

2014 9

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Knox R. McMahon, Circuit Court Judge

Case No.: 2010-GS-32-01876

State of South Carolina, Respondent,

v.

Lexie Dial, III, Appellant.

RECORD ON APPEAL
Volume Two

Wayne Floyd Law Office, P.A.
1611 Augusta Road
P.O. Box 3972
West Columbia, SC 29171-3972
(803) 739-1824
Attorney for Appellant

Alan Wilson
Attorney General

Christina J. Catoe, Esquire
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

RECEIVED
JAN 07 2013
SC Court of Appeals

INDEX

Index.....	i
Trial Transcript, April 11, 2011.....	1
Jury Voir Dire.....	17
Jury Selection.....	50
Motions.....	61
Jury Instructions.....	64
<i>In Camera</i> Testimonies:	
Ricky Lee Campbell.....	82
Eric Russell.....	102
Lexie Dial, Jr.....	138
Bill Rast.....	142
Shawn Grant.....	145
Eric Russell.....	151
Trial Transcript, April 12, 2011	
Pre-trial Matters.....	187
Opening Statements.....	201
State.....	201
Defense.....	207
Michael Szenas.....	211
Direct.....	211
Cross.....	222
Nikki Rodgers.....	223
Direct.....	223
Motion for Mistrial by Defense.....	229
Adam Clayton.....	234
Direct.....	234
Cross.....	246

Mark Schermerhorn.....	249
Direct.....	249
Cross.....	258
Amy Lee.....	260
Direct.....	260
Cross.....	268
Kevin Steels.....	277
Direct.....	277
Cross.....	288
Dr. Wesley Shuler	
Direct.....	290
Cross.....	302
Dr. Sarah Webb-Wood.....	310
Direct.....	310
Cross.....	313
Rick Zureich.....	346
Direct.....	346
Cross.....	350
Shawna Sorrell.....	351
Direct.....	351
Cross.....	360
Sharon Emery.....	371
Direct.....	371
Cross.....	382
Dr. Edward Cheeseman.....	384
Direct.....	384
Cross.....	417
Motion <i>in limine</i>	438
Dr. Greta Harper.....	443
Direct.....	443
Cross.....	466
Motion in re: video and dismissal and mistrial.....	492
Misti Richard.....	498
Direct.....	498
Cross.....	511
Motion.....	549
<i>In camera</i> , Dr. Janice Ross.....	556
Dr. Janice Ross.....	570
Direct.....	570
Cross.....	588
Eddie Prestigiacomio.....	601
Direct.....	601
David Day.....	604
Direct.....	604

Cross.....	618
Motion <i>in limine</i>	630
Shawn Grant.....	637
Direct.....	637
Cross.....	654
Luis Rivera.....	659
Direct.....	659
Cross.....	664
Henry Dukes.....	670
Direct.....	670
<i>In camera</i> Motion, Katherine Levisi.....	675
Eric Russell.....	697
Direct.....	697
Cross.....	725
Dr. Susan Luberoff.....	739
Direct.....	739
Cross.....	771
Motion.....	789
Dr. Bruce Cope.....	795
Direct.....	795
Cross.....	800
Lexie Dial, Jr.....	801
Direct.....	801
William Rast.....	811
Direct.....	811
Courtney Van Baltzer.....	814
Direct.....	814
Reba Hill.....	817
Direct.....	817
Barbara Sox.....	823
Direct.....	823
Court's Discussion with Defendant.....	828
Lexie Dial, Third.....	846
Direct.....	846
Cross.....	872
Motions.....	890
Judge's Charge on the Law.....	942
Jury Question.....	963
Verdict.....	965
Motions.....	968
Sentencing.....	986
Indictment.....	996
Arrest Warrant.....	997
Exhibits.....	998

Defendant's Exhibit #1.....999
Defendant's Exhibit #2.....1005
Defendant Exhibit #3.....1006
Defendant's Exhibit #4.....1007
Defendant's Exhibit #63.....1022
Defendant'sExhibit #64.....1024
Certificate of Counsel.....1026

III

1 RICK ZUREICH, being duly
2 sworn, testified as follows:

3 CLERK: Have a seat, please, sir. Once you are seated,
4 speaking loud and clear, state your full name on the re-
5 cord.

6 WITNESS: Richard Zureich.

7 CLERK: Spell your last name.

8 WITNESS: Z U R E I C H.

9 DIRECT EXAMINATION

10 BY MR. WATERS:

11 Q. Mr. Zureich, how are you doing today?

12 A. Okay.

13 Q. Where do you currently work?

14 A. I work at Platinum Plus in Greenville.

15 Q. And is that a recent job or something you have
16 had for a while?

17 A. Recent job -- I've been working at Heartbreakers in
18 Columbia for six years. Yesterday I started at Platinum
19 Plus.

20 Q. Are they part of the same company or something?

21 A. That's correct.

22 Q. And you said prior to that you were working for
23 six years at Heartbreakers?

24 A. Correct.

25 Q. And what was your job at Heartbreakers?

MR. ZUREICH ON DIRECT

1 A. I am the day shift manager.

2 Q. And let me just get this out of the way. Do you
3 have a prior record?

4 A. Yes.

5 Q. Was that a mail fraud conviction?

6 A. Correct.

7 Q. And that was ten or eleven years ago, is that cor-
8 rect?

9 A. That's right.

10 Q. Were you the manager at Heartbreakers back on Jan-
11 uary 19, 2010?

12 A. Yes, I was.

13 Q. And you were working as the day shift manager, is
14 that correct?

15 A. Correct.

16 Q. Did you have a dancer who worked there with a stage
17 name of Breezy?

18 A. Yes, sir, I did.

19 Q. And is it unusual for dancers to use stage names?

20 A. They always use a stage name.

21 Q. And is that typically how you know them?

22 A. That's correct.

23 Q. Do you recall when Breezy's son was killed?

24 A. Yes.

25 Q. Was there a reaction . . .

MR. ZUREICH ON DIRECT

1 MR. FLOYD: Objection.

2 THE COURT: Rephrase the question. Sustained.

3 MR. FLOYD: Move for mistrial, Your Honor.

4 THE COURT: I would deny your motion for a mistrial.
5 Any other motions?

6 MR. FLOYD: Not at this point.

7 THE COURT: All right. Ladies and gentlemen, I
8 have sustained the objection to the last question, and
9 I am striking that question from the record.

