant, he is
16 entitled to that reasonable doubt, and would be entitled to
17 an acquittal or a verdict of not guilty. But on the other
18 hand, if upon the whole case you find that the state has
19 proved evidence which satisfies you the jury, of the guilt
20 of the defendant beyond a reasonable doubt, then in such
21 circumstances, it would be equally your duty to convict the
22 defendant and find him guilty.

23 The Indictment I have up here, which you will have a
24 little later on when you begin your deliberations is not

CHARGE ON THE LAW

1 evidence. It cannot be considered by the jury as evidence
2 in the case. The Indictment is simply the formal written
3 instrument which contains the charges against the defendant,
4 and is served as a formal document by which the case is
5 processed into the Court. Now during a trial, each of us,
6 you and I have certain duties to perform. As the trial
7 judge it is my responsibility to preside over the trial of
8 this case, and I also have the duty to rule upon, or pass
9 upon the admissibility of the evidence offered during the
10 progress of the trial. You are to consider only the
11 competent evidence before you. And you are to disregard and
12 disabuse from your mind any testimony ordered stricken from
13 the record of the case during the progress of the trial, if
14 there be any. And you are to consider only the testimony
15 which has been presented from the witness stand together
16 with any exhibits admitted into the record of this case, and
17 any stipulations of counsel made into the record, if there
18 be any.

19 Now, I have the additional duty to charge you the
20 applicable law of the case. As the presiding judge, I am
21 the sole judge of the law of the case, and it is your duty
22 to accept and apply the law as I state it to you. If you
23 have a preconceived idea as to what the law is, or what the
24 law ought to be in this case, and it should not agree with

CHARGE ON THE LAW

1 what I tell you the law is, you are obligated under your
2 oath to abandon this perception on your part, because you
3 are sworn to accept the law precisely as I state it to you.
4 In every case tried in this state before the jury, the jury
5 becomes the sole and exclusive judge of the facts of the
6 case. You the jury, are the judge of the facts in this
7 case, and the Court is the judge of the law. The
8 constitution of this state has declared that a trial judge
9 shall not intimate, state, comment upon, or make any
10 statement to a trial jury about the facts of the case.
11 Since you are the sole judge of the facts, you are not to
12 infer from anything that I have said during the progress of
13 this trial in ruling upon the admissibility of evidence or
14 otherwise, or anything that I say to you during the course
15 of this charge to you that I have an opinion about the facts
16 in this case. The law does not permit me to have an opinion
17 about the facts in the case, this is a matter, solely for
18 you the jury, to determine. It is your duty to determine as
19 I have stated to you, the effect, the value, the weight, and
20 the truth of the evidence presented during the course of
21 this trial. Necessarily then, you must assess the
22 credibility of the witnesses who have testified in the case.
23 Credibility is simply a legalistic term that means
24 believability. It becomes your duty then to analyze and

CHARGE ON THE LAW

1 evaluate the evidence and determine that evidence which
2 convinces you of its truth. I charge you that in
3 determining the question of credibility or believability of
4 the witnesses, you may believe one witness as against
5 several witnesses, or several witnesses as against one
6 witness. You may believe a part of the testimony of a
7 witness, and reject the remaining part of the testimony of
8 that same witness. You may believe the testimony of a
9 witness in its entirety, or reject the testimony of a
10 witness in its entirety. You may consider whether any
11 witness has exhibited any interest, any bias, or any
12 prejudice in this case. You may consider the demeanor of a
13 witness and the appearance of a witness from the witness
14 stand. And you may consider the opportunity for knowledge
15 concerning those things about which a witness testified.
16 And in doing so, in exercising your mental processes, and
17 determining what you consider to be true, the law simply
18 requires that you exercise your good judgment, your common
19 sense, your sense of logic and reason, and your experiences
20 in life. It is often said, bottom line, don't leave your
21 common sense at the courthouse door. Once you get into the
22 courtroom is when you need to use your common sense more,
23 probably than any other time in your life. You apply all of
24 these attributes of ability to the evidence, and determine

CHARGE ON THE LAW

1 what you consider the truthful evidence. And to these true
2 state of facts as determined by you the jury, you take and
3 apply the law as I state it to you, and thus arrive at a
4 true verdict in the case.

5 Now let me talk to you about the types of evidence.
6 And I am not suggesting to you what is present and what is
7 not present. You have to find that as the fact finders.

8 There are two types of evidence which are generally
9 presented during a trial. It can be direct evidence and
10 circumstantial evidence. Direct evidence is the testimony
11 of a person who asserts or claims to have knowledge of a
12 fact, such as an eye witness. Circumstantial evidence is
13 proof of a chain of facts and circumstances indicating the
14 existence of a fact. The law makes absolutely no
15 distinction between the weight or the value to be given to
16 either direct or circumstantial evidence. Nor, is a greater
17 degree of certainty required of circumstantial evidence than
18 that of direct evidence. You should weigh all of the
19 evidence in the case. After weighing all of the evidence,
20 if you are not convinced of the guilt of the defendant
21 beyond a reasonable doubt, you must find the defendant not
22 guilty.

23 Now, as to expert testimony. We had several experts in
24 this case that were qualified to testify. In considering

CHARGE ON THE LAW

1 the opinion of an expert witness that has been admitted in a
2 case, you should consider the factual evidence first. An
3 expert may base his opinion upon factual evidence presented
4 at trial. Alternatively, the expert may base the opinion
5 upon facts and data not in evidence. You may consider the
6 expert opinion, if you find that the testimony is based upon
7 facts that are reasonably relied upon by experts in that
8 particular field. You must consider expert testimony in the
9 same manner as you do any other testimony, and give to it
10 such weight as you may believe it to be entitled when
11 considered with all of the other evidence in the case. Such
12 testimony is given for the purpose of helping you understand
13 the evidence, and not for the purpose of controlling your
14 judgment. The value of it does not depend upon the skill
15 and the knowledge professed by the expert, but rather upon
16 the skill and knowledge she or he actually possesses. It is
17 for you to judge whether he or she possesses such knowledge.
18 In this regard you may consider his or her training,
19 experience, ability to communicate their ideas, the logic of
20 their opinion, the factual support for their opinion, and
21 all other factors as you would judge and weigh the testimony
22 of other witnesses. The value and the effect of expert
23 testimony is a matter solely to be estimated by you the
24 jury. No mere opinion of an expert can be accepted as in

CHARGE ON THE LAW

1 and of itself truthful or reliable, but must be weighed by
2 you and convince your judgment beyond a reasonable doubt,
3 and with the same force and effect as any other fact proved
4 in the case, before you can rely upon it as the basis of a
5 conviction. You have heard the testimony of a witness who
6 has special knowledge, skill, experience, training, or
7 education in a particular field, and who has given their
8 opinion as an expert as to matters in which they are
9 skilled. In determining the weight to be given such
10 opinion, you should consider the qualifications and
11 credibility of the expert and the reasons given for their
12 opinion. You are not bound by such opinion. Give it the
13 weight, if any, to which you deem it entitled.

14 The defendant in this Indictment is charged with the
15 offense of homicide by child abuse. I will now define this
16 offense for you. I read from Section 16-3-84 of the Code of
17 Laws of The State of South Carolina of 1976, as amended.

18 A. A person is guilty of homicide by child abuse if
19 the person;

20 1. Causes the death of a child under the age of eleven,
21 while committing child abuse or neglect, and the death
22 occurs under circumstances manifesting an extreme
23 indifference to human life.

24 Or, 2. Knowingly aids and abets another person to

CHARGE ON THE LAW

1 commit child abuse or neglect, and the child abuse or
2 neglect results in the death of a child under the age of
3 eleven.

4 B. For the purposes of this section, the following
5 definitions apply.

6 1. Child abuse or neglect means an act or omission by
7 any person which causes harm to the child's physical health
8 or welfare.

9 2. Harm to a child's health or welfare occurs when a
10 person;

11 A, inflicts or allows to be inflicted upon the child
12 physical injuries, including injuries sustained as a result
13 of excessive corporal punishment. B, fails to supply the
14 child with adequate food, clothing, shelter, or health care,
15 and the failure to do so, causes a physical injury or
16 condition resulting in death.

17 Or C. Abandons the child results in the child's
18 death.

19 The defendant in this case has raised the defense of
20 accident, and let me speak with you about that at this time.
21 The burden is on the state to prove beyond a reasonable
22 doubt, that the killing or the homicide was not accidental.
23 Harm to another including death cannot entail criminal
24 responsibility for the defendant, if the harm accidentally

CHARGE ON THE LAW

1 inflicted without intent to harm, and with recklessness or
2 criminal negligence. Where the manner of death of a human
3 being is the result of an accident or misadventure, no
4 criminal responsibility attaches to the act of the
5 defendant.

6 It is shown that, one. The killing was intentional.

7 Two. That it was done while the defendant was acting
8 in a lawful enterprise.

9 Three. And was not the result of criminal negligence.
10 The death will be excused on the score of accident.

11 Ladies and gentlemen of the jury, you are not partisans
12 or advocates for the state of South Carolina or the
13 defendant.. You do not serve as jurors to reward friends or
14 punish enemies. Obviously, such a perverted system of
15 justice would be intolerable. You have been selected by
16 both the state and the defendant as fair and impartial
17 jurors. It is your duty then by your joint deliberations to
18 determine the truth in this case, giving to the defendant
19 the benefit of every doubt on each and every issue. Then to
20 the facts which you determine to be true, you then take and
21 apply the law which has been given to you by this court, and
22 thus arrive at a verdict which does speak the truth of the
23 case. For the word verdict, which has a Latin derivative
24 means a true saying. When you have accomplished these

CHARGE ON THE LAW

1 responsibilities, you will have satisfied your oath as
2 jurors, and you will have discharged your duty to the Court.

3 Now in this particular case, under this particular
4 statute, there are three possible forms of verdict that you
5 can reach. That is guilty of homicide by child abuse under
6 Statute (A)(1) that I read to you, or under (A)(2), or the
7 defendant may be found not guilty. Do not give any weight
8 as to how I numerically went through those. I just have to
9 state them somehow. And that is your three possible forms
10 of verdict.

11 And I have to give you special instructions concerning
12 those three possible forms of verdict. If you find the
13 defendant guilty, but you have a reasonable doubt as to
14 whether the defendant is guilty of the greater crime charged
15 under this statute which would be (A)(1), or the lesser
16 crime charged which would be (A)(2), you would resolve that
17 reasonable doubt in favor of the defendant, and write a
18 verdict of guilty only as to the lesser charge.

19 Now, of course you could not write a verdict of guilty
20 to any charge unless it is to that charge, and you find all
21 the elements of the charge have been proven by the state
22 beyond a reasonable doubt. And if you find that the state
23 has not proved either of those by reasonable doubt, once
24 again it is your duty to find the defendant not guilty.

CHARGE ON THE LAW

1 The verdict that you render in this case must be the
2 verdict of each and every juror. It must be your unanimous
3 verdict. All twelve jurors must agree on the verdict which
4 you authorize the foreperson to write for the jury.

5 Mr. Foreman, you will have the Indictment with you.
6 And on the back of the Indictment there is a section that
7 says verdict. It will be your duty to write in the
8 appropriate verdict, sign your name, and date the
9 Indictment. And let the bailiff staff know that you have
10 reached a verdict.

11 If you have any problems, the bailiff will be stationed
12 close by. You can knock on the door, and we will try to
13 assist you, try to solve any problems that may arise. If,
14 for any reason one or more of the jurors have to leave the
15 room for a restroom break, smoke break, meal break,
16 whatever, cease your deliberations until you have all twelve
17 back. Do not deliberate unless you have twelve jurors.

18 Now, should you have a juror that refuses to
19 deliberate, immediately notify me of that, and I will make
20 arrangements to correct that.

21 I think that I have covered everything that I need to,
22 but I have to check in with the attorneys to make sure that
23 we have got everything to you in this charge. So I am going
24 to ask you not to begin your deliberations until I send the

CHARGE ON THE LAW

1 Indictment back with the exhibits. And that is another
2 thing that we have got to check off and make sure all of the
3 exhibits are accounted for before we send them back.

4 Because of the instructions that I have just given you,
5 I need the bailiff staff to arrange for a separate room for
6 the three alternates for a few minutes for me. I cannot
7 allow y'all to go back with the original twelve from this
8 point on. It is now five minutes to eleven. If the jury
9 would like lunch, Mr. Foreman if you reach that decision,
10 let us know so we can make the necessary arrangements and
11 get some transportation over here. It will take a few
12 minutes to do that.

13 I think I have covered everything that I had. If y'all
14 will step back and let me talk to counsel.

15 (Whereupon, the jury exits the courtroom at 10:55
16 a.m..)

17 THE COURT: Counsel, I have the 2010 supplement and
18 my main volume says revised in 2003. Y'all don't know of
19 any amendment since then do you, that I may have missed?

20 MR. SWILLEY: Not to my knowledge, Your Honor.

21 MS. MAYES: No, sir, Your Honor.

22 THE COURT: All right. Anything concerning the
23 charge?

24 MS. MAYES: Nothing from the state, Your Honor.

CHARGE ON THE LAW

1 MR. SWILLEY: Nothing from the defense, Your Honor.

2 THE COURT: Once again I thank y'all for your
3 professionalism. You did a great job in getting both sides
4 to the jury.

5 If y'all will check all of the exhibits, we will put
6 them to work.

7 (Whereupon, counsel for both the state and the
8 defendant go over the exhibits with the Clerk of Court. I
9 was the Court reporter only the last day of trial.)

10 THE COURT: All right. We've got to go back on the
11 record just a minute.

12 (PAUSE.)

13 THE COURT: I've got to get the foreman back here,
14 but I need everybody to hear this.

15 (Whereupon, the foreman enters the courtroom at
16 11:00 a.m..)

17 THE COURT: The Grand Jury wrote their information in
18 the wrong place, and I need for you to just drop down. This
19 is where the Grand Jury met and it should have been up here,
20 and they wrote it down here. Whatever verdict y'all reach,
21 please write it under there, and sign your name and date it
22 here. And here are the forms of the verdict as I quoted to
23 you in the verbal charge. The three possible forms of
24 verdict. The bailiff has all the exhibits for you, and you

CHARGE ON THE LAW

1 may begin your deliberations.

2 Thank you very much.

3 (Whereupon, the jury begins deliberations at 11:02
4 a.m..)

5 THE COURT: All right. Let's stand at ease for a few
6 minutes.

7 (Whereupon, the jury knocks with a note.)

8 (Whereupon, the Court stood down these proceedings
9 at 11:03 a.m. until 12:34 p.m..)

10 THE COURT: Ask Mr. Foreman if they want that charge
11 now, or if they want to wait until we get back from lunch.

12 BAILIFF: They would like to have it before lunch.

13 (PAUSE.)

14 THE COURT: All right. Bring them in. They want to
15 be charged before lunch.

16 (Whereupon, the jury enters the courtroom at 12:38
17 p.m..)

18 THE COURT: I apologize for the delay. We had
19 another matter when the request came in and I needed to
20 complete that. So that is what caused the delay.

21 MR. SWILLEY: Your Honor, do we need to bring Mr.
22 Rivers in?

23 THE COURT: We do.

24 MR. SWILLEY: Okay.

CHARGE ON THE LAW

1 THE COURT: Do we have everybody?

2 MR. SWILLEY: I believe we do, Your Honor.

3 THE COURT: All right. The request from the jury is,
4 can we get a better definition of aiding and abetting, and I
5 am going to give an additional charge concerning that
6 request. I will repeat the specific part of 16-3-85, that I
7 have already charged you about, which was (A)(2). Knowingly
8 and abets another person to commit --- let me back up, I
9 left off the first sentence.

10 This is §16-3-85(A)(2). A person is guilty of
11 homicide by child abuse if the person under number two,
12 knowingly aids and abets another person to commit child
13 abuse or neglect, and the child abuse or neglect results in
14 the death of a child under the age of eleven.

15 Now, as far as the general charge of aiding and
16 abetting, that is when you have, two or more persons aid,
17 encourage, and abet each other in the commission of a crime,
18 all who are present are principles and equally guilty.
19 Where two or more persons combine together to commit a
20 crime, and the crime is committed by all those who are
21 present to aid and abet, and assist in the commission of
22 that crime are guilty. The act of one becomes the act of
23 all. The hand of one becomes the hand of all. It makes no
24 difference by whose immediate agency the crime is committed

CHARGE ON THE LAW

1 all the principles. However, mere presence at the scene of
2 the crime, without an intent to aid, abet, or assist in its
3 commission would not constitute guilt.

4 Okay. Any further charge?

5 MR. FOREMAN: No, sir.

6 THE COURT: Ready to go to lunch?

7 MR. FOREMAN: Yes, sir.

8 THE COURT: Where do we stand? Do we have some
9 vehicles lined up?

10 DEPUTY: We just need to go pick up a van.

11 THE COURT: Y'all just step back and give us a minute
12 or two.

13 (Whereupon, the jury returns to the jury room at
14 12:43 p.m..)

15 THE COURT: Any additional --- anything for the
16 record from anybody?

17 MS. MAYES: Nothing from the state, Your Honor.

18 MR. SWILLEY: Nothing from the defense. I believe
19 that charge to be adequate.

20 THE COURT: And do y'all waive the oaths again for
21 the bailiff staff and whoever goes to lunch?

22 MR. SWILLEY: I do, Your Honor.

23 MS. MAYES: State waives, Your Honor.

24 THE COURT: Mr. Bailiff, I need those three

CHARGE ON THE LAW

1 alternates back in here. We will lock the courtroom.

2 (PAUSE.)

3 THE COURT: You may be seated there in the box.

4 First of all, I want to thank you for your patience. I kept
5 you back there for quite some time, but it is obvious that
6 the jury is in the process of deliberating. And second of
7 all, I want to thank you for your time that you have spent
8 this week listening to this case. I have always had
9 sympathy for alternate jurors, because you sit there and go
10 through sometimes a week long trial, and then you don't get
11 to take part in the end result, and it can be frustrating, I
12 know. However, the law will not allow us to have but twelve
13 deliberating jurors.