10 What that means is that at the time of your delib-
11 erations you are not to consider that question at all.

12 As you will recall, in my initial charge to you,
13 I advised that the question is not evidence. The response
14 is the evidence.

15 Mr. Attorney General, you may ask your next ques-
16 tion.

17 MR. WATERS: Thank you, Judge, and I apologize for
18 that.

19 BY MR. WATERS:

20 Q. You obviously don't know anything about what hap-
21 pened to Joshua or anything about these events, is that
22 correct?

23 A. That's correct.

24 Q. Just very generally, do you remember the time
25 frame of what happened to Breezy's son?

1 A. Yes.

2 Q. And is there a reason why it stuck out in your
3 mind, other than the obvious fact that it happened to
4 your employee?

5 A. Well, a lot of the girls get very close, and she
6 had a lot of friends at the club, and when it hit the
7 news and everything that happened, it was on -- every-
8 body was on the internet and it was on TV.

9 Q. And so that's why it sticks out in your mind, cor-
10 rect?

11 A. Yes.

12 Q. Do the dancers at Heartbreakers, do they have set
13 hours? Is that how it works?

14 A. No, not at all.

15 Q. Do you remember around the time that this happened
16 what hours Breezy usually worked?

17 A. Yes.

18 Q. What was that time?

19 A. Typically she could come in early afternoon to mid-
20 afternoon, and what she would do is she would work my
21 shift and then she would work into the next shift, and
22 which the next shift was around seven o'clock at night.

23 It started around seven o'clock at night, and that
24 is typical for a lot of entertainers. We have a happy
25 hour from four to eight, and they try to catch that

MR. ZUREICH ON DIRECT

1 happy hour to get a head start on their evening.

2 Q. Would it be unusual or usual for Breezy to have
3 come in earlier than that afternoon time?

4 A. Very unusual. She always started on my shift.

5 Q. No further questions.

6 THE COURT: Thank you very much, Mr. Waters. Mr.
7 Floyd.

8 MR. FLOYD: Thank you, Your Honor.

9 CROSS EXAMINATION

10 BY MR. FLOYD:

11 Q. Mr. Zureich, tell us exactly what time she came
12 to work and what time she would leave?

13 A. I do not recall the exact time.

14 Q. Do you know what time she worked until?

15 A. . .

16 Q. On the 18th?

17 A. On the 18th? I would be gone by the time she
18 would leave. My shift had ended.

19 Q. Your shift ended?

20 A. Yes.

21 Q. What kind of place is Heartbreakers?

22 A. It's a strip club.

23 Q. Thank you. No further questions.

24 THE COURT: Redirect?

25 MR. WATERS: Nothing, Your Honor.

1 THE COURT: Thank you very much. You may step
2 down.

3 (Witness excused from stand)

4 MR. WATERS: Your Honor, we'd ask that the witness
5 be excused.

6 THE COURT: Any objection?

7 MR. FLOYD: No objection.

8 THE COURT: Sir, you may be excused.

9 (Witness excused)

10 THE COURT: You may call your next witness.

11 MS. WEISS: The State calls Shana Sorrells.

12 THE COURT: All right. Come around and be sworn,
13 please.

14 SHANA SORRELLS, being duly
15 sworn, testified as follows:

16 CLERK: Have a seat and state your full name,
17 please.

18 WITNESS: Shana Sorrells.

19 CLERK: Spell your last name.

20 WITNESS: S O R R E L L S.

21 DIRECT EXAMINATION

22 BY MS. WEISS:

23 Q. Good afternoon, Ms. Sorrells.

24 A. Good afternoon.

25 Q. Please introduce yourself to the jury, and tell

1 them where you are currently employed?

2 A. I am currently employed at the South Carolina Law
3 Enforcement Division, commonly known as SLED.

4 Q. And what is your position there?

5 A. I'm a forensic toxicologist.

6 Q. How long have you been with SLED?

7 A. Five years.

8 Q. To go a little bit into your background, where did
9 you go to college?

10 A. I'm a graduate of the University of South Carolina.
11 I got my B.S. in chemistry, and I also went to the Uni-
12 versity of South Carolina and got my Master's Degree in
13 analytical chemistry.

14 Q. When you left the University of South Carolina,
15 what type of training did you undergo to become a for-
16 ensic toxicologist?

17 Q. We have an extensive year-long in-house program
18 where we are trained under a senior toxicologist. We
19 also have to go through several training seminars in
20 Indiana, Florida, Georgia, and there's one in Oklahoma
21 as well.

22 Q. Do you have any certifications?

23 A. I do not. It would not have been time.

24 Q. The training that you undergo, how long is it?

25 A. . . .

1 Q. I know you have the year in training, but the
2 ones you go to . . .

3 A. They last anywhere from three days to a week.

4 Q. And since you left USC, you've been with SLED?

5 A. There's a six month lapse there but, yes, I have
6 except for those six months.

7 Q. And the entire time you have been doing toxicology?

8 A. Yes, I have.

9 Q. What is your experience in pharmacology?

10 A. Just what we learn on the job. What we learn in
11 training. No -- nothing on the record in pharmacology.

12 Q. Do you have training in pharmacology in the lab?

13 A. We learn in the lab. We have to learn how drugs
14 react with one another and how they interact with the
15 body.

16 To say what you're looking for or to know whether
17 they are at overdose levels.

18 We do learn on the job the different reactions,
19 drug levels, how much is taken into the system and what
20 you expect to see in metabolism; when you take a drug,
21 what drugs you expect it to break down into.

22 That's what we learn on the job and that comes
23 with time and experience.

24 MS. WEISS: Your Honor, at this time I would like
25 to move to qualify Ms. Sorrells as an expert in

1 toxicology.

2 THE COURT: Mr. Floyd?

3 MR. FLOYD: No objection.

4 THE COURT: All right. Ladies and gentlemen, you
5 will recall much of what I say. You may be able to
6 repeat it back to me before the week is out, of course.

7 A person who testifies may only testify to what
8 they saw or know through their senses of smell or some-
9 thing of that nature.

10 However, there is an exception when a witness who,
11 through education or experience or background, has be-
12 come qualified in a particular art, science, craft, skill
13 or profession.

14 They may give their opinion in certain areas if
15 the Court qualifies them as an expert witness.

16 Agent Sorrells will be qualified to give opinion
17 in the area of forensic toxicology and forensic pharma-
18 cology.

19 That does not mean that you must accept the opin-
20 ions, but it is evidence for you, the jury, to use in
21 any way you see fit.

22 You may continue.

23 BY MS. WEISS:

24 Q. Have you had an opportunity to analyze an item of
25 blood belonging to Lexie Dial?

1 A. Yes, I have.

2 Q. And how did you get that?

3 A. It was actually received -- we originally received
4 the case a year ago, back in January of 2010, and an
5 analysis was done.

6 The minimal analysis that we do for this type of
7 case, which it was labeled homicide at the time, so we
8 got the minimal analysis done and the case was finished.

9 Then it was brought up that more work was needed to
10 be done on the case recently, in which it was returned
11 back from the agency.

12 I don't have the agency it was returned to us by,
13 but it was returned to our log-in department at which
14 point one of our technicians in our lab went downstairs
15 to our log-in department and retrieved the evidence
16 and placed it into my custody.

17 Q. And before you begin any analysis, do you check
18 the items that are received to be sure they match with
19 the names on the report?

20 A. Yes, we do.

21 Q. And was that verified?

22 A. It was verified. We actually take photos and store
23 them in our information system as proof of the evidence,
24 how it was labeled, how it was packaged.

25 Q. And is there a label on there with the name belonging

1 to -- that corresponds with the package or a lab num-
2 ber?

3 A. In the -- the blood and the urine sample that I
4 received were labeled Lexie Dial.

5 Q. And can you tell the jury how you go about analyz-
6 ing or doing the basic analysis or complete analysis
7 -- how the analyses are done?

8 A. When a case comes in -- every case that comes in
9 goes through an initial blood alcohol screening. Then
10 it goes through a drug screening, in which we screen it
11 for five different classes of drugs.

12 We screen it for benzodiazepam, amphetamines, meth-
13 amphetamines, your cocaine, your cannaboloid, more com-
14 monly known as your marijuana, and your opiate, your
15 pain meds or hydrocodone or oxycodone.

16 Once that is complete, if any of those produce a
17 positive, we take those and confirm it, because it is
18 possible to get a false positive on the screen.

19 We do a confirmation test to confirm that what
20 we are seeing is actually what has been screened.

21 We then do a more generalized screening to take it
22 a step further, which you look for anything or every-
23 thing that could be there that we could possibly de-
24 tect.

25 Q. And how is that test done?

1 A. That is done using a gas chromatography or mass
2 spectrometer, or GCMS, and then take it to a liquid chrom-
3 atography mass spectrometer, or LCMS.

4 Q. When you do that test, are you testing for a speci-
5 fic drug as you are on the screen, or are you testing
6 for something else?

7 A. On the LCMS, we do look for a list of specific
8 drugs that we have difficulty seeing on the GCMS. On
9 the GCMS, we look for anything and everything.

10 What happens is you get a spectrum which is just a
11 graph of a bunch of peaks, anywhere from two or three,
12 if it's a simple sample, all the way up to two hundred,
13 three hundred, depending on what's there.

14 We go through each and every peak to see if it's
15 just something within the body or if it's an actual
16 drug.

17 Q. And the initial analysis of Lexie Dial's blood, you
18 did not actually perform that analysis?

19 A. I did not, no.

20 Q. Someone in your department did?

21 A. Yes, they did.

22 Q. And did any of those first five drugs or alco-
23 hol show up on that screen?

24 A. All of that was negative.

25 Q. And then it was re-submitted this year, is that

MS. SORRELLS ON DIRECT

1 correct?

2 A. Yes, it was.

3 Q. And this was a test you actually ran?

4 A. Yes, it was.

5 Q. When you ran that test, did you get a printout
6 of peaks?

7 A. Yes, I did.

8 Q. From that printout, did you find Paxil in the blood?

9 A. No, I did not.

10 Q. Did you find any sinus pills in the blood?

11 A. I found Promethazine, which can be given for si-
12 nuses.

13 Q. What about antibiotics?

14 A. No, I did not.

15 Q. And, finally, did you find any nausea pills?

16 A. Promethazine is quite often given for nausea.

17 Q. Is there a common name or prescription name that
18 would be more familiar?

19 A. Phenergen.

20 Q. How much of that did you find in the blood?

21 A. Point O eight milligrams per liter.

22 Q. And what could you tell from point O eight milli-
23 grams per liter?

24 A. It's a normal level that we see quite often in
25 sick patients and DUIs and natural deaths. It is a very

1 common range that we see. Not out of the ordinary.

2 Q. But the person whose blood had that in it had been
3 taking Phenergen or Promethazine?

4 A. Yes.

5 Q. What are the side effects of those?

6 A. One of the most -- normally one of the most common
7 side effects of it is nausea even though it is used to
8 treat nausea.

9 You will also get some dizziness or some sleepless-
10 ness. You will see -- in more severe cases you will
11 have seizures, hallucinations. It can cause high fever,
12 high blood pressure, increased heart rate.

13 Q. What are the most common side effects?

14 A. Lack of sleep, dizziness, blurred vision.

15 Q. Can it cause drowsiness?

16 A. It can in certain cases, but, again -- it can cause
17 drowsiness but it also causes sleeplessness. You wake
18 up constantly in the middle of the night.

19 Q. What is Phenergen mostly used for?

20 A. Typically used or commonly used for nausea. It
21 can be used for cold symptoms or as a sinus medication,
22 allergic reaction.