14 So, with that said, that ends y'all's duty for this
15 week. We are going to come back and work Monday, but it
16 will not require the service of any jurors.

17 Madame Clerk, anything you would like to say about
18 their checks, or if there is any problem with that what they
19 need to do?

20 CLERK OF COURT: I will get them in the mail as soon
21 as possible. If you need a note for your employer, go by
22 the office and they will take care of that for you. Thank
23 you for your service this week.

24 JUROR: May we stay?

VERDICT

49

1 THE COURT: You can. And because they have sent out
2 several request is why I held y'all back there to protect
3 the record, and make sure that all of that was going to have
4 a proper flow, which apparently it has. I can tell you, you
5 are welcome to stay. You may want to go ahead and get some
6 lunch, because they have requested lunch. So it is probably
7 going to be a little while on that. So, with that said, we
8 are going to recess for lunch, and we all need to be back
9 here in about an hour and ten minutes.

10 (Whereupon, a lunch recess was taken from 12:46
11 p.m. until 2:00 p.m. when the jury resumed their
12 deliberations.

13 The jury announces a verdict at 2:37 p.m..)

14 THE COURT: Okay. I know that in matters like this
15 emotions can run very high. So, if you feel like you can't
16 control your emotions, you need to step out. We don't need
17 any problems in the courtroom, no matter what the verdict
18 is.

19 Bailiff, if you will bring them in.

20 (Whereupon, the jury enters the courtroom at 2:39
21 p.m..)

VERDICT

22
23 CLERK OF COURT: Mr. Foreman, have you reached a
24 verdict?

25 MR. FOREMAN: Yes, we have.

VERDICT

50

1 CLERK OF COURT: If you would hand it to me, please.

2 THE COURT: All right. It is signed and dated.

3 Madame Clerk, you may publish the verdict.

4 CLERK OF COURT: The State of South Carolina, County
5 of Chesterfield, Court of General Sessions. The State
6 versus Mitchell Rivers, 2010-GS-13-1072.

7 We the jury find the defendant guilty under (A)(1)
8 Homicide by child abuse. Foreman, John A. Bodenheimer, 2011
9 --- the eleventh day of February 2011. Foreperson, John A.
10 Bodenheimer.

11 Mr. Foreman, is this your verdict and still your
12 verdict?

13 MR. FOREMAN: Yes, ma'am. And if this is the verdict
14 of all twelve, please raise your right hand.

15 THE COURT: All right. Anything further for the
16 jury?

17 MR. SWILLEY: Your Honor, we request a pole of the
18 jury.

19 THE COURT: All right. Madame Clerk, if you would
20 proceed to pole the jury.

21 CLERK OF COURT: When I call your name, tell us if
22 this was your verdict.

23 Betty I. Miller.

24 MS. MILLER: Yes.

25 CLERK OF COURT: Elizabeth R. Harvell. Is this your

VERDICT

51

1 verdict?

2 MS. HARVELL: Yes.

3 CLERK OF COURT: Rose Pegues.

4 MS. PEGUES: Yes.

5 CLERK OF COURT: Charles Ray Lane.

6 MR. LANE: Yes, ma'am.

7 CLERK OF COURT: Betty T. Munn.

8 MS. MUNN: Yes, ma'am.

9 CLERK OF COURT: John A. Bodenheimer?

10 MR. BODENHEIMER: Yes, ma'am.

11 CLERK OF COURT: Sherrie L. Thompson?

12 MS. THOMPSON: Yes.

13 CLERK OF COURT: Ellen Carver.

14 MS. CARVER: Yes, ma'am.

15 CLERK OF COURT: Frances D. Hardison.

16 MS. HARDISON: Yes.

17 CLERK OF COURT: Jennifer Coleman.

18 MS. COLEMAN: Yes.

19 CLERK OF COURT: Sara M. Horne.

20 MS. HORNE: Yes.

21 CLERK OF COURT: Christy M. Rose.

22 MS. ROSE: Yes.

23 THE COURT: Anything further?

24 MR. SWILLEY: There is not.

25 MS. MAYES: Nothing from the state, Your Honor.

SENTENCING HEARING

52

1 THE COURT: Ladies and gentlemen of the jury, thank
2 you so much for your service on this jury. Thank you so
3 much for your patience with the Court. It has been a long
4 week, and it is Friday afternoon, and y'all are ready to
5 head home for the weekend.

6 Normally, most judges would say, thank you for your
7 service, and would allow you to leave. You may do so if you
8 like. But, I have always taken the position that if you
9 would like to stay and watch the mitigation and sentencing
10 phase of the trial, you are more than welcome to do so.
11 You are more than welcome to stay in the jury box, but for
12 security purposes, we have reserved over here two rows, if
13 you would like to step over there, but I will leave that up
14 to you. Now, if you would like to go ahead and leave, that
15 will be fine too. If you are going to leave, we need to
16 make sure you have your personal belongings. But we will be
17 going into mitigation and sentencing in just a minute or
18 two.

19 I would like to say, if you are more comfortable in the
20 jury box, fine. If you would like to sit back there on the
21 front row, that will be fine too.

SENTENCING HEARING

22
23 (Whereupon, the sentencing hearing began at 2:49
24 p.m.)

25 THE COURT: Sheriff, if you would secure the

SENTENCING HEARING

53

1 defendant at this time, please.

2 All right. Y'all come around.

3 MS. MAYES: Ready whenever you are, Judge.

4 THE COURT: Ready. You may proceed.

5 MS. MAYES: Your Honor, before you is Mitchell
6 Rivers. He has now been convicted of this charge that
7 involves the infant, Child .

8 In terms of a prior record, Your Honor, while out on
9 bond, he was arrested and ultimately convicted of the charge
10 of criminal domestic violence against Kimberly Rivers. That
11 is the spouse which he is currently separated from. He
12 plead guilty to that charge on June 27, 2010. He was
13 sentenced to a work camp, and then released July 8, 2010.

14 The state, following that incident did pursue a
15 revocation of his bond. Judge King ended up giving him a
16 stricter bond condition, allowing him to remain out on bond.
17 Very strict conditions which include raising the amount of
18 his bond, and ultimately that prior bond amount was not
19 paid. He was also ordered not to enter Chesterfield County,
20 and ultimately he was found in Chesterfield County, and was
21 served with a bench warrant that had been issued by Judge
22 King, because of his failure to post the higher bond
23 following those new bond conditions.

24 In addition, Your Honor, this case is tragic for many
25 reasons. One of those is that in 1997, there was an

SENTENCING HEARING

54

1 incident in where there was a two-year-old child, A.H.

2 who is the --- was the son of a former girlfriend of
3 Mitchell Rivers. Was hospitalized for a severe head injury.
4 He was diagnosed by Dr. Gerald Atwood of Florence with a
5 severe concussion, and a large lateral skull fracture, as
6 well, as most likely temporal bone or basilar skull
7 fracture. Ultimately the finding of The Department of
8 Social Service was a finding of physical abuse or neglect
9 against Mitchell Rivers. He was placed on the central
10 registry for abuse and neglect for that incident.

11 As Your Honor has heard some testimony, when they did
12 the home study, they did ask Mr. Rivers if he had had any
13 prior involvement with DSS. He was not forthcoming. They
14 did place the child with Mitchell Rivers and Kimberly
15 Rivers, that would not have happened if they had been aware
16 of his prior conviction. In addition to that, apparently,
17 there had been some type of data entry error with the
18 central registry, that due to some oversight they were just
19 not able to match the date of birth. That is the
20 explanation that The Department of Social Service has
21 provided us.

22 But ultimately, he was already on the central registry
23 for abuse and neglect, and this child was placed in his
24 care, and in the care of his wife, and ultimately we have
25 before us the situation where that child is now deceased.

SENTENCING HEARING

55

1 THE COURT: Mr. Forde.

2 MR. FORDE: Yes, Your Honor, briefly. I know I have
3 not been heard from in this trial, but I wanted to take the
4 opportunity not to be too congratulatory at this somber
5 moment, but to thank Ms. Suzanne Mayes of the Prosecution
6 Commission, on behalf of the Fourth Circuit Solicitor's
7 Office. As many of you know who work in the Court system,
8 she is considered one of our foremost experts in the
9 prosecution of child abuse cases here in the state of South
10 Carolina. And to have her appear in the Fourth Circuit, and
11 assist the Fourth Circuit Solicitor's Office, and really
12 have us assist here, has been a pleasure, and I thank you
13 for coming and doing this, and I thank you for your service
14 to the citizens of Chesterfield County. That said, Your
15 Honor, being the Assistant Solicitor for Chesterfield
16 County, and being a resident of this county, obviously the
17 allegations of this case and the final result is very
18 disturbing to me professionally. What we have here is a
19 horrible, horrible situation that has robbed a child of the
20 possibility of life, and quite frankly robbed society of the
21 opportunity of what that child may have become. And I would
22 personally like to ask Your Honor, to please keep that in
23 mind in sentencing, and bear in mind the gravity of the
24 situation we had before us.

25 Thank you.

STATEMENT BY MR. SWILLEY ON BEHALF OF THE DEFENDANT 56

1 THE COURT: Anything else from the state?

2 MS. MAYES: Nothing from the state, Your Honor.

3 THE COURT: Mr. Swilley.

4 STATEMENT BY MR. SWILLEY ON BEHALF OF THE DEFENDANT

5 MR. SWILLEY: Thank you, Your Honor, if it pleases
6 the Court.

7 When I got this case several months ago, I went to
8 Mitchell's home, I met him, and I have never known him to be
9 anything less than very polite, very congenial to myself. I
10 don't think that he has ever done --- that he ever did
11 anything to any child out of malice, or anger, or
12 aggression. Your Honor, I would just very respectfully ask
13 the Court to take mercy upon Mitchell. I ask the Court to
14 be mindful of the fact that he does not have any convictions
15 other than that CDV conviction that Ms. Mayes listed. As a
16 result of the incident in 97, whatever may have transpired,
17 there was no conviction from that matter. So, Your Honor, I
18 would just respectfully request that you bear those things
19 in mind in determining sentencing.

20 THE COURT: Thank you, sir. Mr. Rivers, anything you
21 would like to say at this time?

22 STATEMENT BY MR. RIVERS

23 MR. RIVERS: yes, sir. I honest to God didn't hurt my
24 child. And the only thing I was doing was trying to do
25 right by him, to provide for him, and provide for my family.

STATEMENT BY MR. RIVERS

57

1 Now, I have been found guilty for something that I
2 didn't do. And now I am going too, loose my other family,
3 because an innocent man is getting ready to go down the road
4 because of hearsay. And now I am not going to be able to
5 see my child that is born by Michelle Hancock.

6 And on the record A.H. and Laquetta Huntley,
7 they my kids, because I raised them to be seventeen and
8 fifteen-years-old. And I was going to get them every
9 weekend, every weekend. And the only reason they found me
10 in Chesterfield County is because I had to come to court
11 January 10th, but we snowed in. That was it. That was it.
12 That's all I did. I never tried to do nothing wrong. I
13 never tried to bother nobody. All I did was work and try
14 to provide for my family. That's it. I would never hurt a
15 child in my life. I wasn't even there when my other son had
16 got hurt. And if that the case, if they say it was on file
17 about my son got hurt in 97, why did they place
18 Child in my care the first time then, if they did
19 the home study, and if it was on the record. That is
20 something I can't understand. But now they making me look
21 like I'm a bad person, and I'm not a bad person. The only
22 one I ever seen has even took the stand was Kimberly Quick
23 Rivers. I just hurts because I'm fixing to loose my family
24 for nothing.

25 THE COURT: Mr. Rivers, at this time I want to advise

STATEMENT BY MR. RIVERS

58

1 you of your appellate rights. Counsel can discuss this with
2 you further. From the bench I want to advise you that you
3 have a right to appeal. Any appeal must be filed by what we
4 call a notice of appeal within ten days of sentencing. And
5 since sentencing will be today, you need to be aware of that
6 time line.

7 MR. RIVERS: Yes, sir.

8 THE COURT: I am not going to sit up here and preach
9 a sermon about all of this. There are two things that stick
10 out in my mind, from your own mouth. You told the
11 authorities that child wasn't breathing, and you gave CPR,
12 and the life came back in that child, and you laid it back
13 down on the crib, or the bed, or wherever --

14 MR. RIVERS: Yes, sir.

15 THE COURT: -- and went to mow the yard. That was
16 horrible judgment.

17 MR. RIVERS: Yes, sir.

18 THE COURT: Anyone would know that if a child stopped
19 breathing that you would go ahead and call for emergency
20 help, no matter how you came out with resuscitation.

21 MR. RIVERS: Can I say something else, Your Honor?

22 THE COURT: Yes, sir.

23 MR. RIVERS: I really wasn't thinking, because when he
24 --- I pretty much wasn't thinking, because I'm on Tri-County
25 Mental Health, and I am on anti-depression pills. And like

SENTENCE OF THE COURT

59

1 you said, It was rough for me to do it, I'm sorry. And I
2 regret it every day of my life. I really do, because I
3 would never hurt my only child.

4 THE COURT: Other factors that gives me the most
5 trouble and really backs me into a corner sentencing wise is
6 that when that investigation was launched, you fully well
7 knew that you were not to be responsible for raising any
8 more children without that being cleared up. And you sat
9 right there, played that game and allowed that child to come
10 into your house. I hope and pray that you understand that
11 this court can't risk that ever happening again.

12 MR. RIVERS: Yes, sir.

13 SENTENCE OF THE COURT

14 THE COURT: Therefore, it is the sentence of the
15 court that you, Mitchell Rivers, be confined in the State
16 Department of Corrections for the rest your natural life.

17 MR. RIVERS: What. What. I didn't do anything.

18 THE COURT: The first one out there that opens their
19 mouth again, sheriff, bring them up here and they are going
20 to be going over to the county jail.

21 MR. RIVERS: I didn't hurt my child. I want to
22 appeal. I want to appeal this.

23 THE COURT: All right. Sheriff, take him into
24 custody.

25 MR. FORDE: The jurors would like an escort --- an

THE STATE VERSUS MITCHELL RIVERS

60

1 escort.

2 THE COURT: Sheriff, if you would make sure that
3 there are plenty of folks out on the courthouse lawn. That
4 doesn't give anybody the right to go out there and show off
5 now. I meant what I said. I am not tolerating it. We had
6 an incident a couple of years ago that about got out of hand
7 out there. We are not going to have that again.

8 DEPUTY: Yes, sir.

9 THE COURT: Off the record.

10 (Whereupon, this hearing was concluded at 3:00
11 p.m. on Friday, February 11, 2011.)

12 -- END OF REQUESTED TRANSCRIPT --

13

CERTIFICATE OF REPORTER

61

I, the undersigned, Pamela Ozment-Cartee, official court reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the trial of the above captioned case, relative to appeal, in The Court of General Sessions in Chesterfield County, South Carolina, on the 11th day of February 2010.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

April 18, 2011

A handwritten signature in cursive script, reading "Pamela Ozment-Cartee", is written over a horizontal line.

Pamela Ozment-Cartee
Circuit Court Reporter

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No: 2011-186026

THE STATE

RESPONDENT,

v.

MITCHELL RIVERS

APPELLANT.

SUPPLEMENTAL RECORD ON APPEAL

BENJAMIN J. TRIPP
Appellate Defender

ALAN WILSON
Attorney General

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

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

INDEX

STATE'S MOTION IN SUPPORT OF EVIDENCE OF ABUSE.....	1
DEFENDANT'S MOTION TO DENY ADMISSION OF EVIDENCE OF EXTRANEOUS INJURIES OF DECEDENT.....	3
DEFENDANT'S MEMORANDUM IN OPPOSITION TO INTRODUCE EVIDENCE OF COLLATERAL INJURIES.....	4

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHESTERFIELD)

STATE OF SOUTH CAROLINA) #10-GS-13-1072
))

vs.)

MITCHELL C. RIVERS) MOTION IN SUPPORT
DEFENDANT.) OF EVIDENCE OF ABUSE
_____)

Now comes the State by and through the office of Solicitor, Fourth Judicial Circuit, and the S.C. Commission on Prosecution Coordination, to move before this Honorable Court for admission of certain evidence relating to child abuse and neglect in the above-captioned case.

In this case the four-month-old infant was determined at autopsy to have died as a result of asphyxia/smothering. In addition, the infant suffered from contusions of varying age on the galea (scalp area) with minimal subarachnoid hemorrhage. The scalp contusions were red and yellow in different locations, suggesting both acute (fresh) and recent trauma. The autopsy also noted healed rib fractures with old contusions. There was also evidence of facial petechiae consistent with asphyxiation and various external abrasions. The Defendant, Mitchell Rivers, has maintained in a statement to law enforcement that the infant's death by asphyxiation occurred as the child slept in his arms during the night. The State maintains that the constellation of injuries is evidence of child abuse and neglect, directly relevant pursuant to SCRE Rule 404(b) to counter the argument of "mistake or accident." In addition, the State maintains that such evidence of abuse and neglect is further relevant in establishing "motive" pursuant to SCRE Rule 404(b). The use of such evidence to counter "mistake or accident" and to establish motive was recently upheld in the case of *State v. Smith*, Op. No. 4785 (S.C. Ct. App., filed January 26, 2011). The Smith case was a homicide by child abuse prosecution wherein the State presented evidence of ongoing abuse and neglect committed against the infant victim.

In the present case against Defendant Mitchell Rivers, there is evidence of acute (fresh) head and scalp injuries to the victim inflicted within the same general timeframe as the fatal injury of asphyxiation and/or inflicted contemporaneous with the fatal injury. In addition, there is evidence of external abrasions sustained within the same general timeframe of the fatal injury. The constellation of injuries is relevant and necessary in establishing evidence of child abuse and neglect.

In the cases of *Estelle v. McGuire*, 502 U.S. 62 (1991) and *State v. Lopez*, 412 S.E.2d 390 (S.C. 1991), evidence relating to battered child syndrome was offered by a qualified medical expert. In *Estelle*, the court provided the following definition of battered child syndrome: "when a child has sustained repeated and/or serious injuries by non-accidental means."

In *Estelle*, the U.S. Supreme Court upheld the use of prior injuries to a child as evidence of battered child syndrome: "When offered to show that certain injuries are a product of child

abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted the injuries.”

In *Lopez*, the South Carolina Supreme Court upheld testimony from a pathologist concerning his opinion that the victim was a battered child. The Court held that battered child syndrome evidence “is admissible when given by a properly qualified expert and such testimony may support an inference that a child’s injuries were not sustained by accidental means.” *State v. Lopez*, 412 S.E.2d at 393 (1991). The Court further noted that battered child syndrome “has been developed as a result of extensive research and become an accepted medical diagnosis in other jurisdictions.” *State v. Lopez*, 412 S.E.2d at 393 (1991).

Further, in *Estelle v. McGuire*, the Court determined that it is not necessary for the defense to allege an accidental injury before battered child syndrome evidence is admissible.

Most recently, in *State v. Smith*, Op. No. 4785 (S.C. Ct. App, filed January 26, 2011), the court upheld the admission of evidence of prior abuse and determined that the State successfully established how such evidence logically related to two exceptions listed under SCRE Rule 404(b): motive and absence of mistake. The current case against Defendant Rivers is directly on point – he has alleged in a statement to law enforcement that the victim’s death resulted from accidental asphyxiation. Thus, proof of contemporaneous and/or acute injury is relevant and necessary in establishing “absence of mistake or accident” and motive to commit acts or omissions amounting to child abuse and neglect.

In addition, in *State v. Holder*, 676 S.E.2d 690 (S. Ct. 2009) the court held that evidence of prior injuries to the victim in a child homicide prosecution had probative value. The court noted that certain photographs established “a pattern of continuous abuse and neglect, which made it more probable that (child) was a victim of child abuse or neglect rather than a mere accident.” *State v. Holder*, 676 S.E.2d at 699 (2009). The court also determined that the photographs were admissible to “establish that (defendant) was aware of ongoing abuse of her child, which is directly relevant to whether her acts or omissions resulted in the death of (child). They are thus relevant to establish elements of the offense, including ‘extreme indifference.’” *State v. Holder*, 676 S.E.2d at 699 (2009).

For the foregoing reasons, the State maintains that evidence of ongoing child abuse and neglect is necessary and relevant in the trial of the present case.

Respectfully submitted,



Suzanne Mayes

S.C. Commission on Prosecution Coordination

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	MOTION TO DENY ADMISSION
	)	OF EVIDENCE OF EXTRANEIOUS
v.	)	INJURIES OF DECEDENT
	)	
MITCHELL RIVERS,	)	Case No.: 2010-GS-13-1072
<u>Defendant.</u>	)	

The Defendant, by and through counsel, moves this Honorable Court to deny the admission of evidence of any extraneous injuries to the decedent in the above referenced case that occurred prior to the decedent's death. Evidence proffered at trial will reveal that the cause of death of the decedent was asphyxia. The autopsy report indicated that there were several unrelated injuries that the decedent child incurred that included healed broken ribs, a cerebral edema, and galeal contusions. There is no nexus between these extraneous injuries and the cause of death of the decedent. Also, none of these injuries have been attributed to the actions of the Defendant by any source at this time.

Admission of such evidence of extraneous and unrelated injuries would not comport with SCRE 401 in that it would not the evidence any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Also, if the Court were to deem that such evidence has any probative value, any such probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, by considerations of undue delay, or waste of time pursuant to SCRE 403. Evidence of alleged prior child abuse is inadmissible where there is no evidence that the Defendant inflicted the previous injuries. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997).

Respectfully Submitted,

Matthew S. Swilley
Attorney for Defendant
300 Russell Street, Suite 113
Darlington, SC 29532
Phone: 843-398-4069

Chesterfield, South Carolina

January 21, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	MEMORANDUM IN OPPOSITION
	)	TO INTRODUCE EVIDENCE OF
vs.	)	COLLATERAL INJURIES
	)	
MITCHELL RIVERS,	)	2010-GS-13-1072
<u>Defendant</u>	)	

The State moves to introduce evidence of the decedent child's collateral injuries that were discovered post-mortem which include contusions of varying age on the scalp area with minimal subachnoid hemorrhage, and healed rib fractures with old contusions. The Autopsy report concludes that the decedent child died as a result of asphyxiation. The Defendant gave a statement to law enforcement that he awoke and the decedent child's head was lodged between his arm and his chest and the child was not breathing. He maintains that he performed CPR and the child began to breathe on his own again but later stopped breathing. He then stated that he alerted 911 and performed CPR on the child until EMS arrived. The child was declared deceased when it arrived to the hospital.

The State maintains that the "constellation of injuries is evidence of child abuse and neglect and that it is relevant pursuant to Rule 404(b) to counter the argument of mistake of accident and to establish motive. This argument fails because the collateral injuries of the child cannot be attributed to anyone in this scenario, let alone the Defendant, by any evidence. In order to introduce evidence of a prior bad act pursuant to Rule 404(b) SCRE, first the state must prove the Defendant committed the act by clear and convincing evidence. State v. Fletcher, 664 S.E.2d 480, 483 (S.C. 2008). Next the state must show how the act logically relates to the crime of which the defendant has been charged. No one who was interviewed by law enforcement has attempted to explicate the collateral injuries and the State does not assert how or when the occurred or from whom from any source. Nor can the state show how these injuries logically related to the death of the child. The State cannot even prove that a "bad act" occurred under Rule 404(b) SCRE.

The State cites the recent case of State v. Smith, Op. No. 4785 (S.C. Ct. App. Filed January 26, 2011). The Smith case differs from this scenario because in Smith the Defendant did not contest the admissibility of several collateral injuries, but only one prior incident of a broken femur in which there was evidence that the Defendant was at fault. In this scenario, there is not evidence whatsoever that the Defendant was at fault.

The State also refers to State v. Lopez, 412 S.E. 2d 390 (S.C. 1991) and Estelle v. McGuire 502 U.S. 62 (1991) as allowing evidence relating to battered child syndrome as offered by a medical expert. In this case, it has not been alleged that the child died from blunt force trauma or any intentional act on the part of the Defendant, therefore such evidence of "battered child syndrome" would not be relevant and would be extremely prejudicial.

Lopez also involved evidence that the Defendant had caused other injuries intentionally and that the injuries were similar in nature to the ones at issue at trial. There was evidence in the record through testimony that the Defendant had abused the victim prior to the allegations for which he was on trial. In this case, there is not such testimony. There are only injuries.

The case at bar is most analogous to State v. Pierce, 485 S.E.2d 913 (S.C. 1997). In Pierce, the S.C. Supreme Court reversed a conviction where there was no evidence that the Defendant had inflicted the injuries upon the Decedent child. In Pierce, the state sought to introduce evidence that the Defendant had previously jerked the decedent child off of the counter at the doctor's office to put him into a stroller. The Court held that this act did not have a close similarity with the act alleged and therefore was not admissible under Rule 404(b) SCRE. In a case of common scheme or plan exception... a close degree of similarity or connection between the prior bad act and the crime is necessary. State v. Parker, 433 S.E.2d 831 (S.C. 1993). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Stokes, 304 S.E.2d 814 (S.C. 1983). In this instance, the State cannot prove that the injuries resulted from a prior bad act, let alone one that is similar in manner to which the child died. The State maintains that some of the collateral injuries of the decedent child are proximate in time to his death, but it cannot be proved that they are so proximate as to justify their admission as relevant or in compliance with Rule 404(b).

The State also attempts compare State v. Holder, 676 S.E.2d 690 (S.C. 2009) with the present case. The basis for Holder's prosecution was that she allowed her boyfriend to abuse her child on numerous occasions. The prior injuries that the photographs tended to reveal in Holder were pre-mortem photographs of the child's injuries which would have established the Defendant was aware of the abuse. The autopsy photographs in this scenario depict a dead infant with collateral injuries that cannot be attributed to his death that only establish that the child had injuries, nothing else.

For the foregoing reasons, the Defendant maintains that evidence of collateral injuries would only serve to prejudice the jury against the Defendant and would have relatively no probative value.

Respectfully submitted,

Matthew S. Swilley
Asst. Public Defender
4th Judicial Circuit

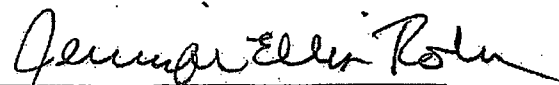
Chesterfield, South Carolina

February 8, 2011

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

BY:



Jennifer Ellis Roberts

S.C. Bar No: 1871

February 27, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MITCHELL RIVERS,

APPELLANT

Appellate Case No. 2011-186026

ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF AUTHORITIES

Cases

<u>Arnold v. State</u> , 309 S.C. 157, 420 S.E.2d 834 (1992)	11
<u>Binney v. State</u> , 384 S.C. 539 (2009)	15
<u>Gay v. Ariail</u> , 381 S.C. 341, 673 S.E.2d 418 (2009)	15
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068 (1970).....	14
<u>Old Chief v. United States</u> , 519 U.S. 112, 117 S.Ct. 644 (1997)	13
<u>S.C. Dept. of Social Serv's v. Johnson</u> , 386 S.C. 426, 688 S.E.2d 588 (2009).....	15
<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991).....	13
<u>State v. Braxton</u> , 343 S.C. 629, 541 S.E.2d 833 (2001)	10
<u>State v. Brown</u> , 360 S.C. 581, 602 S.E.2d 392 (2004)	14, 15, 16
<u>State v. Cutro</u> , 332 S.C. 100, 504 S.E.2d 324 (1998)	11
<u>State v. Evans</u> , 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008).....	14, 16
<u>State v. Kelley</u> , 319 S.C. 173, 460 S.E.2d 370 (1995).....	12
<u>State v. King</u> , 334 S.C. 504, 514 S.E.2d 578 (1999).....	9, 10
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923)	9, 10
<u>State v. Muldrow</u> , 348 S.C. 264, 559 S.E.2d 847 (2002)	15
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	10
<u>State v. Pierce</u> , 326 S.C. 176, 485 S.E.2d 913 (1997)	11

Statutes

S.C. Code Ann. § 16-3-85(A)(1)	15

Rules

Rule 403, SCORE..... 10, 12

Rule 404(b), SCORE 9, 11

Constitutional Provisions

U.S. Const. amend XIV, § 1 14

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 6

ARGUMENT

 I. The trial court erred reversibly by admitting evidence of prior physical abuse to Child where the State provided no evidence indicating the injuries were inflicted by Appellant, and where the injuries did not cause Child’s death 9

 II. The trial court erred reversibly by failing to grant Appellant’s motions for directed verdict in his trial for Homicide by Child Abuse where the State’s theory for proving that the death occurred “under circumstances manifesting an extreme indifference to human life” was based on the failure to obtain adequate health care, despite the facts that Appellant provided CPR and called 911..... 14

CONCLUSION..... 17

PETITION TO BE RELIEVED AS COUNSEL 18

TABLE OF AUTHORITIES

Cases

<u>Arnold v. State</u> , 309 S.C. 157, 420 S.E.2d 834 (1992)	10
<u>Binney v. State</u> , 384 S.C. 539 (2009)	14
<u>Gay v. Ariail</u> , 381 S.C. 341, 673 S.E.2d 418 (2009)	14
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068 (1970).....	13
<u>Old Chief v. United States</u> , 519 U.S. 112, 117 S.Ct. 644 (1997)	12
<u>S.C. Dept. of Social Serv's v. Johnson</u> , 386 S.C. 426, 688 S.E.2d 588 (2009)	14
<u>State v. Alexander</u> , 303 S.C. 377, 401 S.E.2d 146 (1991).....	12
<u>State v. Braxton</u> , 343 S.C. 629, 541 S.E.2d 833 (2001)	9
<u>State v. Brown</u> , 360 S.C. 581, 602 S.E.2d 392 (2004)	13, 14, 15
<u>State v. Cutro</u> , 332 S.C. 100, 504 S.E.2d 324 (1998)	10
<u>State v. Evans</u> , 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008).....	13, 15
<u>State v. Kelley</u> , 319 S.C. 173, 460 S.E.2d 370 (1995).....	11
<u>State v. King</u> , 334 S.C. 504, 514 S.E.2d 578 (1999).....	8, 9
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923)	8, 9
<u>State v. Muldrow</u> , 348 S.C. 264, 559 S.E.2d 847 (2002)	14
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	9
<u>State v. Pierce</u> , 326 S.C. 176, 485 S.E.2d 913 (1997)	10

Statutes

S.C. Code Ann. § 16-3-85(A)(1)	14

Rules

Rule 403, SCORE..... 9, 11

Rule 404(b), SCORE 8, 10

Constitutional Provisions

U.S. Const. amend XIV, § 1; 13

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court reversibly erred by admitting evidence of prior physical abuse to Child where the State provided no evidence indicating the injuries were inflicted by Appellant, and where the injuries did not cause Child's death?

- II. Whether the trial court reversibly erred by failing to grant Appellant's motions for directed verdict in his trial for Homicide by Child Abuse where the State's theory for proving that the death occurred "under circumstances manifesting an extreme indifference to human life" was based on the failure to obtain adequate health care, despite the facts that Appellant provided CPR and called 911?

STATEMENT OF THE CASE

Appellant Mitchell C. Rivers was indicted by the Chesterfield County grand jury on October 19, 2010, for homicide by child abuse. R. 8, ll. 11-19; R. 385 (Indictment). The charge stemmed from an incident on the morning of August 7, 2005.

Appellant's case proceeded to trial before the Honorable Paul M. Burch, and the jury. Mathew Swilley (Counsel) and Tiffany Gibson represented Appellant, while the State was represented by Suzanne Mayes and Adam Foard. R. 1. The jury found Appellant guilty as charged. R. 373, ll. 4-14. The trial court imposed a sentence of life without possibility of parole. R. 382, ll. 14-16.

STATEMENT OF THE FACTS

Appellant and his wife, Kimberly Quick Rivers (Wife), put their Child¹ to sleep on their own bed at approximately 10:00 pm on August 6, 2005. Both Appellant and Wife later went to bed as well sometime between 11:00 pm and 1:00 am. R. 266, ln. 6—R. 267, ln. 8; R. 283, ll. 13-21. Appellant placed Child between his right arm and chest, and went to sleep.² R. 284, ll. 3-7.

At around 6:00 am on August 7, Appellant awoke and found Child was in the pit of his arm and not breathing. According to his own testimony, he performed CPR on Child; Child began to breathe again, and the color returned to Child's complexion. Appellant stated that he then placed Child into the play pen on his stomach with his face to the side.³ R. 267, ln. 9—R. 268, ln. 3; R. 281, ln. 22—R. 282, ln. 16; R. 284, ll. 8-12.

Appellant went outside to finish yard work. Upon reentering the house, Wife came up to him and said Child was not breathing. Appellant immediately went into the bedroom, began CPR on Child, and had Wife call 911; the 911 operator received the call at approximately 6:53 am. R. 121, ll. 5-10. Upon instruction from the operator, Appellant moved Child to a flat surface in the four-bedroom mobile home: Appellant placed Child on the table, and continued to perform CPR. R. 268, ll. 6-20; R. 284, ln. 13—R. 285, ln. 4; R. 297, ll. 3-7.

¹ Appellant and Wife were the primary caregivers of Child after Jennifer Quick, who is the mother of Child and sister of Wife, was deemed unfit to care for Child shortly after birth. Child was approximately four months of age at the time of the present incident. R. 107, ln. 10—R. 112, ln. 7.

² Appellant weighed in excess of 300 pounds at the time of the incident. R. 264, ll. 19-20.

An ambulance arrived at 7:10 am. Paramedic Ron Martin (Martin) came into the residence, took child to the ambulance, and left for the hospital. R. 128, ll. 5-24; R. 268, ln. 21—R. 269, ln. 5. Martin testified that he saw Child on the table with Appellant standing over him. R. 140, ll. 18-23. Appellant and several family members left for the hospital as well. Child was pronounced dead shortly thereafter. R. 140, ll. 4-11; R. 269, ll. 3-18. Investigator Wayne Jordan (Jordan), of the Chesterfield County Sheriff's Office, took several photographs of Child in the hospital afterward. R. 194, ll. 6-23; R. 203, ln. 20—R. 205, ln. 7; R. 271, ll. 3-15.

Child's remains were then transported to Newberry County where an autopsy was performed by forensic pathologist Dr. Janice Ross (Ross) on August 8, 2005. R. 146, ln. 4—R. 147, ln. 1. Ross determined the cause of death to be asphyxiation due to smothering. R. 148, ll. 5-6. Ross also found various injuries on Child, including petechia over the face, several spots of contusions of various ages on Child's scalp and ear, a cut on Child's lip that was healing, a scratch on the neck, and broken ribs that were seven to fourteen days old and likewise healing. R. 148, ll. 7-13; R. 150, ln. 1—R. 153, ln. 24; R. 157, ln. 5—R. 158, ln. 1. Ross later opined at trial that only the red contusions were categorized as contemporaneous to the death as occurring within hours or days of the incident. R. 153, ll. 5-24; R. 175, ln. 11—R. 176, ln. 5. However, Ross also agreed that the collateral injuries did not cause Child's death, and that there was no way to tell who caused them. R. 167, ll. 1-25; R. 168, ll. 10-17.

The State's second expert forensic pathologist, Dr. Clay Nichols (Nichols) of North Carolina, also testified regarding Child's injuries. R. 178, ln. 1—R. 179, ln. 4.