23 Most commonly, it is given for nausea.

24 Q. And typically that would be something that would
25 be out of your system in approximately how long?

MS. SORRELLS ON DIRECT

1 A. We usually say that we can see a drug, depending
2 on how much he takes, within the blood within twenty-
3 four hours.

4 Q. And you were talking about Paxil, which is a dif-
5 ferent type of drug. Does it have a longer track line?

6 A. Yes, it does.

7 Q. And about how long can you see that?

8 A. Paxil on average can be about -- on average any-
9 where from seven to twenty hours.

10 Q. And what about Zoloft?

11 A. Zoloft runs about the same. At a minimum, it will
12 be a half life of seven hours.

13 MS. WEISS: Beg the Court's indulgence.

14 (Brief pause in the proceeding)

15 MS. WEISS: No further questions.

16 THE COURT: Thank you, Ms. Weiss.

17 Mr. Floyd.

18 MR. FLOYD: Thank you, sir.

19 CROSS EXAMINATION

20 BY MR. FLOYD:

21 Q. Ms. Sorrells, basically you were analyzing body
22 fluids taken from Lexie Dial on January 19, 2010?

23 A. I was analyzing a vial of blood labeled Lexie Dial.

24 Q. And it was drawn on January 19, 2010?

25 A. I -- the only way that I was aware of that was

1 when I received the 2010 case in 2011.

2 Q. And you were analyzing blood drawn on January 19,
3 2010?

4 A. Yes.

5 Q. Now, the substances that might be in that blood
6 stay in that blood, do they not?

7 A. They do, yes.

8 Q. So it is not likely you would wait a year to do a
9 test and everything would be dissolved?

10 A. Right, because now you no longer have -- once the
11 blood is taken out of the body, you no longer have those
12 active enzymes breaking it down. It remains in the state
13 that it is in.

14 Q. Okay, so whatever was the amounts when you tested it
15 would be the same amounts as when it was drawn in Jan-
16 uary of 2010?

17 A. Yes, it would.

18 Q. And isn't it true that Lexie Dial tested negative
19 for alcohol?

20 A. Yes, he did.

21 Q. And negative means none, right? It means there
22 is no -- negative means none and positive means there
23 would be some amount in there. Right?

24 A. Yes.

25 Q. So he was negative for alcohol?

1 A. Yes, he was.

2 Q. And negative for amphetamines?

3 A. Yes, he was.

4 Q. Negative for benzodiazepam?

5 A. Yes, he was.

6 Q. And he was negative for methamphetamines?

7 A. He was.

8 Q. He was negative for oxycodone?

9 A. He was.

10 Q. And he was negative for cannabis?

11 A. Yes.

12 Q. And he was negative for cocaine metabolite?

13 A. Yes.

14 Q. And negative for opiates?

15 A. Yes.

16 Q. Now, when you first got the fluid samples, those
17 were the types of drugs everybody was looking for? Those
18 kind of -- they are some legal, I guess. Alcohol is
19 legal, but some of the drugs you were looking for were
20 the kinds of things that can affect a person?

21 A. That, and we screen those because most of those
22 drugs have to have some other preparation done to them
23 because we are able to see them, and which we wouldn't
24 normally see them in running a general screen.

25 So we have to have a specific screen to be able

1 to say that these drugs are there or not there.

2 Q. Okay, so you did a specific test for these parti-
3 cular items?

4 A. Yes, we did.

5 Q. And he was negative?

6 A. Yes, he was.

7 Q. Now, then later the same blood samples were sent
8 back to you?

9 A. Yes, it was.

10 Q. And you were to test for other things?

11 A. Yes.

12 Q. You tested for Paxil?

13 A. I was asked specifically to test for Zoloft and
14 Paxil at that time.

15 Q. Okay.

16 A. And I tested for them because the way to test for
17 them is a general screen. I just ran the general screen.

18 Q. Okay, and Zoloft and Paxil -- he was negative for
19 both of those, you said?

20 A. Yes, he was.

21 Q. And those are the types of medications that when
22 you have too much of they can severely affect your emo-
23 tional state?

24 A. Yes, they can.

25 Q. Okay. The only thing you found was Phenergen or

1 some substance similar to that?

2 A. It was Phenergen.

3 Q. And that is for nausea?

4 A. Commonly nausea, yes.

5 Q. And the level that you found in him, it was within
6 prescribed or acceptable levels?

7 A. Therapeutic levels, yes.

8 Q. All right, and Phenergen has nothing to do with
9 DUI, does it?

10 A. It can. We see it quite often in DUI cases, but
11 most of the time it doesn't affect -- doesn't have a
12 strong effect on DUI cases, no, unless it is an extremely
13 high amount which we have seen before.

14 Q. You are talking about something -- some level be-
15 yond the point of zero eight you found and said is a
16 therapeutic level?

17 A. Yes.

18 Q. And at the therapeutic level, it should have no
19 impact on the person's abilities?

20 A. It can have some impact because every drug comes
21 with side effects. Each person has a different metabo-
22 lism, they are made differently, so each person reacts
23 differently to the drug.

24 So it is possible that some side effect could have
25 occurred even within therapeutic levels.

1 Q. And the most common thing is dizziness, from what
2 you have seen?

3 A. Dizziness and lack of sleep are two of the common
4 side effects.

5 Q. So lack of sleep could be a side effect?

6 A. Could be.

7 Q. Not necessarily though?

8 A. Not necessarily, but it could be.

9 Q. Thank you. No further questions.

10 THE COURT: Redirect?

11 MS. WEISS: Nothing further, Your Honor.

12 THE COURT: Thank you for being with us. You may
13 step down.

14 MR. FLOYD: I'm sorry.

15 THE COURT: Go ahead.

16 CROSS EXAMINATION CONTINUED

17 BY MR. FLOYD:

18 Q. Didn't you all also check the blood of Joshua Dial?

19 A. No, we did not. There is no record that I had his
20 blood.

21 (Brief pause in the proceeding)