³ Child typically slept in the play pen, which was located in the bedroom of Appellant

Specifically, Nichols agreed that Child died as a result of asphyxiation due to smothering. Nichols further testified that Child was subjected to physical abuse and emphasized that the rib fractures were significant, yet he acknowledged that, with the exception of some bruising and petechia, the timing of Child's other injuries indicated they did not occur at the time of death. R. 182, ln. 8—R. 184, ln. 15. Finally, Nichols conceded that nothing in his review of this case connected Appellant with his findings of abuse. R. 187, ll. 6-10.

Appellant testified at his trial, and confirmed the sequence of events from the night of August 6 to the morning of August 7, 2011. He further denied knowledge of Child's injuries, and indicated he was never alone with Child. R. 286, ln. 16—R. 288, ln. 17. Moreover, several other members of the family and household also testified, and verified that Appellant did not abuse Child.⁴ R. 291, ll. 17-24; R. 297, ll. 8-20; R. 307, ll. 6-15; R. 312, ln. 21—R. 313, ln. 15.

The jury found Appellant guilty as charged, and the trial court imposed a sentence of life imprisonment without possibility of parole. R. 373, ll. 4-14; R. 382, ll. 14-16. This appeal follows.

and Wife. R. 275, ln. 24—R. 276, ln. 12.

⁴ At the time, at least five family members lived in the residence where the incident occurred. R. 196, ll. 16-25; R. 302, ll. 12-25.

ARGUMENT

I. The trial court reversibly erred by admitting evidence of prior physical abuse to Child where the State provided no evidence indicating the injuries were inflicted by Appellant, and where the injuries did not cause Child's death.

Appellant moved in limine to suppress evidence of the collateral injuries to Child discovered by Ross during the autopsy.⁵ R. 86, ln. 16—R. 87, ln. 6. The trial court denied the motion, and specifically ruled that “[t]hese child cases are getting a little different treatment than what we normally are used to involving adult cases and other type[s] of criminal cases.” R. 87, ll. 7-12. Appellant asserts the denial of his motion was erroneous, as Child’s prior injuries were not logically related to the cause of death, nor did the State prove by clear and convincing evidence that the injuries were inflicted by Appellant. Moreover, the State utilized the prior injuries to Child throughout trial, including in its closing argument to the jury in order to obtain Appellant’s conviction. As such, Appellant was prejudiced by the trial court’s erroneous admission of 404(b) evidence, as it likely impacted the outcome of the trial. Accordingly, Appellant requests reversal of his conviction, and a new trial granted.

Evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged is excluded under South Carolina law except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999); State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923). “To be admissible, the bad act must logically relate to the crime with which the defendant has

⁵ In the event the Court deems the matter unpreserved for direct appeal for failure to timely object contemporaneously when the testimony was elicited, then the issue may be proper for post-conviction relief.

been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (citing State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)) Thus, the record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. Id.; see also State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001). Further, even though the evidence is clear and convincing and falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCORE; Fletcher, 379 S.C. at 23, 664 S.E.2d at 483; King, 334 S.C. at 512, 514 S.E.2d at 582.

In the present case, evidence of injuries which occurred prior to Child’s death and were discovered during Ross’ autopsy of Child constituted character evidence of prior bad acts of child abuse unrelated to the asphyxiation of Child. According to the State’s own expert witnesses, the injuries were unrelated to the asphyxiation of Child with the exception of petechia on Child’s face.

Additionally, the State failed to show by clear and convincing evidence that it was Appellant who inflicted any of the injuries to Child other than petechia on Child’s face. First, the State’s witnesses plainly indicated that there was no way to tell who inflicted the injuries by looking at them. Second, the only other witnesses who were in a position to observe Appellant’s interaction with Child prior to the incident unanimously indicated that Appellant did not harm Child. R. 291, ll. 17-24; R. 297, ll. 8-20; R. 307, ll. 6-15; R. 312, ln. 21—R. 313, ln. 15. As such, there was no evidence in the record linking

Appellant to the injuries other than petechia found on Child.⁶ Therefore, the trial court erred in admitting evidence of Child's other injuries not related to his death, including fractured ribs, bruises, abrasions, and lacerations. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484-85; see also State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997); State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998).

Furthermore, Appellant was prejudiced by the trial court's erroneous admission of this evidence. A trial error is harmless only when it did not contribute to the verdict obtained. See, e.g., Fletcher, 379 S.C. at 25, 664 S.E.2d at 485 (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)).

Here, the State took full advantage of the trial court's admission of 404(b) evidence to argue for conviction. First, the State pointed to the injuries found in the autopsy when it told the jury in opening statement that the medical evidence in the case suggested Child's death was "something entirely different" than an accidental smothering in bed. R. 97, ll. 8-23; R. 98, ln. 24—R. 99, ln. 9.

Second, the State repeatedly elicited testimony from Martin, Ross, Nichols, Jordan, and special agent Rick Charles emphasizing the fractured ribs, bruises, and other injuries to Child unrelated to asphyxiation. R. 138, ln. 17—R. 139, ln. 24; R. 148, ln. 7—R. 152, ln. 7; R. 154, ln. 5—R. 155, ln. 4; R. 155, ln. 20—R. 9, ln. 9; R. 183, ln. 1—R. 185, ln. 22; R. 186, ll. 12-19; R. 204, ln. 2—R. 205, ln. 5; R. 249, ln. 14—R. 250, ln. 2.

⁶ It is noteworthy that the State's theory regarding admission of Child's prior injuries was to show that Child was "subjected to ongoing maltreatment" R. 99, ll. 2-5. In short, the State sought admission of evidence of the other injuries to establish a pattern of child abuse and neglect. However, the South Carolina Supreme Court "has specifically rejected an identical contention under similar facts." Fletcher, 379 S.C. at 26 n.4, 664 S.E.2d 480 at 484 n.4 (citing Pierce, 326 S.C. at 176, 485 S.E.2d at 913).

Indeed, the State's purpose for such repeated testimony regarding injuries to Child unrelated to asphyxiation or to Appellant's conduct is epitomized by Nichols' final words on direct examination: "This is a classic case of Battered Child Syndrome." R. 186, ln. 19.

Finally, the State again expounded upon Child's other injuries during its closing argument with the stated intention of showing "repetitive injuries that Dr. Nichols referred to as battered child [syndrome]." R. 2, ln. 10—R. 23, ln. 25; R. 24—R. 25, ln. 17. As a result, the erroneous admission of the injuries unrelated to either the actions of Appellant or the asphyxiation of Child's likely contributed to the verdict.

Moreover, even if evidence of Child's other injuries were admissible under Rule 404, SCRE, any probative value regarding them would be substantially outweighed by prejudice to Appellant. See Fletcher, 379 S.C. at 23, 664 S.E.2d at 483 ("Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant."); see also Rule 403, SCRE.

Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense

charged.” Old Chief v. United States, 519 U.S. 112, 180, 117 S.Ct. 644, 650 (1997); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

“For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other.” Old Chief, 519 U.S. at 910, 117 S.Ct. at 655. In the present case, the State failed to show the collateral injuries were either inflicted by Appellant or related to Child’s death; thus, due to the State’s failure to establish any foundation linking the other injuries to Appellant’s conduct or the charged offense, the evidentiary value of the evidence in Appellant’s trial held no probative value. Yet, the State was still permitted to elicit highly prejudicial evidence of injuries that included fractured ribs, multiple contusions, and abrasions to a Child of nearly four months of age with the purpose of arguing repetitive injury. Therefore, the prejudicial effect of admitting evidence of these other injuries significantly outweighed any probative value the evidence may have had.

- II. The trial court reversibly erred by failing to grant Appellant's motions for directed verdict in his trial for homicide by child abuse where the State's theory for proving that the death occurred "under circumstances manifesting an extreme indifference to human life" was based on the failure to obtain adequate health care, despite the facts that Appellant provided CPR and called 911.**

Counsel moved for a directed verdict of acquittal at the end of the State's case, and at the close of all evidence. The trial court denied Appellant's motions "based on the evidence before [it] and the wording of the statute that [Appellant] is charged with and also some prior cases." R. 255, ln. 25—R. 256, ln. 14; R. II. 3, ll. 8-22. Appellant asserts the trial court erred by failing to grant a directed verdict of acquittal based on the State's failure to produce competent evidence of a material element of the offense. Specifically, Appellant asserts the State failed to produce evidence proving Child's death occurred under circumstances manifesting an extreme indifference to human life.

Rule 19 provides that, "on motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged . . . if there is a failure of competent evidence tending to prove the charge in the indictment." Rule 19(a), SCRCrimP (West, Westlaw current through Dec. 1, 2011) (emphasis added). Stated differently, a trial court must direct a verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged."); see also U.S. Const. amend XIV, § 1; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). When considering a motion for directed verdict of acquittal, “the trial court is concerned the existence or non-existence of evidence, not its weight.” Brown, 360 S.C. at 586, 602 S.E.2d at 395.

Here, the State failed to prove the material element required by Section 16-3-85(A)(1) of the South Carolina Code demanding that “death occurs under circumstances manifesting an extreme indifference to human life.” Specifically, Section 16-3-85(A)(1) of the South Carolina Code provides the following:

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.

S.C. Code Ann. § 16-3-85(A)(1) (West, Westlaw current through End of 2011 Sess.).

Thus, Section 16-3-85(A)(1) of the South Carolina Code requires the circumstances manifesting “extreme indifference to human life” be present at the time “death occurs;” not before, and not after, but when death occurs.⁷

Here, regardless of whether Child was revived by Appellant shortly after 6:00 am when he performed CPR, or whether Appellant was not able to revive Child at that time,

⁷ When interpreting statutes under South Carolina law, the court “looks to the plain meaning of the statute and the intent of the Legislature.” Binney v. State, 384 S.C. 539, 544 (2009) (quoting Gay v. Ariail, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009)). “If a statute’s language is plain, unambiguous, and conveys a clear and definite meaning, rules of statutory interpretation are not necessary, and the court has no right to look for or impose another meaning.” S.C. Dept. of Social Serv’s v. Johnson, 386 S.C. 426, 688 S.E.2d 588, 592 (2009). “We are bound to construe a penal statute strictly against the State and in favor of the defendant.” State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002).

the State failed to prove Child's death occurred under circumstances manifesting extreme indifference to human life. In the first scenario, Child was smothered and rendered unconscious at some point between midnight and 6:00 am due to Appellant sleeping in the same bed with Child. Appellant then administered the proper medical care to ensure Child's well-being when he awoke. If Child responded as Appellant stated on video, and in his written statement, and in his testimony, then Child was fully revived when Appellant placed him in the play pen, and emergency services would not be needed.

The second scenario is similar to the first. Child was smothered and rendered unconscious at some point between midnight and 6:00 am due to Appellant sleeping in the same bed with Child. Appellant then administered the proper medical care to ensure Child's well-being when he awoke. Yet, if Child was unresponsive as Duff and Charles indicated Appellant told them, then emergency services would not have been able to revive Child as he likely passed-on at a time prior to administering CPR.

In short, circumstances manifesting "extreme indifference to human life" were not present at the time death occurred in Appellant's case. As a result, the State failed to meet its burden of proving this element of the crime of Homicide by Child Abuse under Section 16-3-85(A)(1) of the South Carolina Code, and the trial court should have directed a verdict of acquittal. See, e.g., Brown, 360 S.C. at 586, 602 S.E.2d at 395; Evans, 376 S.C. at 424, 656 S.E.2d at 783; see also Rule 19, SCRCrimP.

CONCLUSION

Accordingly, Appellant Mitchell Rivers respectfully requests reversal of his conviction, and remand for a new trial pursuant to Issue I. Appellant also requests instruction for entry of a directed verdict of acquittal upon remand pursuant to Issue II.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Breen R. Stevens', with a long horizontal flourish extending to the right.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of August, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MITCHELL RIVERS,

APPELLANT

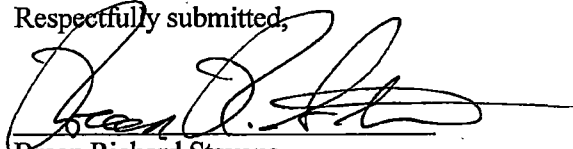
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mitchell Rivers states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Paul M. Burch, which was held on February 11, 2011, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Mitchell Rivers.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of August, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MITCHELL RIVERS,

APPELLANT

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Trial transcript, February 8-10, 2011 (by Pamela E. Green), pp. 1-323;
- (3) Trial transcript, February 11, 2011 (by Pamela Ozment-Cartee), pp. 1-61;
- (4) Sentence sheet.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 15th, 2012



Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 15th, 2012

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MITCHELL RIVERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and on Mitchell Rivers, #344799 at Lee Correctional Institution, this 15th day of August, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.

The South Carolina Court of Appeals

The State, Respondent

v.

Mitchell Rivers, Appellant.

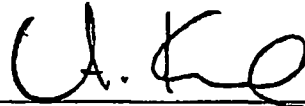
Appellate Case No. 2011-186026

ORDER

Counsel has submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and a motion to be relieved as counsel. We deny the motion to be relieved as counsel and direct the parties to brief the following issue and any other issues of arguable merit:

Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?

Appellant shall serve and file a brief on this issue within twenty days of the date of this order. Thereafter, respondent shall have thirty days to serve and file its brief.



FOR THE COURT

Columbia, South Carolina

cc: Salley W. Elliott
Breen Richard Stevens
John W. McIntosh
William Benjamin Rogers, Jr.
Robert Michael Dudek

FILED
9/5/13

Benjamin John Tripp
Alan McCrory Wilson

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MITCHELL RIVERS,

APPELLANT

APPELLATE CASE NO. 2011-186026

BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>State v. Cutro</i> , 332 S.C. 100, 504 S.E.2d 324 (1998).....	9
<i>State v. Fletcher</i> , 379 S.C. 17, 664 S.E.2d 480 (2008).....	9
<i>State v. King</i> , 334 S.C. 504, 514 S.E.2d 578 (1999)	8, 9
<i>State v. Lyle</i> , 125 S.C. 406, 118 S.E. 803 (1923).....	8, 9
<i>State v. Martucci</i> , 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008)	9, 10
<i>State v. Pagan</i> , 369 S.C. 201, 631 S.E.2d 262 (2006)	9
<i>State v. Pierce</i> , 326 S.C. 176, 485 S.E.2d 913 (1997).....	9

Rules

Rule 403, SCRE.....	9, 10
Rule 404, SCRE.....	10
Rule 404(b), SCRE	8

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?

STATEMENT OF THE CASE

The Chesterfield County grand jury indicted Appellant Mitchell C. Rivers on October 19, 2010 for homicide by child abuse. R. 385. On February 8, 2011, Appellant's case proceeded to trial before the Honorable Paul M. Burch and a jury. Mathew Swilley and Tiffany Gibson represented Appellant, and Suzanne Mayes and Adam Foard represented the State. R. 1.

On February 10, 2011, the jury found Appellant guilty as charged. R. 373, ll. 4-14. The trial court sentenced Appellant to imprisonment for life without possibility of parole. R. 382, ll. 14-16.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING EVIDENCE OF THE CHILD'S COLLATERAL INJURIES BECAUSE THE STATE ADDUCED NO EVIDENCE TO CONNECT APPELLANT TO THE INJURIES AND BECAUSE THE EVIDENCE WAS NOT RELEVANT TO SHOW MOTIVE OR INTENT UNDER THE CHARGE OF HOMICIDE BY CHILD ABUSE.

STATEMENT OF FACTS

Appellant and at least five other family members lived in the same residence. R. 196, ll. 16-25; R. 302, ll. 12-25. Appellant and his wife put their approximately four month child to sleep on their own bed at approximately 10:00 p.m. on August 6, 2005.¹ Both Appellant and his wife went to sleep sometime between 11:00 p.m. and 1:00 a.m. R. 107, ln. 10—R. 112, ln. 7; R. 266, ln. 6—R. 267, ln. 8; R. 283, ll. 13-21. Appellant, weighing over 300 pounds at the time, placed the child between his right arm and chest when going to sleep. R. 264, ll. 19-20; R. 284, ll. 3-7.

At around 6:00 a.m. on August 7, Appellant awoke and found the child was in the pit of his arm and not breathing. According to his own testimony, he performed CPR on the child, who then began to breathe again while the color returned to the child's complexion. Appellant stated that he then placed the child into the play pen next to the bed on his stomach with his face to the side.² R. 267, ln. 9—R. 268, ln. 3; R. 281, ln. 22—R. 282, ln. 16; R. 284, ll. 8-12.

¹ Appellant and his wife were the primary caregivers of the child. Jennifer Quick, the child's natural mother and the sister of Appellant's wife, was deemed unfit to care for the child shortly after birth. R. 107, ln. 10—R. 112, ln. 7.

² The child typically slept in the play pen. R. 275, ln. 24—R. 276, ln. 12.

Appellant went outside to complete some yard work he had started the day before. Upon reentering the house a short time later, his wife told him the child was not breathing. Appellant immediately went into the bedroom, administered CPR on the child, and instructed his wife to call 911. The 911 operator received the call at approximately 6:53 a.m. R. 121, ll. 5-10. Acting on instructions from the operator, Appellant moved the child to a flat surface and continued to perform CPR. R. 268, ll. 6-20; R. 284, ln. 13—R. 285, ln. 4; R. 297, ll. 3-7.

An ambulance arrived at Appellant's home at 7:10 a.m. Paramedic Ron Martin came into the residence, took the child to the ambulance, and left for the hospital. R. 128, ll. 5-24; R. 268, ln. 21—R. 269, ln. 5. Appellant and several family members left for the hospital as well. The child was pronounced dead shortly thereafter. R. 140, ll. 4-11; R. 269, ll. 3-18. Investigator Wayne Jordan of the Chesterfield County Sheriff's Office took several photographs of the deceased child in the hospital. R. 194, ll. 6-23; R. 203, ln. 20—R. 205, ln. 7; R. 271, ll. 3-15.

The child's remains were transported to Newberry County where forensic pathologist Dr. Janice Ross performed an autopsy on August 8, 2005. R. 146, ln. 4—R. 147, ln. 1. Dr. Ross determined the cause of death to be asphyxiation due to smothering. R. 148, ll. 5-6. Dr. Ross found signs of injury to the child, including petechia³ over the face, red and yellow contusions on the child's scalp and ear, a cut on the child's lip that was healing, a scratch on the neck, and broken ribs that were "at least seven to fourteen days old" that were healing. R. 148, ll. 7-13; R. 150, ln. 1—R. 153, ln. 24; R. 157, ln. 5—R. 158, ln. 1.

Prior to trial, Appellant moved in limine to suppress evidence of the collateral injuries to Child discovered by Ross during the autopsy. R. 86, ln. 16—R. 87, ln. 6. After jury selection and prior to opening statements, the trial court denied the motion, stating that “[t]hese child cases are getting a little different treatment than what we normally are used to involving adult cases and other type[s] of criminal cases. . . . You’re protected on the record on that.” R. 87, ll. 7-12. The trial judge then called in and briefly addressed the jury, and the State then delivered its opening statement. In the statement, counsel for the State told the jury, “you’ll hear testimony that . . . at autopsy was found old and new bruising and contusion along the scalp.” Tr. 97, ll. 13-17. During the ensuing presentation of its case, the State called Dr. Ross to testify that only the red contusions and petechia could have been caused contemporaneously with the child’s death. R. 153, ll. 5-24; R. 175, ln. 11—R. 176, ln. 5. She further testified that “[t]he rib fractures were old and the other abrasions were, to other parts of the body were probably consecutive, done at the same time, although they did not cause the death.” Tr. 167, ll. 17-20. Dr. Ross admitted that there was no way to tell who caused the collateral injuries. R. 167, ll. 1-25; R. 168, ll. 10-17.

The State’s second forensic pathologist, Dr. Clay Nichols of North Carolina, also testified regarding the child’s injuries. R. 178, ln. 1—R. 179, ln. 4. Specifically, Dr. Nichols agreed that the child died as a result of asphyxiation due to smothering. Dr. Nichols further testified that the child was subjected to physical abuse and emphasized that the rib fractures were significant, though he acknowledged that, with the exception of some bruising and petechia, the timing of the child’s other injuries indicated they did not

³ “Petechia are little red dots caused when there is compression of the circulatory system .

occur at the time of death. R. 182, ln. 8—R. 184, ln. 15. Finally, Dr. Nichols conceded that nothing in his review of this case connected Appellant with his finding of abuse. R. 187, ll. 6-10.

Appellant testified at his trial and denied knowledge of the child's injuries, explaining that he was never alone with the child. R. 286, ln. 16—R. 288, ln. 17. Several other members of Appellant's family and household testified and verified that Appellant did not abuse Child. R. 291, ll. 17-24; R. 297, ll. 8-20; R. 307, ll. 6-15; R. 312, ln. 21—R. 313, ln. 15.

In closing, counsel for the State argued the varying ages of the child's injuries showed the child was the victim of repetitive child abuse. Counsel specifically referred to the child's yellow contusions and healing ribs. R. 344, ln. 17—R. 36, ln. 25.

DISCUSSION

The trial court reversibly erred by admitting evidence of the child's collateral injuries because the State adduced no evidence to connect Appellant to the injuries and because the evidence was not relevant to show motive or intent under the charge of homicide by child abuse. Evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged is excluded under South Carolina law except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). "Evidence of other crimes must be put to a rather severe test before admission. The acid test of admissibility is the logical relevancy of the other crimes. The trial judge must clearly

...” R. 152, ll. 15-17.

perceive the connection between the other crimes and the crimes charged.” *State v. Cutro*, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998); accord *State v. Martucci*, 380 S.C. 232, 252-53, 669 S.E.2d 598, 609 (Ct. App. 2008) (holding in case for homicide by child abuse, evidence that defendant taped child’s mouth shut, that defendant dunked child’s head in water until he choked to stop him from crying, and that child had bite marks was admissible to show motive and the intent necessary for conviction).

“If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) (citing *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006)). Evidence of a prior bad act is not admissible if the State fails to adduce any proof that a defendant was responsible for the act. *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997).

Further, even if evidence is clear and convincing and falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; *Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483; *King*, 334 S.C. at 512, 514 S.E.2d at 582.

In this case, testimony regarding the child’s broken but healing ribs, old contusions, and healing scratches constituted evidence of former injuries collateral to the death of the child. Not only did the State fail to adduce clear and convincing evidence linking Appellant to these injuries, but it failed to adduce any such evidence. At least five of Appellant’s family members had regular contact with the child by virtue of living in the same residence. The State’s forensic witnesses testified that they could not discern who or what instrumentality inflicted these injuries. The only witnesses with personal knowledge of Appellant’s interaction with the child prior to the incident uniformly

testified that Appellant did not harm the child. The record contains no evidence linking Appellant to these injuries. Therefore, the trial court erred in allowing the testimony regarding these collateral injuries.

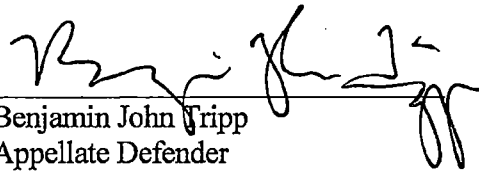
Moreover, the State failed to clearly and logically connect these injuries to the element of intent for purposes of the charge of homicide by child abuse. The intent required under the charge is extreme indifference to human life. *Martucci*, 380 S.C. at 252-53, 669 S.E.2d at 609. In *Martucci*, the defendant's prior acts of taping the child's mouth shut, dunking the child's head in water until he choked to stop him from crying, and biting the child were unquestionably deliberate actions knowingly causing serious harm. Thus, the jury could infer for purposes of the act at issue that the defendant had the same motive to quiet the child in deliberately harming him and the same knowledge of the harm that would result from the act showing indifference to the child's well-being. Here, the State adduced no evidence as to how the child's collateral injuries occurred or what instrumentality caused them. Therefore, no evidence showed the collateral injuries resulted from anything more than accident or inadvertence, and only intemperate speculation could link them to an unjustified motive or extreme indifference to life.

Finally, even if evidence of the collateral injuries was admissible under Rule 404, SCRE, it would be inadmissible under Rule 403. The dearth of evidence connecting Appellant to the injuries and the circumstances of the injuries to the intent behind the act at issue means the evidence of the injuries has no probative value. Therefore, as a matter of law, the probative value would be substantially outweighed by prejudice to Appellant, and the evidence would be inadmissible.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the trial court and remand for a new trial.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

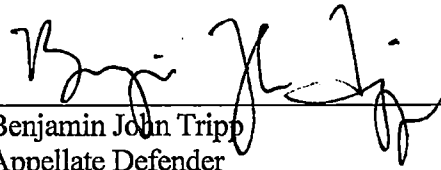
V.

MITCHELL RIVERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of December, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of December, 2013.

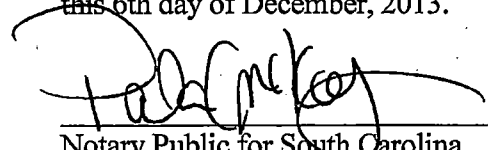

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
ARGUMENT	11
The trial court properly admitted evidence of collateral injuries indicative of prior child abuse to counter Appellant's defense of accident, to establish motive, and to establish the element of extreme indifference	11
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases:

<u>Anders v. California</u> , 386 U.S. 738 (1967)	2
<u>Estelle v. McGuire</u> , 502 U.S. 62 (1991)	5
<u>Jackson v. Denno</u> , 378 U.S. 368 (1964)	3
<u>McKnight v. State</u> , 378 S.C. 33, 661 S.E.2d 354 (2008)	18
<u>State v. Adams</u> , 322 S.C. 114, 470 S.E.2d 366 (1996)	17, 18
<u>State v. Aleksey</u> , 343 S.C. 20, 538 S.E.2d 248 (2000)	14
<u>State v. Brazell</u> , 325 S.C. 65, 480 S.E.2d 64 (1997)	13
<u>State v. Brooks</u> , 341 S.C. 57, 533 S.E.2d 325 (2000)	14
<u>State v. Floyd</u> , 295 S.C. 518, 369 S.E.2d 842 (1988)	11
<u>State v. Forrester</u> , 343 S.C. 637, 541 S.E.2d 837 (2001)	12
<u>State v. Holder</u> , 382 S.C. 278, 676 S.E.2d 690 (2009)	5, 15
<u>State v. Jarrell</u> , 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002)	18
<u>State v. King</u> , 334 S.C. 504, 514 S.E.2d 578 (1999)	16, 17
<u>State v. Kromah</u> , 401 S.C. 340, 737 S.E.2d 490 (2013)	11, 13
<u>State v. Lopez</u> , 306 S.C.362, 412 S.E.2d 390 (1991)	5
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923)	14
<u>State v. Martucci</u> , 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008)	13, 14, 17
<u>State v. Saltz</u> , 346 S.C. 114, 551 S.E.2d 240 (2001)	14
<u>State v. Schumpert</u> , 343 S.C. 502, 507, 435 S.E.2d 859, 862 (1993)	11, 12
<u>State v. Smith</u> , 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011) <i>rev'd by State v. Smith</i> , 406 S.C. 215, 750 S.E.2d 612 (2013)	5
<u>State v. Tucker</u> , 273 S.C. 736, 259 S.E.2d 414 (1979)	18

State v. Wannamaker, 346 S.C. 495, 552 S.E.2d 284 (2001)..... 11

Other authorities:

Rule 401, SCRE..... 13

Rule 402, SCRE..... 13, 14

Rule 403, SCRE..... 14, 15

Rule 404(b), SCRE 4, 5, 13

S.C. Code Ann. 16-3-85(A)(1) (2003)..... 18

The Criminal Law of South Carolina 96 (5th ed. 2007)..... 18

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?

STATEMENT OF THE CASE

A Chesterfield County Grand Jury indicted Appellant on homicide by child abuse. (R. 385-86.) On February 8, 2011, Appellant proceeded to trial before a jury. Matthew Swilley and Tiffany Gibson represented Appellant, and Suzanne Mayes and Adam Foard represented the State. The jury found Appellant guilty, and the Honorable Paul M. Burch sentenced Appellant to life in prison. (R. 373, lines 7-8; R. 382, lines 14-16.)

On February 15, 2011, Appellant filed a Notice of Appeal. On August 15, 2012, Appellant's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on the issues of whether the trial court erred by admitting evidence of prior physical abuse and by failing to grant Appellant's motions for directed verdict. On September 5, 2013, this Court denied Appellant's counsel's petition to be relieved and directed the parties to brief the following issue: Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?

STATEMENT OF FACTS

On August 7, 2005, at 7:10 a.m., Emergency Medical Technician Ron Martin responded to a 911 call involving an infant (Victim). (R. 126, line 23-R. 128, line 5.) Martin arrived at the location to find a child who was not breathing, had no pulse, and had petechial hemorrhage to the face.¹ (R. 129, lines 3-8.) Martin and his colleagues began administering basic life support and tried advanced measures to resuscitate. (R. 129, line 25-R. 130, line 2.) However, Victim was pronounced deceased at the hospital. (R. 134, line 16-R. 135, line 11.) Dr. Janice Ross performed an autopsy on Victim and determined the manner of death was homicide and the cause of death was asphyxia. (R. 147, line 22-R. 148, line 6.)

Investigator Wayne Jordan, of the Chesterfield County Sheriff's Office, obtained written statements from Appellant (Victim's adoptive father) and Kimberly Quick Rivers (Appellant's wife and Victim's adoptive mother). (R. 195, line 16-R. 196, line 6.) On September 15, 2005, Investigator Jordan and other law enforcement agents met with Appellant again and reinterviewed him. (R. 209, line 7-R. 210, line 6.) Following that interview, Jordan obtained a videotaped statement from Appellant. (R. 212, lines 4-14.) On September 19, 2005, Appellant made another statement in writing. (R. 216, line 3-R. 219, line 3.) Appellant was arrested following that statement and charged with homicide by child abuse. (R. 221, lines 14-22; R. 385-86.)

Pretrial, the trial court held a Jackson v. Denno² hearing to determine the admissibility of Appellant's statements. (R. 28, line 21-R. 86, line 14.) The trial court determined Appellant freely, voluntarily, and intelligently gave the statements without

¹ Martin described petechial hemorrhage as "a bloodshot look" caused by "rupture[] of the small capillaries in the face." (R. 129, lines 14-17.)

² 378 U.S. 368 (1964).

coercion, duress, threats, or promises and, thus, denied Appellant's motion to suppress. (R. 86, lines 1-14.) The trial court also denied Appellant's motion to suppress evidence of abuse. (R. 87, lines 7-11.) The trial court based its decision on written motions and memoranda each party submitted. (R. 86, line 16-R. 87, line 1.) The following exchange took place:

[Appellant]: Your Honor, we may have already given [the State] a copy of this as far as the motion. I think we made cross-motions to keep out certain aspects of the collateral evidence that was observed during the autopsy.

The Court: If counsel agrees with you, **do you prefer to have it verbally put on the record or do you agree that the memoranda come in as argument?**

What's y'all's pleasure on that?

[The State]: Yes, sir, Your Honor. No objection from the State. I believe we have previously submitted our memorandums [sic] along with supporting documents.

The Court: I certainly don't mind making them a Court Exhibit to the record.

[Appellant]: Neither do I, Your Honor.

The Court: Both of you clearly stated your positions.

[Appellant]: Yes, sir.

The Court: I'm gonna [sic] have to deny that motion too based especially on the recent case. These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases.

All right. You're protected on the record on that.

(R. 86, line 16-R. 87, line 12.) (emphasis added.)

In its written Motion in Support of Evidence of Abuse, the State argued "the constellation of injuries is evidence of child abuse and neglect, directly relevant pursuant to SCRE Rule 404(b) to counter the argument of 'mistake or accident.'" (Supp. R. 1.)

Additionally, the State maintained the evidence of abuse and neglect established “motive” pursuant to Rule 404(b), SCRE. In its motion, the State pointed out that evidence of head and scalp injuries, in addition to external abrasions, were sustained within the same general timeframe of the fatal injury. Therefore, the State argued the “constellation of injuries [was] relevant and necessary in establishing evidence of child abuse and neglect.” (Supp. R. 1.)

The State cited several South Carolina cases and one United States Supreme Court case to support its motion. In support of its contention that the evidence countered mistake or accident and established motive, the State cited this Court’s opinion in State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011), which had recently been decided.³ In support of evidence of battered child syndrome being offered by a qualified medical expert, the State cited Estelle v. McGuire, 502 U.S. 62 (1991) and State v. Lopez, 306 S.C.362, 412 S.E.2d 390 (1991). Additionally, the State cited State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), to support its argument that evidence of prior injuries to the victim in a child homicide prosecution have probative value and establish extreme indifference.

Appellant argued in his motion that because the collateral injuries were not attributed to him, the evidence could not be introduced under Rule 404(b), SCRE. After reviewing both parties’ motions and memoranda on the issue of collateral evidence of injuries, the trial court denied Appellant’s motion to keep the evidence out.

At trial, Dr. Janice Ross, the pathologist who performed the autopsy on Victim, testified regarding Victim’s injuries. (R. 148, lines 9-13.) She described some bruises

³ This Court’s opinion has since been reversed by State v. Smith, 406 S.C. 215, 750 S.E.2d 612 (2013).

and abrasions found in the area of the scalp, some bruises of the head—mostly in the back, including several small circular ones—and several rib fractures that were healing. (R. 148, line 9-R. 151, line 15.) Appellant did not object to Dr. Ross's testimony regarding these injuries. Dr. Ross noted contusions that were consistent with blunt force trauma such as a knuckle or fist. (R. 152, lines 2-7.) She testified the petechiae and the contusions to Victim's head would have occurred contemporaneous with the asphyxiation. (R. 154, line 22-R. 155, line 4.) Specifically with respect to the rib fractures, Dr. Ross testified the child's chest cavity would have to have been squeezed with a lot of pressure to have fractured the back part of the rib cage. (R. 157, lines 5-18.) Dr. Ross estimated the age of the fractures to be approximately seven to fourteen days prior to the time of death. (R. 157, line 21-R. 158, line 1.) Again, Appellant did not object to this testimony.

Dr. Ross reported the manner of death was homicide and the cause of death was asphyxia due to smothering. (R. 147, line 24-R. 148, line 6.) She specifically reached the determination of homicide based on "the findings of the petechial[e], . . . causing asphyxia, smothering, and the contusions around his head. There was also, internally around his brain, was subdural hemorrhage, which goes along with a blunt force trauma to the head." (R. 154, lines 3-10.) Dr. Ross testified "it would take significant force . . . to put pressure on the chest . . . and to stop the breathing or to put something around the neck to cause the petechial[e]." (R. 156, lines 1-5.)

On cross-examination, Appellant was able to elicit testimony from Dr. Ross that there was no way to tell who might have caused the collateral injuries and that those particular injuries did not cause Victim's death. (R. 166, line 25-R. 167, line 20.) Dr. Ross testified the abrasions found on Victim occurred at the same time as the death. (R.

167, lines 17-19.) While she testified the abrasions did not cause the death, she did not know whether they were related to the asphyxiation. (R. 167, lines 17-24.) When asked whether Victim's breathing problems could have contributed to the asphyxiation, Dr. Ross agreed that they might have caused some degree of asphyxiation but could not have caused petechiae. (R. 169, lines 6-13.) The petechiae occurred due to pressure on the blood vessels from pressure on the neck or upper chest. (R. 169, lines 18-24.)

Dr. Clay Nichols, the deputy chief medical examiner for North Carolina, also testified after reviewing Dr. Ross's autopsy findings and underlying data. (R. 177, lines 4-14; R. 181, lines 11-18.) He, too, testified regarding the multiple rib fractures, abrasions, and contusions on Victim's body. (R. 183, lines 1-7.) Dr. Nichols pointed out that the multiple bruises, bleeding on the brain, and subdural hematoma that Victim had could not have been caused by CPR and stated, "This is a classic case of Battered Child Syndrome." (R. 186, lines 12-19.) At no point did Appellant object to the admission of Dr. Nichols' testimony regarding the collateral injuries to Victim or specifically to Dr. Nichols' using the phrase "Battered Child Syndrome." The only objections Appellant made were based on bolstering, cumulative testimony, and speculation. (R. 181, lines 21-25; R. 182, lines 14-17; R. 184, lines 21-24.)