22 A. I do not have any tests of Joshua Dial's blood
23 at all.

24 Q. Okay. I understand you didn't, but do you recognize
25 these documents?

1 A. These are . . .

2 Q. Are those SLED lab results?

3 A. These are SLED lab results.

4 Q. And do they reveal results for Joshua Dial?

5 A. They do.

6 Q. And would you agree with me they are negative in
7 all aspects?

8 A. They are negative in all aspects.

9 Q. And his blood was tested to see if it had any kind
10 of substances in it?

11 A. Exactly.

12 Q. And it was completely negative?

13 A. It was completely negative.

14 Q. Thank you. No further questions.

15 THE COURT: Madam Attorney General, any questions?

16 MS. WEISS: No, Your Honor.

17 THE COURT: Thank you for being with us. You may
18 step down.

19 Any objection to the officer being excused?

20 MR. FLOYD: No, Your Honor.

21 THE COURT: Thank you. You will be excused.

22 (Witness excused)

23 THE COURT: All right, we will take a brief recess
24 of about fifteen minutes. Everyone will remain seated
25 until the jury leaves the Courtroom.

1 Leave your notepads and do not discuss the case
2 during this brief recess.

3 Thank you very much.

4 (Jury excused from Courtroom).

5 THE COURT: The Clerk will please secure the note-
6 pads.

7 We'll be in recess for fifteen minutes.

8 (Whereupon, the Court took a recess after which
9 the matter resumed)

10 THE COURT: Do you have anything to discuss before
11 we bring in the jury?

12 MS. WEISS: Yes, Your Honor. Our next witness --
13 our next two witnesses will be Sharon Emory, the RN who
14 took the retinal photographs, and Dr. Edward Cheeseman,
15 who is a pediatric ophthalmologist.

16 So at this time we would like to discuss the admis-
17 sibility of the retinal photographs.

18 Your Honor has indicated a -- I don't want to say
19 -- the Court asked if we could pare down the retinal
20 photographs.

21 I spoke with Dr. Cheeseman, and we have pared down
22 the photographs to just these six -- well, this is for
23 demonstrative purposes -- there is no objection to them.

24 I have shown them to Mr. Floyd, and he still ob-
25 jects based on previous grounds.

1 We have narrowed them down to these six.

2 THE COURT: All right. Show me the ones that have
3 been removed from consideration, please.

4 (Brief pause)

5 THE COURT: Thank you. I've been handed up these
6 photos that the State intends to offer, 28, 29, 37, 43,
7 44, and 53.

8 I would like to record the other numbers that are
9 now withdrawn.

10 You have objection to these, 28, 29, 37, 43, 44
11 and 53?

12 MR. FLOYD: Yes, Your Honor. I withdraw my objec-
13 tions of a cumulative nature which I had added. However,
14 Your Honor, that process that is used there, retinal
15 photography or . .

16 THE COURT: Retinal what?

17 MR. FLOYD: Retinal photography or whatever term
18 they use in these pictures -- presents an imagine that
19 it just appears like a normal eye and then with blood
20 in it.

21 I think that is misleading, and that an appearance
22 is given to the eye in the process that is more preju-
23 dicial than probative, and we would object to it, Your
24 Honor, to these photographs, to the image that it pre-
25 sents.

1 THE COURT: All right. Well, of course, I can't
2 rule on it until I hear the testimony and hear what is
3 the foundation that is laid by the Doctor or the photo-
4 grapher in that regard.

5 Madam Attorney General, if the proper foundation
6 is laid, I will rule on them at that time.

7 All right.

8 MS. WEISS: Thank you, Your Honor.

9 THE COURT: I do want to put on the record the
10 numbers that have been withdrawn. If you will let my
11 Law Clerk finish that.

12 (Brief pause)

13 THE COURT: Your only objection now, Mr. Floyd, is
14 a 403 objection?

15 MR. FLOYD: Correct.

16 THE COURT: All right. Madam Attorney General,
17 those 60 and 61 -- 60, 61, 62, you still intend to use
18 those for demonstrative purposes?

19 MS. WEISS: Yes, Your Honor. I had anticipated
20 probably just using 61.

21 THE COURT: You have no objection to that, is that
22 correct?

23 MR. FLOYD: That's correct, Your Honor.

24 THE COURT: All right, sir.

25 MS. WEISS: I did provide him a copy of those, Your
Honor.

1 THE COURT: Thank you.

2 (Brief pause)

3 THE COURT: All right. So the State has withdrawn
4 then 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35,
5 36, 38, 39, 40, 41, 42, 45, 47, 46, 48, 49, 50, 51, 52,
6 54, 55, 56, 57, 58, 59, and 60 and 62 that were offered
7 for demonstrative purposes.

8 Those have been withdrawn by the State, and there-
9 fore the issue on the cumulative nature objection has
10 been withdrawn.

11 Anything further, Madam Attorney General?

12 MS. WEISS: Nothing further.

13 THE COURT: Mr. Floyd?

14 MR. FLOYD: No, Your Honor.

15 THE COURT: Bring us our jury, please.

16 (Jury returned to the Courtroom)

17 THE COURT: All right, welcome back, ladies and
18 gentlemen. Does everyone have your note pads?

19 All right, we will continue with the trial in the
20 case and the taking of testimony by the State in its
21 case in chief.

22 Call your next witness, please.

23 MS. WEISS: Your Honor, the State calls Sharon
24 Emory.

25 THE COURT: If you would come around and be sworn,

1 please.

2 SHARON EMORY, being duly sworn,
3 testified as follows:

4 CLERK: Please have a seat and state your full
5 name, spelling your last name, for the record, please.

6 WITNESS: My name is Sharon Emory, E M O R Y.

7 DIRECT EXAMINATION

8 BY MS. WEISS:

9 Q. Ms. Emory, would you please tell the jury a lit-
10 tle bit about yourself, where you are employed, and your
11 position there?

12 A. I'm a registered nurse. I work for Palmetto Health,
13 Richland, and in the neonatal intensive care unit, and
14 my current position is the ophthalmology coordinator
15 for the NIC U.

16 I also work for the School of Medicine in the Depart-
17 ment of Pediatrics.

18 Q. You said you work in the NIC U?

19 A. Yes.

20 Q. The neonatal intensive care unit?

21 A. The neonatal intensive care unit.

22 Q. Do you ever have occasion to work with the PIC U,
23 or pediatric intensive care unit?

24 A. Yes, I do. From the perspective of obtaining ret-
25 inal photographs. I am consulted by the ophthalmology

1 service.

2 Q. How many people are trained at Palmetto-Richland
3 Memorial to take retinal photographs?

4 A. Currently I'm the only imager that Palmetto Health
5 has.

6 Q. And how would one going about taking a retinal
7 photograph?

8 A. You want to know what the process is for taking
9 the retinal photographs?

10 A. Do you do it with a regular camera?

11 A. No. We do it with a retinal camera, or what we
12 have is call a Ret-Cam. That was specifically designed
13 for obtaining these type photographs.

14 Q. And you are the only person trained to take these
15 photographs?

16 A. That's correct.

17 Q. And what type of training did you receive in order
18 to be able to take them?

19 A. I received training from Clarity Medical Systems,
20 the maker or manufacturer of the cam, when it was pur-
21 chased for the hospital.

22 Q. And how many Ret-Cams does the hospital have?

23 A. The hospital has one.

24 Q. Is that for a special reason?

25 A. We purchased it in September of 2008 so that we

1 would be able to participate in a study that was look-
2 ing at Avastin versus the current treatment of photo-
3 coagulation for laser therapy for retinopathy of prema-
4 turity.

5 REPORTER: I'm sorry. Go back to coagulation.

6 THE COURT: Go back to the study.

7 A. Okay. The name of the study is Avastin versus
8 photo-coagulation for treatment of retinopathy of
9 prematurity.

10 THE COURT: All right, your next question.

11 BY MS. WEISS:

12 Q. And what year was that camera purchased?

13 A. In September of 2008.

14 Q. And have you been the primary or sole person tak-
15 ing photos since September of 2008?

16 A. Correct.

17 Q. What is the purpose of the camera? Was it allowed
18 to be used for other purposes outside the study?

19 A. Yes.

20 Q. And it just belongs to the hospital?

21 A. Technically, it belongs to the NIC U, but, yes,
22 the hospital.

23 Q. And you said that you come in and take photographs
24 when you are requested by the ophthalmologist?

25 A. That's correct.

MS. EMORY ON DIRECT

1 Q. And is Dr. Cheeseman one of those ophthalmologists?

2 A. Yes.

3 Q. And for what reason would Dr. Cheeseman typically
4 request your assistance?

5 A. They use photos for different things. For educa-
6 tion purposes, if there is some interesting finding in
7 the back of the eye. They would use that so that the
8 residents would be educated.

9 To provide what they call ground rounds in educat-
10 ing other people and for then also for documentation
11 purposes, such as in this case.

12 Q. Were you working on January 20th of 2010?

13 A. Yes, I was working for the School of Medicine, in
14 the Department of Pediatrics, on that day.

15 Q. Were you contacted to come and take photographs
16 with the Ret Cam?

17 A. Yes, I was contacted that morning, early in the
18 morning, by the resident on call, and they informed me
19 that there was a patient that needed to be imaged in
20 the PIC U.

21 And they gave me the patient's name and the room
22 number.

23 Q. And did they give you a name?

24 A. Yes. His name was Joshua Dial.

25 Q. Did you know at that time his age?

1 A. I cannot tell you if they told me at that time how
2 old he was.

3 Q. How far away is the School of Medicine where you
4 were working that day and the PIC U?

5 A. I was at Nine Medical Park across the campus -- so
6 half a block.

7 Q. Were you aware at that point whether Dr. Cheeseman
8 had already visited with the child and seen the child?

9 A. I was not aware at that time whether he had seen
10 the child.

11 Q. So you were just sort of given a heads-up at that
12 point?

13 A. That's correct.

14 Q. Okay.

15 A. They asked me to come, and I asked them if I would
16 be able to wait until after I was able to leave the
17 clinic, and they said yes, I could do that.

18 Q. At some point did that status change?

19 A. I received a phone call from the PIC U at some time
20 around lunch time to let me know that unfortunately
21 Joshua had expired, and I told them I would come right
22 away at that point.

23 At that point, I left the clinic and went and
24 picked up my Ret Cam and went to the Children's Hospital
25 to the PIC U.

MS. EMORY ON DIRECT

1 Q. Approximately how long would that have taken?

2 A. That -- ten minutes.

3 Q. It's within walking distance?

4 A. Yes.

5 Q. When you go in -- let's go back a little bit from
6 this case. With the Ret Cam, what is your normal pro-
7 cedure when you take photographs of the retina?

8 A. My normal procedure is to find out if the baby has
9 been dilated, and if he hasn't then we will provide the
10 drops to dilate him.

11 Then I would speak with the nurse at the bedside
12 to let them know that I had been consulted for obtain-
13 ing of photographs.

14 Then I try to read the notes if I have an opportun-
15 ity because the resident and the attending at times have
16 seen the baby prior to my coming. So I try to read
17 their notes to see what they have found, and then I
18 will obtain the photographs.

19 Q. You stated in this case that Joshua had already
20 passed away.

21 A. Yes.

22 Q. Does that change what you are asked to do with
23 the Ret Cam or what photographs you are able to obtain?

24 A. Does it change -- it does not change the photographs
25 I am able to obtain, but it does change my usual way

1 of -- although I did bother to read the chart, I was
2 alone at the bedside.

3 Usually there is a flurry of activity when I go
4 in, but on that particular day it was just the detective
5 and, of course, Joshua in the room.

6 Q. Do the eyes change as far as what you were getting
7 ready to photograph? Did that change from when he was
8 alive an hour or less prior to when you arrived?

9 A. There is some literature that discusses that there
10 are changes, but it is my understanding that those changes
11 occur sometime between the time of twenty-four to forty-
12 eight hours which had not elapsed at this point.