Dr. Ross and Dr. Nichols both testified the rib fractures had to have occurred some time after June 20, 2005, when Victim had x-rays that did not show any rib fractures. (R. 158, line 19-R. 159, line 9; R. 184, lines 6-15.)

Investigator Wayne Jordan testified regarding a written statement he took from Appellant. (R. 195, line 16-R. 202, line 1.) He read the statement to the jury, in which Appellant stated Victim started crying at 6:00 a.m. on the morning of his death. (R. 201, line 11.) Appellant then stated he changed Victim's diaper and gave him a bottle, burped

him, and laid him on his back before going outside to do yard work. (R. 201, lines 12-15.) He then testified that at approximately 6:45 or 6:50, his wife told him Victim was not breathing, at which point he told her to call 911 and began CPR as the 911 operator talked him through it. (R. 201, lines 18-22.)

Investigator Jordan testified that SLED became involved in the case after he was advised of the autopsy results. (R. 209, lines 5-12.) At that time, SLED set up a time to reinterview Appellant and his wife. (R. 209, lines 12-20.) That interview led to a videotaped statement, taken on September 15, 2005. (R. 211, line 2-R. 212, line 20.) The State published the videotaped statement to the jury. (R. 213, line 19-R. 214, line 1.) In the videotaped statement, Appellant told police he had found Victim not breathing in his arms. (R. 214, lines 20-24.) On September 19, Appellant gave another written statement. (R. 217, lines 12-22.) Investigator Jordan read this statement to the jury, which included the following account:

That night our baby had slept in the same bed, and I was – laid him on the side between my chest and armpit, and we both went to sleep.

Around 6:00AM I woke up and the baby was not breathing, and I tried my hardest and hardest to do CPR that morning to bring him back, and his color had started coming back and he had started breathing.

So, I laid him down in the play pen and went outside to clean off the yard. I came back inside and she had said he stopped breathing. So, I told her to call 9-1-1 to help me this time, and I kept doing CPR like she said till the ambulance get [sic] there, and then I did, I know I was wrong for not calling the 9-1-1 first when that happened, and I should have told them that, everybody, but I did not know what to do. Lord knows I would never hurt my own son, and I'm sorry, and I regret it everyday [sic]. But I please beg you, all of you to please help me.

(R. 220, line 18-R. 221, line 10.)

Sergeant Julie Duff, of the Florence Police Department, testified about her role in reinterviewing Appellant with SLED. (R. 232, line 1-R. 233, line 22.) She recalled that during the interview, Appellant told them he wanted to change his story. (R. 238, lines 19-22.) At that point, Appellant told them Victim had slept in the crook of his arm and was not breathing in the morning. (R. 239, lines 2-6.) He also admitted he had not fed the baby a bottle and changed him, as he originally said. (R. 239, lines 7-9.) Duff testified that Appellant said he placed the baby face down in the play pen and went outside, without waking his wife and telling her something was wrong with Victim. (R. 239, lines 12-15.) Duff stated, "He went outside, he knew the baby was not breathing, and he said he went outside to smoke some crack, and he said later his wife notified him that the baby was not breathing. He also stated that he must have accidentally smothered the baby in his arm." (R. 239, lines 16-20.)

SLED Agent Rick Charles also testified regarding reinterviewing Appellant. (R. 244, line 5-R. 245, line 24.) After finding no stomach contents on Victim, Agent Charles questioned Appellant about inconsistencies in his prior statement; Appellant changed his story. (R. 250, lines 3-16.)

After the State rested, defense counsel called Appellant. (R. 258, lines 20-21.) He testified that on August 6, 2005, Victim slept in the bed with him and his wife and the following morning Appellant awoke around 6:00 a.m. to find Victim's face under his armpit. (R. 265, line 1-R. 267, line 11.) He claimed he did CPR and blew into Victim's mouth, causing Victim to start wheezing and get color back into his face. (R. 267, lines 11-16.) Appellant stated, "Then I'm thinking that he [sic] okay. So, I laid him down, and then that's when I went outside to get finished cutting the grass." (R. 267, lines 17-19.) He testified that as he was going back into the house after cutting the grass, his wife told

him Victim had stopped breathing. (R. 268, lines 6-9.) He asked his wife to call 911 and started CPR as the 911 operator talked him through it. (R. 268, lines 10-14.)

Ultimately, the jury found Appellant guilty of homicide by child abuse, and Judge Burch sentenced him to life in prison. (R. 373, 382.)

ARGUMENT

The trial court properly admitted evidence of collateral injuries indicative of prior child abuse to counter Appellant's defense of accident, to establish motive, and to establish the element of extreme indifference.

Appellant argues the trial court erred by admitting evidence of collateral injuries to Victim. Specifically, he argues the State adduced no evidence to connect Appellant to the injuries and the evidence was not relevant to show motive or intent. However, because Appellant did not contemporaneously object to testimony regarding the collateral injuries, this issue is not preserved for appellate review. Even if preserved, the trial court properly admitted the evidence to: (1) show the element of extreme indifference by establishing a pattern of abuse and neglect; (2) contradict Appellant's claim of accident; (3) establish motive; and (4) give a full picture of the circumstances of the case under *res gestae*.

Preservation

Initially, the State submits Appellant's argument is not preserved for appellate review because it was not raised contemporaneously. An *in limine* ruling is not final and contemporaneous objection is required to properly preserve an error for appellate review. State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced." State v. Kromah, 401 S.C. 340, 353, 737 S.E.2d 490, 496 (2013). A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). "Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review." State v. Schumpert, 343 S.C.

502, 507, 435 S.E.2d 859, 862 (1993). “In most cases ‘[m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.’” State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) (citation omitted).

Pretrial, Appellant and the State filed motions and memoranda addressing the issue of whether to keep out certain aspects of the collateral evidence observed during the autopsy. The trial judge referenced these during pretrial motions and indicated he would make them court’s exhibits after asking whether counsel preferred to put their arguments on the record verbally or would agree that the memoranda come in as argument.⁴ (R. 86, lines 15-R. 87, line 3.) Neither party objected to the memoranda coming in as argument. (R. 86, lines 24-25; R. 87, lines 2-6.) After indicating both parties clearly stated their positions in their motions and memoranda, the trial court stated, “I’m gonna [sic] have to deny that motion too based especially on the recent case. These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases. All right. You’re protected on the record on that.” (R. 87, lines 7-12.) The trial court indicated the parties were protected on the record because he had accepted their written motions and memoranda rather than requiring them to argue to the court, to which both parties agreed.

To the extent Appellant may be relying on the trial court’s statement that counsel was “protected on the record” to preserve this issue for appellate review, the trial court’s statement cannot reasonably be construed as some kind of overarching permission allowing Appellant to be excused from the requirement to contemporaneously object

⁴ The motions and memoranda did not become Court’s exhibits.

when evidence was introduced. At trial, Appellant did not object at any point while witnesses testified regarding collateral injuries to Victim. Because a contemporaneous objection was required when the evidence was introduced, this issue is not preserved for appellate review. Kromah, 401 S.C. at 353, 737 S.E.2d at 496.

Appellant cannot simply rely on his motion *in limine* to preserve this issue on appeal. He stated in his memorandum, "In order to introduce evidence of a prior bad act pursuant to Rule 404(b) SCRE, first the state must prove the Defendant committed the act by clear and convincing evidence." (Supp. R. 4.) However, this does not remove Appellant's duty to object to the evidence contemporaneously. As this Court pointed out in State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), because Martucci did not argue at trial that the State failed to show the prior acts by clear and convincing evidence, the issue could not be considered on appeal. A blanket statement of law written in a memorandum accompanying a motion *in limine* is not equal to a contemporaneous objection and does not accomplish the same result in preserving the issue.

Merits

The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina."

Rule 402, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision made on an improper basis, such as an emotional one. State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001).

In Martucci, this Court discussed the importance of admitting evidence of prior incidents of abuse in a homicide by child abuse trial. 380 S.C. 232, 669 S.E.2d 598. This Court stated, "When a child is brought to an emergency room with injuries in various stages of healing, there is evidence of recurring child abuse. **If the multiple, separately occurring injuries are not admissible in child abuse prosecutions, the crime would be virtually impossible to prove.**" 380 S.C. 232, 254, 669 S.E.2d 598, 609 (emphasis added). "As a result of the difficulties in proving child abuse, **evidence which shows a pattern of abuse becomes even more probative than it might otherwise be.**" Id. at 256, 669 S.E.2d at 611 (emphasis added) (citation and internal quotation marks omitted). This Court found the evidence "established a pattern of continuous abuse or neglect necessary to prove homicide by child abuse" and made it more probable that the child was a victim of child abuse or neglect. Id. at 254, 669 S.E.2d at 610.

This Court affirmed the admission of evidence in Martucci under the common scheme or plan exception pursuant to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Here, the situation is a little different because no evidence directly tied Rivers to the injuries. However, Rivers testified he and his wife were the only ones who were with Victim. (R. 288, lines 9-10.) Consequently, Rivers or his wife had to have been the ones

who caused the injuries Victim sustained in the period of time prior to his death. Because the trial court charged the jury under both subsections of § 16-3-84 of the Code, Appellant could have been found guilty under aiding and abetting the homicide by child abuse. In that case, evidence that either he or his wife, as Victim's sole caregivers, abused Victim by causing bruises and rib fractures in the weeks prior to his death is certainly relevant to show a pattern of abuse caused by one of the caregivers and aided by the other.

Appellant argues the evidence was not relevant to show motive and intent. Interestingly, he does not argue the evidence was not relevant to counter Appellant's argument of accident or mistake. Appellant's own defense, according to his testimony, was that he woke up with the baby under his armpit. (R. 267, lines 9-14.) Furthermore, Appellant argued accident in his Memorandum in Opposition to Introduce Evidence of Collateral Injuries. (Supp. R. 4.) This defense is a clear attempt at establishing accident or mistake; thus, evidence of a pattern of abuse was relevant to counter Appellant's defense theory.

Appellant argues even if the evidence falls within a Lyle exception, the evidence has no probative value; thus, he argues it would be inadmissible under Rule 403. Specifically, he argues the lack of probative value is based on the "death of evidence connecting Appellant to the injuries and the circumstances of the injuries to the intent behind the act." (App. Br. 10.) To the contrary, the State submits the evidence is probative not only of lack of accident or mistake but also to establish the extreme indifference element of homicide by child abuse. In State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), our supreme court held the trial court did not abuse its discretion in

admitting photographs showing prior abuse of the victim in a homicide by child abuse case. It based its decision on the following:

Under section 16-3-85, the State was required to show Holder manifested an "extreme indifference" to her child's wellbeing. These photographs tend to establish Holder was aware on ongoing abuse of her child, which is directly relevant to whether her act or omissions resulted in the death of Bo. They are thus relevant to establish elements of the offense, including "extreme indifference."

Further, the photographs established a pattern of continuous abuse and neglect, which made it more probable that Bo was a victim of child abuse or neglect rather than a mere accident.

Id. at 294, 676 S.E.2d at 699.

In his motion regarding extraneous injuries, Appellant refers to healed broken ribs, a cerebral edema, and galeal contusions. The only actual injuries not related to the asphyxiation are the healing rib fractures and the older yellow bruises. Dr. Ross did not indicate the age or healing stage of any other injuries. In fact, Dr. Ross testified the asphyxiation, the petechiae, and the red contusions on the scalp likely occurred at the same time. (R. 153, lines 20-24.) Additionally, Dr. Ross indicated the abrasions found on Victim's body occurred around the time of death even though she did not know whether they were related to the asphyxiation. (R. 167, lines 17-24.) Dr. Nichols also testified the older rib fractures did not happen at the same time as the multiple abrasions and contusions, which could be contemporaneous with the asphyxiation. (R. 183, line 1-R. 184, line 3.) As noted above, Appellant did not object to any of this testimony.

Finally, evidence of bad acts may be admitted under the *res gestae* theory. "The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. King, 334 S.C. 504,

512, 514 S.E.2d 578, 582 (1999). Under *res gestae*, evidence of other crimes is admissible:

when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .’ [and is thus] part of the *res gestae* of the crime charged.”

Id. at 512-13, 514 S.E.2d at 582-83 (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)). In Martucci, this Court found the incidents were relevant to establish Martucci’s state of mind and show whether he manifested an extreme indifference to human life. State v. Martucci, 380 S.C. 232, 257, 669 S.E.2d 598, 612 (Ct. App. 2008). Specifically, this Court found:

The alleged child abuse occurred in the month and a half to several weeks before the fatal trauma was inflicted. The evidence was necessary to establish the crime charged. Its admission was essential and relevant to a full presentation of the evidence in this case. The testimony regarding the prior bad acts was relevant to show the complete, whole story relating to the charge of homicide by child abuse. Moreover, the probative value of the evidence outweighed its prejudicial effect.

Id.

Here, Dr. Ross and Dr. Nichols testified the rib fractures had to have occurred some time after June 20, 2005, when Victim had x-rays that did not show any rib fractures. (R. 158, line 19-R. 159, line 9; R. 184, lines 6-15.) Again, Appellant made no objection to that testimony. Just as in Martucci, the healing rib fractures helped to

complete the story and give a full presentation of the case in the context of showing Appellant's extreme indifference to human life.

A person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life" S.C. Code Ann. § 16-3-85(A)(1) (2003). "For purposes of the [homicide by child abuse] statute, 'extreme indifference' has been defined as 'a mental state akin to intent characterized by a deliberate act culminating in death.'" McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (quoting State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 366, 367 (Ct. App. 2002)). Our courts have equated it more to the reckless disregard of reckless homicide cases. William Shepard McAninch et al., The Criminal Law of South Carolina 96 (5th ed. 2007). Recklessness is:

something more than mere negligence or carelessness which indicates inadvertence, which is the failure to exercise due care, sometimes called ordinary care, which means such care as a person of ordinary reason and prudence would exercise under the same circumstances. Recklessness denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.

McAninch et al., *supra* at 196 (quoting State v. Tucker, 273 S.C. 736, 739, 259 S.E.2d 414, 415 (1979)). See also Jarrell, 350 S.C. at 98, 564 S.E. 2d at 367 ("In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care.").

Even if the trial court erred in admitting testimony of extraneous injuries to Victim, any error was harmless in light of Appellant's own statements and testimony. He

admitted he awoke to find Victim not breathing, gave CPR until Victim started wheezing, never called 911 or woke up his wife to inform her of Victim's medical crisis, and yet then left the four-month-old baby alone and went outside. This is a clear demonstration of extreme indifference to human life. Leaving a child alone who just had to be revived through CPR shows a reckless disregard for the safety of Victim. Even without any other evidence of injuries, Appellant's omission of not seeking help for Victim but instead leaving him alone after an episode of not breathing (or while not breathing depending on which of Appellant's accounts the jury chose to believe), is enough to demonstrate extreme indifference to human life. Thus, any error in admitting evidence of collateral injuries was harmless.

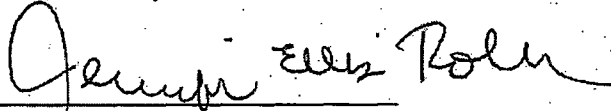
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 

Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 27, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2011-186026

THE STATE,

Respondent,

v.

MITCHELL RIVERS,

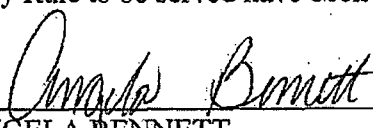
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Benjamin John Tripp, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 27th day of February, 2014.


ANGELA BENNETT
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mitchell Rivers, Appellant.

Appellate Case No. 2011-186026

Appeal From Chesterfield County
Paul M. Burch, Circuit Court Judge

Opinion No. 5296
Heard January 8, 2015 – Filed February 11, 2015

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, and
Appellate Defenders Breen Richard Stevens and
Benjamin John Tripp, all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Assistant
Attorney General Jennifer Ellis Roberts, all of Columbia;
and Solicitor William Benjamin Rogers, Jr., of
Bennettsville, for Respondent.

LOCKEMY, J.: Mitchell Rivers was convicted of homicide by child abuse following the death of his four-month-old adopted son (the victim). Rivers appeals his conviction, arguing the trial court erred in admitting evidence of injuries the

victim sustained at an earlier time because no evidence connected Rivers to the injuries. We affirm.

FACTS

The State alleged the victim died of asphyxiation while in Rivers's custody. Rivers claimed the victim's death was an accident and "did not occur under circumstances that manifest extreme indifference to human life."

Before trial, Rivers filed a motion to exclude "certain aspects of the collateral evidence that was observed during the [victim's] autopsy." In a memorandum filed with the court, Rivers explained he was seeking to exclude "evidence of any extraneous injuries to the [victim] . . . that occurred prior to the [victim]'s death." He asserted "[t]here [wa]s no nexus between these extraneous injuries and the causes of death of the [victim]" and that "[e]vidence of alleged prior child abuse is inadmissible where there is no evidence that the [d]efendant inflicted the previous injuries." The State filed a memorandum supporting admission of the evidence, arguing "the constellation of injuries is evidence of child abuse and neglect, directly relevant pursuant to [Rule 404(b), SCRE,] to counter [Rivers's] argument of mistake or accident" and to establish motive.

During a pretrial hearing on Rivers's motion, the trial court stated it would admit the parties' memoranda as court exhibits and noted both parties "clearly stated [their] positions." The trial court denied Rivers's motion, stating, "These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases." The trial court concluded its ruling by informing Rivers, "You're protected on the record on that."