13 Q. What did you do when you went into Joshua's room?

14 A. I picked him up and repositioned him. I placed
15 a lid speculum in his eye to hold his eye open, and I
16 obtained the photographs then by placing the camera on
17 his eye with some coupling jel.

18 I obtained the photographs in the usual fashion.

19 Q. What was the condition of his eyes?

20 A. They were fixed and dilated.

21 Q. Who keeps the photographs after you take them?

22 A. The photographs remain on the Ret Cam, and then I
23 copy them to a flat drive. I provide a CT of the photo-
24 graphs to whoever the attending is, which is from the
25 chart.

1 Another copy is provided to the forensic pediatri-
2 cian, and they are uploaded to the hospital server.

3 Q. And when you are taking these photos, while you
4 are taking them, is it possible for somebody to view
5 while you are taking them?

6 A. Correct. The Ret Cam has a laptop that sits on
7 it with a screen, and so someone can see the photographs
8 as they are taken.

9 Q. Was anyone in the room?

10 A. Detective Grant from the Lexington County Sheriff's
11 Department was in the room.

12 Q. When you take the Ret Cam pictures, are they taken
13 as film or are they -- how do you take them?

14 A. I take a video, and I have a forty second window
15 from which I can take and videotape the back of the eye.
16 I take my film out of that once I'm done, and then I can
17 go back and take as many clicks and video as I want.

18 I usually do it by video and then pulling my still
19 pictures out of the video.

20 Q. And you take the camera and place it on the eye . .

21 A. Right.

22 Q. . . and take the photos, and do you -- are you
23 able to move around and view the entire eye?

24 A. Correct.

25 Q. And are you able to view the different areas

1 -- the eye is round?

2 A. Correct.

3 Q. Are you able to view the different areas around?

4 A. Correct.

5 Q. How is that possible?

6 A. Because you can either move the eye with the de-
7 pressor or you can move the camera.

8 In this case, the eye was still so it is easier
9 to achieve whatever angle is needed.

10 In other cases, it is difficult at times because
11 it can cause eye strain. So you would have to depress
12 at that point in that case.

13 Q. But in this case, you were able to move the cam-
14 era?

15 A. Correct.

16 Q. And what are sort of the outside images you are
17 trying to get? What would be the goal you are trying
18 to do at that point?

19 A. Ideally, I try to take a picture of the direct back
20 part of the eye, what they call the posterior pole, and
21 then you want temporal, nasally, inferiorally and super-
22 iorally. So those are the four objects.

23 Q. And were you able to obtain those?

24 A. Correct. Temporal, nasal, up and down.

25 Q. And then you were able to pull stills?

1 A. Yes.

2 Q. And have you had the opportunity recently to review
3 the stills that you pulled out?

4 A. Yes, I have.

5 Q. And do you know approximately how many stills you
6 pulled out from Joshua's eyes?

7 A. It was twenty on the disc that was provided, and
8 one of them was a poor image, so there were nineteen
9 pictures.

10 Q. And were you able to provide -- I'm going to show
11 you what's been marked as State's Exhibit 83 for identi-
12 fication.

13 A. Yes, maam.

14 Q. Do you recognize this picture?

15 A. Yes.

16 Q. You were able to provide that to all the people
17 you mentioned earlier?

18 A. Yes, I did.

19 Q. And you've reviewed this?

20 A. Yes.

21 Q. I show you what has been marked State's Exhibit
22 37, 43, 44 and 53. Do you recognize these photographs?

23 A. Yes.

24 Q. What are they?

25 A. Photographs of Joshua Dial that were taken on the

MS. EMORY ON DIRECT

1 20th of January of 2010.

2 Q. And these are four of the nineteen photographs
3 that you took?

4 A. Yes, they are.

5 MS. WEISS: Your Honor, I would at this time move
6 State's Exhibits 53, 44, 43 and 37 into evidence.

7 MR. FLOYD: If I could approach?

8 THE COURT: Sure.

9 (Conference at the bench between counsel and the
10 Court off the record)

11 THE COURT: All right, 37, 43, 44 and 53 are for
12 identification purposes only at this time.

13 You may continue.

14 BY MS. WEISS:

15 Q. And the photographs I just have shown to you were
16 given to Dr. Cheeseman?

17 A. That's correct.

18 Q. I don't have any further questions at this time.
19 Please answer any questions Mr. Floyd may have.

20 A. Sure.

21 THE COURT: Cross examine -- you said no further
22 questions?

23 MS. WEISS: That's correct.

24 THE COURT: All right, Mr. Floyd.

25 MR. FLOYD: Thank you, Your Honor.

1 CROSS EXAMINATION

2 BY MR. FLOYD:

3 Q. What -- is this like a regular camera?

4 A. No. This is a specialized camera, designed to
5 take pictures of the back of the eye.

6 You can taken the lens off and take a picture of
7 the room, take a picture like that, but it is specific-
8 ally designed to use for retinal images.

9 Q. It has a special kind of light?

10 A. It has a special kind of light with a special type
11 lens that allows us to obtain these photographs.

12 Q. Do you know what its light source is?

13 A. I don't know if I can describe it to you. It
14 is part of the Ret Cam itself.

15 There is a light box and a fiber-optic cable that
16 attaches to the camera and that camera is placed directly
17 on the eye.

18 Q. And the image that is produced, is it altered from
19 the way it normally looks?

20 A. No. It is not altered from the way it normally
21 would look.

22 In other words, if I took the lens off that allows
23 us to take pictures of the back of the eye and I took
24 a picture of you, it would allow me to take a picture
25 of you.

1 sworn, testified as follows:

2 CLERK: Please have a seat, and once you are seated
3 state your full name for the record, spelling your last
4 name.

5 WITNESS: My full name is Edward Williams Cheeseman,
6 Junior, and my last name is spelled C H E E S E M A N.

7 DIRECT EXAMINATION

8 BY MS. WEISS:

9 Q. Dr. Cheeseman, would you please introduce yourself
10 to the jury, tell them where you are currently employed
11 and your current position?