Following his trial, the jury convicted Rivers of homicide by child abuse, and the trial court sentenced him to life imprisonment. This appeal followed.¹

LAW/ANALYSIS

¹ Rivers's appellate counsel initially filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asking to be relieved as counsel. This court denied the petition to be relieved as counsel and directed the parties to address the following issue and any other issues of arguable merit: "Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?" *State v. Mitchell Rivers*, S.C. Ct. App. Order dated Sept. 5, 2013.

Rivers argues the trial court erred in admitting evidence of the victim's other injuries because no evidence connected Rivers to the injuries. We find this issue is unpreserved.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694.

Initially, we note that prior to trial, the trial court never ruled on the current issue on appeal—whether evidence of the victim's other injuries was inadmissible because no evidence connected Rivers to the injuries. Rather, in denying Rivers's motion to exclude evidence of the victim's other injuries, the trial court stated, "These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases." Although Rivers argued in his pre-trial memoranda that "[e]vidence of alleged prior child abuse is inadmissible where there is no evidence that the [d]efendant inflicted the previous injuries," the trial court's ruling that "child cases are getting a little different treatment" does not indicate it considered whether there was any evidence connecting Rivers to these injuries. Moreover, Rivers never objected or requested clarification from the trial court regarding its ruling. We further note that at the time of the pre-trial hearing, there had been no evidence presented as to who was responsible for the victim's other injuries. The parties had not proffered any testimony on this issue, and they had not submitted any affidavits indicating the evidence they intended to present at trial. Thus, the trial court could not have made a pre-trial ruling as to whether there was any evidence connecting Rivers to the victim's other injuries.

In addition, we find this issue unpreserved because Rivers never raised the issue at trial for the trial court to make a final ruling. *See State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."). The State presented evidence of the victim's other injuries through the testimony of Dr. Janice Ross, a forensic pathologist who performed the victim's autopsy. Dr. Ross described several rib fractures found on the victim's body that were in the process of healing at the time of the victim's death. Dr. Ross explained the rib fractures revealed "no significant

recent bleeding" and opined that some of the fractures were probably "at least seven to fourteen days old." Although Rivers objected during portions of Dr. Ross's testimony, arguing her testimony was speculative and cumulative, Rivers did not raise his current argument on appeal that there was no evidence connecting him to these prior injuries. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."). Rivers likewise did not object on this ground during the testimony of paramedic Ron Martin and forensic pathologist Dr. Clay Nichols, who both testified regarding the victim's other injuries. Consequently, the trial court never ruled on whether evidence of the victim's other injuries was inadmissible because there was no evidence connecting Rivers to these injuries.

We further find no exception exists that would have relieved Rivers of his requirement to obtain a final ruling when the evidence was offered at trial. *See Atieh*, 397 S.C. at 646-47, 725 S.E.2d at 733 ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); *id.* at 646-47, 725 S.E.2d at 733 (noting exceptions to this rule include (1) "when the motion in limine is made immediately prior to the introduction of the evidence in question" and (2) when the "trial court clearly indicates its ruling is final"). Following the pre-trial hearing, the State presented multiple witnesses before Dr. Ross first testified about the victim's other injuries; therefore, evidence of the other injuries did not immediately follow River's pre-trial motion to exclude the evidence. Likewise, even assuming the trial court ruled on this issue pre-trial, the trial court's cursory remark that Rivers "[was] protected on the record on that" was not a clear indication that its ruling on the admissibility of this evidence was final. Accordingly, because the trial court did not rule on whether there was evidence connecting Rivers to the victim's other injuries, we find the issue is unpreserved.²

CONCLUSION

² During oral argument, the State admitted its strongest argument was the issue presented is unpreserved. We remind the bar that our appellate courts have "consistently refused to apply the plain error rule" and "it is the responsibility of counsel to preserve issues for appellate review." *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

We hold the issue presented on appeal is unpreserved because it was not raised to and ruled upon by the trial court. Accordingly, the trial court is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

2015CP13-108

STATE OF SOUTH CAROLINA)

County of Chesterfield)Mitchell Rivers 344799)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS)

A True Copy Attest
Jury of Sequestration
CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

APPLICATION FOR)

POST-CONVICTION RELIEF)

2015 FEB 27 AM 11 02
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, SC**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution, 990 Wilsack Highway, Bishopville, South Carolina 29010
2. Name and location of Court which imposed sentence Chesterfield County, General Sessions Court, P.O. Box 529, Chesterfield, SC 29709
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-13-1072 Homicide by child abuse
 - (b) N/A

- (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) February 11, 2011 Natural Life
- (b) N/A
- (c) N/A
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. Conviction And Sentence Affirmed
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. February 11, 2015
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A

- (b) N/A
- (c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Defense Counsel's failure to object to (A)(2) charge
- (b) Defense Counsel's failure to object to supplemental instructions
- (c) Appellate Counsel's failure to raise directed verdict

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Unindicted (A)(2) charge constituted material variance
- (b) Supplemental instructions impermissibly enlarged indictment
- (c) Directed verdict was preserved for Appellate review

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

2015 FEB 27 AM 11 02
 FAYE L. SELLERS
 CLERK OF COURT
 CHESTERFIELD COUNTY, S.C.

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Defense Counsel's failure to object to the Section (A)(2) charge to jury as a lesser included offense of section (A)(1) constituted deficient performance.

(b) Defense Counsel's failure to object to the erroneous supplemental jury instructions that enlarged applicant's indictment constituted deficient performance.

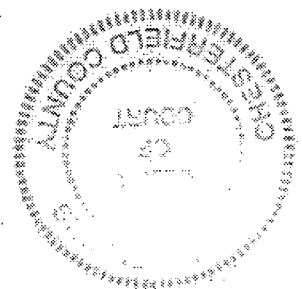
(c) Appellate Counsel's failure to raise the directed verdict issue on appeal constituted deficient performance.

(d) Defense Counsel's failure to preserve for appellate review the issue of admissibility of evidence of collateral injuries constituted deficient performance.

A True Copy, Attest
Judge S. Sellers
CLERK OF COURT, C.P. & S.C.
CHESTERFIELD COUNTY, SC

2015 FEB 27 AM 11 02

FAYE L. SELLERS
CLERK OF COURT, C.P. & S.C.
CHESTERFIELD COUNTY, SC



11. State concisely in the same order the facts which support each of the grounds set out in (10):

- (a) The trial judge egregiously erred by charging the unindicted "section (A)(2)" as a lesser included offense of "section (A)(1)", based on the fact both have "distinct elements", "sentencing ranges", and the unindicted section (A)(2) charge constituted a "material variance" from the "indicted crime".
- (b) The trial judge egregiously erred by "adding" through a lesser included offense charge, a "theory" of prosecution "accomplice liability" that was not supported by the indictment.
- (c) The issue Appellate Counsel raised on appeal was "unpreserved" when "directed verdict" issue was unequivocally "preserved for appellate review".
- (d) Defense Counsel failed to object and request clarification from the trial judge regarding his ruling on whether any evidence connected applicant to the injuries of Mitchell A Rivers.

A True Copy, Attest
Judge J. Williams

2015 FEB 27 AM 11 02

FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.



(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. ~~Directed~~ Directed Verdict Motions
- ii. N/A
- iii. N/A
- iv. N/A

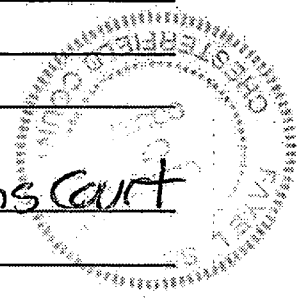
(b) the proceedings in which each ground was raised:

- i. ~~Trial~~ Trial General Sessions Court
- ii. N/A
- iii. N/A

2015 FEB 27 AM 11:02
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, SC

CLERK OF COURT DR. & J.S.
CHESTERFIELD COUNTY, SC

A True Copy, Attest
Faye L. Sellers



16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Collateral review through PCR represents the
 (b) first appropriate opportunity the Applicant
 (c) has had to raise these issues.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No
 (b) your trial, if any? yes
 (c) your sentencing? yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

2015 FEB 27 AM 11 02
 FIVE SELLERS
 CLERK OF COURT
 CHESTERFIELD COUNTY, SC.

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Matthew Swilley, 300 Russell Street, Suite 113, Dar, SC 29532
Tiffany Gibson, Chesterfield County Public Defender
 ii. Richard Green Stevens, PO Box 11589, Columbia, SC 29211
Benjamin John Tripp, PO Box 11589, Columbia, SC 29211
 iii. Robert Michael Dedeck, PO Box 11589, Columbia, SC 29211
 (b) the proceedings at which each such attorney represented you:
 i. Trial And Sentencing
Trial And Sentencing
 ii. Appeal
Appeal
 iii. Appeal
Appeal

A True Copy, Attest
 J. C. Bell
 CLERK OF COURT
 CHESTERFIELD COUNTY, SC.
 Revised 3/2003

19. State clearly the relief you seek in filing this application:

Vacation of judgements and sentences. Seek new trial
Vacation of judgements and sentences. Seek new trial
Vacation of judgements and sentences. Seek new trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Bishopville)

VERIFICATION

2015 FEB 27 AM 11 02
 FAYE L. SELLERS
 CLERK OF COURT
 WESTERFIELD COUNTY, S.C.

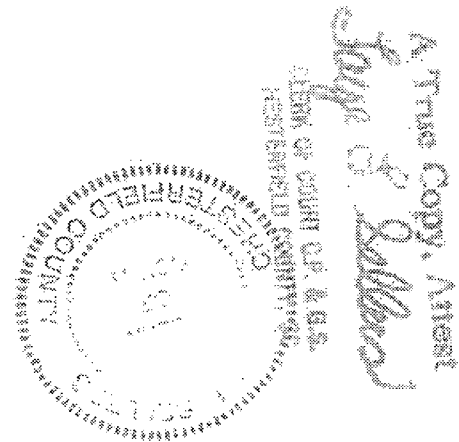
I, Mitchell Rivers, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me at this time for vacating, setting aside or correcting the convictions and sentence attacked in this application; and that the matters and allegations therein set forth are true and correct.

Mitchell Rivers Mitchell Rivers

SWORN to and subscribed before me this 24
 day of February 2015

David J. Briggers (L.S.)
 Notary Public

My Commission Expires: 11-05-2019



**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Mr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Mitchell Riving Mitchell Riving
Applicant

SWORN or affirmed to and subscribed before me this

24 day of February, 2015.

James J. Duggers
Notary Public

My Commission Expires: 11-05-2019

2015 FEB 27 AM 11 02
FAYE L. SELLERS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	C/A NO: 2015-CP-13-108
	)	
Mitchell Rivers, #344799,	)	
	)	
Applicant,	)	
	)	AMENDMENT TO PCR APPLICATION
v.	)	
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

The Applicant, through appointed counsel below, makes the following additional claims and amendments to his prior application for post-conviction relief filed February 27, 2015:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Counsel failed to object to testimony and argue at trial child's prior injuries were not connected to Applicant. (See State v. Mitchell Rivers, App. Case. No. 2011-186026)

Respectfully submitted,


 Lance S. Boozer
 Attorney for Applicant
 1400 Laurel Street, Suite 4A
 Columbia, SC 29201
 Phone: (803) 608-5543
 Fax: (803) 926-3463

Columbia, South Carolina
 May 31, 2017

AFFIDAVIT OF SERVICE

I, the undersigned, of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing Amendment to Prior PCR Application upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, addressed as follows:

Johnny E. James, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

THE BOOZER LAW FIRM, LLC



Lance S. Boozer

Attorney for Applicant
1400 Laurel Street, Suite 4A
Columbia, SC 29201
Phone: (803) 608-5543
Fax: (803) 926-3463

Columbia, South Carolina
May 31, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTERFIELD)
))
))
Mitchell Rivers, #344799,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

2015-CP-13-0108

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on February 27, 2015, would respectfully show this Court:

I.

Mitchell Rivers ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Chesterfield County. Applicant was indicted at the October 2010 term of the Chesterfield County Grand Jury for homicide by child abuse (2010-GS-13-1072). Applicant was represented by Matthew Swilley, Esquire, and Tiffany Gibson, Esquire. On February 8, 2011, Applicant proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Applicant guilty as indicted. Judge Burch sentenced Applicant to imprisonment for a term of life.

A timely Notice of Appeal was filed on Applicant's behalf. Benjamin J. Tripp, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in a published opinion. State v. Rivers, Opinion No. 5296 (S.C. Ct. App. filed February 11, 2015). The Remittitur was returned on February 27, 2015.

Attached herewith and incorporated herein by reference are the records of the Chesterfield County Clerk of Court regarding the subject conviction, the transcript from Applicant's trial, and Applicant's records for the Department of Corrections and appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Defense counsel's failure to object to (A)(2) charge."
 - a. "Counsel's failure to object to the section (A)(2) charge to jury as lesser included offense of section (A)(1) constituted deficient performance."
2. "Defense counsel's failure to object to supplemental instructions."
 - a. "Supplemental instructions impermissibly enlarged indictment."
3. "Appellate counsel's failure to raise directed verdict."
 - a. "The issue appellate counsel raised on appeal was "unpreserved" when "directed verdict" issue was unequivocally "preserved for appellate review.""
4. "Defense counsel's failure to preserve for appellate review the issue of admissibility of evidence of collateral injuries constituted deficient performance."
 - a. "Defense counsel failed to object and request clarification from the trial judge regarding his ruling on whether any evidence connected applicant to the injuries of" the victim.

III.

Respondent construes Applicant's allegations one, two and four as claims of ineffective assistance of counsel and submits these allegations are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334

S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant “must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice.” Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). “The two-part test adopted in Strickland also applies to challenges to guilty pleas based on ineffective assistance of counsel.” Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011).

First, the applicant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland

test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent therefore requests that this Court convene an evidentiary hearing only on the allegation of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code Ann. § 17-27-10 *et seq.*; Rule 71.1, SCRCP. All claims should be made well in advance of the PCR hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Filings by Applicant will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claim of ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

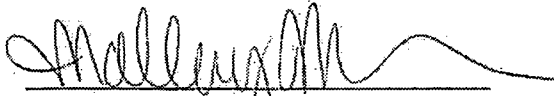
December 16, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHESTERFIELD	)	
	)	
	)	2015-CP-26-8676
MITCHELL RIVERS, 344799,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Lance Boozer, Esquire
Boozer Law Firm, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201

DATED this 16th day of December, 2016.



 Mallory Morris, Legal Assistant
 For Respondent

State of South Carolina))
County of Dillon)

In Circuit Court of the
Fourth Judicial Circuit
2015-CP-13-00108

MITCHELL RIVERS,
Plaintiff,

VS.

Transcript of Record

THE STATE,
Defendant.

Dillon, South Carolina
July 17, 2017

B E F O R E:

The Honorable Roger E. Henderson

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

Mr. Lance Boozer, Esquire
Attorney for Plaintiff

Mr. Johnny Ellis James, Jr., Esquire
Attorney for Defendant

Lisa Carter
Circuit Court Reporter

I N D E X

WITNESSESPAGE

Mitchell Rivers:

Direct Examination by Mr. Boozer..... 7

Cross Examination by Mr. James..... 21

Matthew Swilley:

Direct Examination by Mr. Boozer..... 27

Cross Examination by Mr. James..... 40

Tiffany Gibson:

Direct Examination by Mr. James..... 42

Benjamin J. Tripp:

Direct Examination by Mr. James..... 45

Cross Examination by Mr. Boozer..... 47

I N D E X

NO.DESCRIPTIONEV.

(No Exhibits Were Introduced During This Hearing)

1 THE COURT: All right. Mr. James, you may call
2 your next case.

3 MR. JAMES: Give me just one moment, Your Honor.

4 THE COURT: All right.

5 MR. JAMES: Your Honor, the State calls Mitchell
6 Rivers versus the State of South Carolina. It's docket
7 number 2015-CP-13-0108. Mr. Rivers is here today and he is
8 represented by Lance Boozer. I represent the State. My
9 name is Johnny Ellis James, Jr. Would you like any
10 procedural history of the case?

11 THE COURT: Yes, sir.

12 MR. JAMES: All right. Mr. Rivers was indicted in
13 2010 for homicide by child abuse. He proceeded to trial
14 before the Honorable Paul M. Burch and was convicted on
15 February 11, 2011. He was sentenced to life incarceration.
16 At that trial he as originally represented by Matthew
17 Swilley as well as Tiffany Gibson. The prosecutor in that
18 case was Suzanne Mayes and the second chair prosecutor was
19 Adam Foard.

20 Mr. Rivers promptly appealed and on appeal Mr.
21 Benjamin Tripp initially offered an Anders brief which was
22 rejected by the Court of Appeals. The Court of Appeals
23 requested that the parties brief any issue of whether, I'm
24 sorry, "Did the trial court erred in admitting evidence of
25 collateral injuries indicative of child abuse". The

1 parties then brief that issue and the Court of Appeals
2 affirmed the conviction as to that issue. And, of course,
3 in that appeal, Your Honor, it bears mentioning that they
4 affirmed the case on the bases that the issue that was
5 brief was not preserved for appellate review. They didn't
6 go deep into the merits of it.

7 This applicant for post-conviction relief was filed
8 February 27, 2015. The State made it's return on or about
9 October 16, 2016 and Mr. Rivers filed one amendment to that
10 application on May 31, 2017.

11 Your Honor, the State's understanding of the
12 allegations today are as follows; One, that counsel's
13 failure to object to the section (A) (2) charge to the jury
14 as a lesser included offense of section (A) (1)
15 constituting deficient performance; that defense counsel
16 failed to objection to supplemental instruction that
17 permissibly enlarged the indictment; that defense counsel's
18 failure to preserve for appellate review the issue of
19 admissibility of evidence of collateral injuries constituted
20 deficient performance; and, additional Mr. Rivers alleges
21 inefficient assistance of appellate counsel and that the
22 issue of appellant counsel raised on appeal was unpreserved
23 when the directed verdict issue was unequivocally
24 preserved for appellant review. In Mr. Rivers' amendment he
25 clarifies one of those issues that counsel was ineffective

1 for failing to object to testimony and argue at trial that
2 the child's prior injuries were not connected to the
3 applicant. And with that stated, I seek the floor to Mr.
4 Boozer.