12 A. I am with the University of South Carolina School
13 of Medicine. I am the Chairman of the Department of
14 Ophthalmology, and I am also a pediatric ophthalmolo-
15 gist at the University of South Carolina School of
16 Medicine.

17 Q. Would you please explain what a pediatric ophthal-
18 mologist is and what you do?

19 A. Yes, a pediatric ophthalmologist is someone who
20 specializes in eye exams and diseases involving children,
21 usually until about the age of eighteen.

22 It can also go beyond that age for people who are
23 developmentally delayed, in order to take care of them.

24 It requires an additional year of fellowship train-
25 ing, ophthalmology residency training, to achieve that

1 certification.

2 Q. And going back just a tad, where did you go to
3 college?

4 A. I went to college at the United States Naval Acad-
5 emy, in Maryland.

6 Q. And where did you go after that?

7 A. After that, I was in the Navy for a number of years,
8 and I did an MBA program at Miami University in Ohio, and
9 I taught ROTC students there.

10 Then I went to medical school, went to the Uniform
11 Services University in Health Services in Bethesda,
12 Maryland.

13 Q. Where you obtained your M.D.?

14 A. That's when I obtained my M.D. Degree, yes.

15 Q. And after that, where did you go to do your resi-
16 dency and specialize?

17 A. After that, I did an internship -- what they call
18 a transitional year -- at the National Medical Center
19 in Bethesda. Then I spent a couple of years in the Navy
20 as a comprehensive ophthalmologist at the Great Lakes
21 Naval Training Center.

22 After that, I had the opportunity to go back and
23 do a fellowship in pediatric ophthalmology, which I did
24 at Johns Hopkins University in Baltimore, Maryland.

25 After I finished there, I went back to the National

1 Naval Medical Center in Bethesda, where I practiced
2 pediatric ophthalmology.

3 Q. And is there a board certification for pediatric
4 ophthalmology?

5 A. No, there is board certification for ophthalmol-
6 ogy in general, but for pediatric ophthalmology it is
7 a requirement to do a fellowship. It is not a board.

8 Q. And how many years have you been a pediatric oph-
9 thalmologist?

10 A. I finished my training in 1996, so that would be
11 about fifteen years.

12 Q. What brought you to South Carolina?

13 A. I retired from the Navy in 2003, and I wanted to
14 go somewhere where there was a need. In Washington,
15 D.C., they already had quite a few pediatric ophthal-
16 mologists, but it seemed like there was a void in South
17 Carolina for pediatric ophthalmologists.

18 Q. What year did you come to South Carolina?

19 A. In 2005.

20 Q. Did you come initially to the University?

21 A. No, initially I accepted a job in Greenville, South
22 Carolina, in a private practice with another individual
23 in the area of pediatric ophthalmology.

24 Unfortunately, that need that was projected in
25 that area was not accurate, and so the folks in Columbia

DR. CHEESEMAN ON DIRECT

1 came and said they needed somebody there, and would I be
2 interested, and I said, absolutely, if there is a prob-
3 lem here.

4 Q. And what year did you come to USC in Columbia?

5 A. I came to USC in 2008.

6 Q. And you are the Chair of the Department of Ophthal-
7 mology?

8 A. Yes.

9 Q. When did you become the Chair of the Department of
10 Ophthalmology?

11 A. Two years ago.

12 MS. WEISS: Your Honor, at this time I would like
13 to offer Dr. Cheeseman as an expert in pediatric oph-
14 thalmology.

15 THE COURT: Mr. Floyd?

16 MR. FLOYD: No objection, Your Honor.

17 THE COURT: All right. Again, ladies and gentle-
18 men, normally when a person testifies they are not
19 allowed to give opinion testimony. They must testify
20 to what they saw, heard, or sensed by smell or some-
21 thing of that nature.

22 However, there is an exception when someone is
23 qualified because of education or experience or training
24 in a particular art, science or trade or profession.
25 They are permitted to give their opinion in certain

DR. CHEESEMAN ON DIRECT

1 areas if the Court qualifies them that way.

2 This witness, Dr. Edward Cheeseman, will be qual-
3 ified in the area of pediatric ophthalmology to give
4 opinion testimony in that area.

5 That does not mean that you must accept the opin-
6 ion, but it is evidence that the jury can use in any
7 way that you see fit.

8 Thank you, Solicitor. You may continue.

9 MS. WEISS: Thank you.

10 THE COURT: Excuse me, Madam Attorney General.

11 MS. WEISS: Thank you, Your Honor.

12 BY MS. WEISS:

13 Q. Dr. Cheeseman, do you have a private practice where
14 you see patients on a regular basis?

15 A. It is not technically a private practice because
16 I work for the University of South Carolina. Yes, I see
17 patients, including on an emergent basis, if needed.

18 Q. And what ages do you see patients, Doctor?

19 A. Anywhere from newborn clear up to -- unless they
20 are developmentally challenged individuals, up to eight-
21 een usually, which kind of defines their cut-off in
22 pediatric.

23 Q. Are you also on call for the NIC U and the PIC U
24 at the hospital?

25 A. When there is a case where they would like a

1 pediatric ophthalmology opinion, yes, they will call
2 me in.

3 Q. On January 20, 2010, do you recall if you were
4 working that day?

5 A. Yes, I was.

6 Q. Do you recall whether you were requested for a
7 consult in the PIC U on that day?

8 A. I was.

9 Q. And who called you?

10 A. We were contacted by the pediatrician at the PIC
11 U, as I recall, and it was Dr. Greta Harper, who needed
12 a consult on a child.

13 Q. Where were you when you were awaiting -- obviously
14 you would go over to the hospital when you are requested
15 by the PIC U.

16 Where were you when you were requested to come
17 over?

18 A. We have an office in Four Medical Park, which is
19 directly across the street from the hospital, in walk-
20 ing distance.

21 Q. Do you recall what time you were requested to come
22 over to the PIC U?

23 A. It was in the vicinity of eleven o'clock in the
24 morning.

25 Q. And do you recall how much time it took you from

DR. CHEESEMAN ON DIRECT