5 THE COURT: Okay. Mr. Boozer?

6 MR. BOOZER: Thank you, Your Honor. If it pleases,
7 the Court? Judge, just as a preliminary matter, I'm going
8 to be focusing quite a bit on the opinion, the Court of
9 Appeals opinion in this case. I've noted that in my
10 package that I received from the Attorney General's office,
11 I think that I only have a partial opinion. I do have for
12 myself a full one. I just wanted to make sure that, Your
13 Honor, was provided with a complete opinion.

14 THE COURT: It looks like I do. I have a complete
15 opinion, yes.

16 MR. BOOZER: Okay. And with that, Your Honor, we'd
17 go ahead and call Mr. Rivers to the stand.

18 THE COURT: All right. Come forward, Mr. Rivers.

19 THE CLERK: Place your left hand on the Bible and
20 raise your right hand. Do you solemnly swear or affirm the
21 testimony you're about to give the court is the truth, the
22 whole truth and nothing but the truth so help you God?

23 MR. RIVERS: I do.

24 THE CLERK: Thank you. You can be seated. State
25 your full name for the court?

1 MR. RIVERS: Mitchell Charles Rivers.

2 MITCHELL RIVERS, first being
3 duly sworn, testified as follows:

4 **Direct Examination by Mr. Boozer:**

5 Q. Mr. Rivers, how are you doing today?

6 A. I'm doing fine.

7 Q. All right. Do you know why you are here today?

8 A. Yes, sir.

9 Q. Why is that? What did you file to get in court?

10 A. I had filed a PCR, post-conviction relief form.

11 Q. All right. Mr. Rivers, what is it that you're
12 currently incarcerated for?

13 A. Homicide by child abuse.

14 Q. And did you go to trial ---

15 A. Yes, sir.

16 Q. --- on those charges?

17 A. Yes, sir.

18 Q. Okay. What type of sentence did you receive after
19 that?

20 A. Natural life sentence.

21 Q. And who represented you for the trial?

22 A. Mr. Matthew Swilley.

23 Q. All right. Now, you've heard the allegations that
24 have been recited by the attorney general, are those
25 correct?

M. Rivers- Direct Examination by Mr. Boozer

8

1 A. Yes, sir.

2 Q. All right. So let's -- let's give a little bit of
3 background. Your lawyer was Mr. Swilley?

4 A. Yes, sir.

5 Q. And did you hire Mr. Swilley or was he appointed to
6 represent you?

7 A. He was appointed to represent me.

8 Q. All right. Do you know about how many times you meet
9 with Mr. Swilley prior to your trial?

10 A. Around about three to four times if I'm not mistaken.

11 Q. And sort of give me and the court a time line of when,
12 what was alleged to have happened, occurred and then the
13 time that you were arrested and the time of the trial, how
14 much time, sort of, passed in between all of that?

15 A. You talking about when I was -- when they was getting
16 to prepare me to go trial and stuff?

17 Q. That's right. Yes, sir.

18 A. It was like, I think, about like a month.

19 Q. How about -- do you recall when you got arrested?

20 A. I recalled when I got arrested in 2005.

21 Q. All right. And when was your trial?

22 A. My trial was in 2011.

23 Q. All right. When did Mr. Swilley come on your case?

24 A. Mr. Swilley came on my case -- I was just getting off
25 work, he said that he was my representative and that was in

1 2010-2011.

2 Q. Who was representing your before 2010 or 2011?

3 A. I didn't have nobody.

4 Q. Do you know why you didn't have anybody?

5 A. My understand was at the first beginning when I had
6 got bonded out they had throw my case out.

7 Q. Okay.

8 A. And so when I had got bonded out I went back to work.

9 Q. Were you originally charged with something different
10 or

11 A. No, sir.

12 Q. Let's talk a little bit more about that. Why did you
13 think the case had been thrown out?

14 A. Because my, to be honest with you, my understanding I
15 never thought I deserved to have the case when I was trying
16 to save his life.

17 Q. Okay.

18 A. And the allegations that was put forth that's
19 something ain't never happened.

20 Q. Let me ask you this, you said that you had bonded out?

21 A. Yes, sir.

22 Q. When was that?

23 A. It was August. I had bonded out in August.

24 Q. Of what year?

25 A. August of 2005.

M. Rivers- Direct Examination by Mr. Boozer

10

1 Q. Okay.

2 A. I had a \$5,000 bond.

3 Q. That was your bond?

4 A. Yes.

5 Q. How much did y'all have to put up for that?

6 A. Five hundred dollars.

7 Q. All right. And the charge was homicide ---

8 A. Homicide by child abuse.

9 Q. All right. Did you have a lawyer with you at your
10 bond hearing?

11 A. I think it was Mrs. Rivers.

12 Q. It was who?

13 A. I think it was Mrs. Patricia Rivers.

14 Q. Okay.

15 A. If I'm not mistaken.

16 Q. All right. So quite a bit of time passed between when
17 the allegations happened and when you went to trial, right?

18 A. Yes, sir.

19 Q. All right. Give the court a little bit of background.
20 You actually testified at trial, right?

21 A. Yes, sir, I did.

22 Q. All right. Just kinda of give the court, sort of, a
23 nut shell overview of what you're testimony in your -- what
24 happened?

25 A. Okay. Around about, it was in August when he just had

1 I think getting passed away and it was in August. At 5:45
2 that morning I was outside cutting grass.

3 Q. Okay.

4 A. Okay. Kimberly, my ex-wife, was the last one at the
5 scene with Mitchell Alexander Rivers, that's our son. And
6 so she ran outside to get me while was I was cutting grass
7 and so my mom, she passed away now, but she was there and I
8 grabbed the phone, I called 9-1-1. They got a tape
9 recorder. When I called 9-1-1 I told them Mitchell
10 Alexander is not breathing. My son is not breathing. So
11 I'm begging them for help. So they told me to lay him on a
12 flat surface, lift his head upwards a little bit and do CPR
13 on him, but be careful with doing things because he was
14 three and half months years old. And so I proceeded with
15 CPR until the MS (sic) got there. After they got there,
16 they took him to the hospital. It was around about like
17 7:30 -- around about 7:30, 7:45, the doctor came back in
18 and said we did all we can do for him but he passed away
19 and he died on our patient table number one.

20 Q. Let me ask you this, did -- had there been anything
21 that had happened early that night with child as far, was
22 there any problem with his breathing or anything like that?

23 A. He did have a breathing issue. The biological mother,
24 Jennifer Quick, she was unfit to take care of him so me and
25 my ex-wife had adopted him. So that put him in, what you

M. Rivers- Direct Examination by Mr. Boozer

12

1 call a foster home before we had -- because we had to go
2 through the proper procedure work, fingerprints, social
3 security number. They had to do a background check on me
4 about my job and everything. Make sure I had a stable
5 house and everything for he can stay in. And so he had got
6 sick one day so I took off work for three days, took him
7 back to the hospital and they had to put him in intensive -
8 - the doctor said his lungs was, like, full of fluid.

9 Q. Okay. You were working and had a job throughout this
10 whole time?

11 A. Yes, sir. I was working twelve hours shifts Monday
12 through Friday and on weekends I was an egg gather.

13 Q. Was there any testimony at the trial about the baby
14 sleeping in the bed with you or anything like that?

15 A. Yes, sir.

16 Q. Okay. Tell us about that. Is this from you? Was
17 this testimony from ---

18 A. Yeah. This testimony was for me.

19 Q. Okay. Tell us about that.

20 A. I had got off work, Kimberly had gave him a bath, and
21 so I just had went to Walmart and bought him to uniforms..
22 After we gave him a bath, we sat him in there with my mama
23 because she was in a hospital bed. After we sat him in
24 there with my mama, my mama said that his feet was cold.
25 So we put socks on them. So I went to lay down and he laid

1 down I had him laying down on the side. Like -- like --
2 like a parent do, just rocking him and stuff and going to
3 sleep so we fell asleep together. I woke up and he was up
4 under my arm pit so I did CPR.

5 Q. He was not -- he was having breathing issues then?

6 A. I think -- yes, sir, he been having breathing issues
7 then so I had did CPR the first time and he was okay. So I
8 woke him up, I said listen -- I fell asleep, he was right
9 there, and so I didn't -- I think everything was fine at
10 the time, I'm not going to lie. And so everything was
11 good. I gave him a bottle and that's the God's truth, I
12 gave him a bottle and then I lay him down in the crib and
13 he was okay. So Kim was keeping an eye on him. So I went
14 outside I started cutting the grass.

15 Q. All right. And just to be clear, this was not y'all
16 child?

17 A. No, sir. It was my sister-in-law's child.

18 Q. And you had the child, why?

19 A. We had the child because DSS said she was unfit.

20 Q. Okay. And y'all were deemed to be fit place for the
21 child to grow up?

22 A. Well, we was -- first, I had to move back in with my
23 mother because the house that we were staying in at first,
24 it was down there by Walmart, and it was, it was not fit to
25 stay down there. So I told Kim, I said listen, we've got

M. Rivers- Direct Examination by Mr. Boozer

14

1 to move back to my mother house. And so that's what we had
2 did, we had moved back to my mother house because the
3 lights and stuff was hanging down out the ceiling at that
4 house.

5 Q. All right. Now, obviously you, of course, had told
6 Mr. Swilley everything that happened, correct?

7 A. Yes, sir.

8 Q. Okay. In this case prior to your trial and I know
9 there was an attempted plea, were there any plea offers
10 that were being made early on?

11 A. There was no plea offer made except for they had went
12 to court and they came at me when I was in trial, they came
13 to me, I was in the back and they sat down and said, um, do
14 a plea deal to zero (0) to twenty (20) and I said I really
15 can't do a plea deal because I'm not guilty for anything.

16 Q. Okay. And let's talk a little bit more about that.

17 MR. BOOZER: And, Your Honor, I'm going to be
18 referring in the trial transcript beginning at page 51 and
19 then I'm going to flip over to 54 and 55.

20 THE COURT: All right, sir.

21 Q. So, Mr. Rivers, during the trial or I guess kind of
22 earlier on in the trial, there was a plea offer?

23 A. Yes, sir.

24 Q. Was that to a lesser offense of inflicting great
25 bodily injury upon a child, if you recall?

1 A. I don't recall. I don't recall at all.

2 Q. Okay. But if that's what the solicitor states on page
3 51, he's waiving presentment to the grand jury on this
4 particular document of infliction for great bodily injury
5 and tenders a plea to this charge at this time, that's
6 where y'all start the plea?

7 A. Yes, sir.

8 Q. Or try to start one?

9 A. Try -- yes, sir.

10 Q. All right. And at that point you are pleading
11 pursuant to what's called Alford, is that your
12 understanding?

13 A. Sir?

14 Q. You are pleading -- you are entering that plea
15 pursuant to what's called Alford or North Carolina versus
16 Alford?

17 A. Mmm, hmm.

18 Q. Do you recall that?

19 A. Yes, sir. Yes, sir.

20 Q. All right. And then -- that carried -- do you know
21 what that carried? What that charge would've carried?

22 A. No, sir.

23 Q. Was it zero (0) to twenty (20), does that sound about
24 right?

25 A. I think it was about zero (0) to twenty (20).

M. Rivers- Direct Examination by Mr. Boozer

16

1 Q. Versus on the other one, you would be looking at a
2 life sentence if you got found guilty, right?

3 A. Yes, sir.

4 Q. Okay. And now flip it over to page 54 and the judge
5 is explaining some things to you, are you pretty familiar
6 with this transcript?

7 A. It's been, I'm not going to lie, it's been so long. I
8 read it on and off.

9 Q. Well, in that transcript you made the following
10 statement on page 54 ---

11 A. Mmm, hmm.

12 Q. And the judge wants to get a little bit more of
13 information from you and you said, "yes, sir, that
14 clarifies it but I can't do that. I'm sorry. I'm sorry I
15 can't do that over my heart now, I'm sorry. I can't. I
16 can't plead guilty to that. I'm sorry, Mr. Man. I'm just
17 sorry."

18 A. Yes, sir.

19 Q. "I can't do that." And you gone on to say, "I just
20 can't do that."

21 A. Yes, sir, I remember that now.

22 Q. Okay. And then the court would not accept your plea.
23 You did not end up entering a plea, did you?

24 A. No, sir.

25 Q. Why did you back out of the plea?

1 A. Because to me if I'm going to plead guilty for
2 something that means now I did something. I didn't do
3 nothing but try to save a life, that's it. I didn't cause
4 no bodily harm, no nothing.

5 Q. Okay. Let's -- let's talk about -- and let me ask you
6 this, were you pretty adamant the whole time that Mr.
7 Swilley was a lawyer that you wanted a trial on this case?

8 A. Yes, sir.

9 Q. Okay. You weren't going to Mr. Swilley and asking him
10 to plea, were you?

11 A. No, sir.

12 Q. --- you were wanting a trial?

13 A. I wanted a trial.

14 Q. All right. Let's go through your allegations. You've
15 got an allegation that you feel the trial judge erred by
16 charging unindicted section (A) (2) as a lesser included
17 offense, what is it that you mean by that?

18 A. What I mean by that -- it's been so long, I'm not
19 going lie. He was trying to charge me -- the judge when he
20 told -- to be honest he sat there and told me that if I
21 take a plea deal that it would be best. If I go through
22 trial he's gonna give me the maximum security, maximum life
23 sentence.

24 Q. Okay. And you're talking about on page 55 from the
25 court is saying, "Because if that jury convicts of that

M. Rivers- Direct Examination by Mr. Boozer

18

1 original charge," and you say, "I know", he says, "you
2 understand that minimum sentence?" and you say, "I know",
3 is that what you're talking about when you're having that
4 conversation?

5 A. Yes, sir.

6 Q. Okay. You've also got an allegation that you feel
7 like and I think you may have already talked about it but
8 you may not have, but the trial jury erred by adding
9 through a lesser included offense charge a theory of
10 prosecution or accomplice liability that was not supported
11 by the indictment. We've got some other allegations, is
12 that something that you want to go forward with?

13 A. Nah, that's fine.

14 Q. Okay. You've also got an issue that appellate counsel
15 raised on appeal was un-preserved when the directed verdict
16 issue was unequivocally preserved for appellate?

17 A. Yes, sir.

18 Q. Who was -- who represented you on your appeal?

19 A. Mr. Benjamin Tripp.

20 Q. All right. What is exactly the issue and we're going
21 to talk about another issue I know that you have that is
22 addressed on appeal, but specifically what issue about the
23 directed verdict you feel he didn't raise?

24 A. When Mr. Burch sat there and said, he had said to me
25 what he had said to the court about -- he had said these

1 cases by the children is getting lesser and lesser or
2 something about the cases or whatever, and then he had
3 overruled one of the things with Mr. Swilley, I forgot
4 which one it was. You have to forgive me on that.

5 Q. You're talking about where his motion for directed
6 verdict was denied?

7 A. Yes, sir.

8 Q. Okay. Let me ask you this, how did -- was Mr. Tripp
9 was appointed to represent you?

10 A. Sir?

11 Q. Was Mr. Tripp appointed to represent you?

12 A. Yes, sir.

13 Q. All right. Did you have any conversations with him?

14 A. I had a few conversation with Mr. Tripp.

15 Q. All right. Now, on the appeal initially your
16 appellate lawyer file was called a Anders brief, do you
17 understand that?

18 A. Yes, sir.

19 Q. Okay. And then is it your understanding that your
20 attorney and the state were then directed to brief a
21 specific issue?

22 A. Yes, sir.

23 Q. And that issue that was briefed was that the issue of
24 whether the court erred in allowing evidence of some other
25 injuries that were to the child into evidence?

M. Rivers- Cross Examination by Mr. James

20

1 A. Yes, sir.

2 Q. All right. And so did your appellate attorney brief
3 that issue?

4 A. Has he brief that issue?

5 Q. He briefed that issue on appeal for you, right?

6 A. Yes, sir.

7 Q. Okay. And then ultimately, though, the Court of
8 Appeals, you understand that they denied your appeal?

9 A. Yes, sir. I understand that.

10 Q. All right. And you understand that this is sort of
11 legal stuff that I'll get into with your lawyer but you
12 understand that it was denied because the issue was not
13 preserved ---

14 A. Preserved.

15 Q. --- for them to review?

16 A. Yes, sir, I understand that.

17 Q. All right. Let me ask you this, after the trial, did
18 you have any contact with Mr. Swilley?

19 A. I had received a letter from Mr. Swilley. I have a
20 copy but I didn't bring it with me but I still -- I
21 remember it very well. He said that was the worstest (sic)
22 day of his career when I went to trial and they found me
23 guilty. He said he wouldn't believe in the Fourth Circuit
24 Judicial System. I remember it just like that.

25 Q. Okay. Did you ever have any discussions with Mr.

1 Swilley other than that letter, did you ever talk to him?

2 A. I had wrote him a letter and I told him, thank him for
3 everything for what he had tried to do for me and may God
4 bless him and that was just -- I had no bad karma or
5 nothing with him.

6 Q. Okay. And your other allegations are really tied
7 together, one of which you filed on your own and then I
8 amended it for you, one of which is defense counsel failed
9 to object and request clarification from the trial judge
10 regarding his ruling on whether any evidence connected
11 applicant to the injuries of Mitchell A. Rivers, and then
12 your amendment is, counsel failed to object the testimony
13 and argue at trial the child's prior injuries were not
14 connected to applicant and then I cite your appellate
15 opinion.

16 A. Yes, sir.

17 Q. Now, of course, you and I discussed that many of the
18 questions that I have are going to be directed at your
19 trial counsel, you understand that?

20 A. Yes, sir.

21 Q. Okay. So I don't have anymore questions for you. If
22 the State has any questions, please answer those, okay?

23 A. Yes, sir. I sure will. Thank you.

24 THE COURT: Mr. James?

25 Cross Examination by Mr. James: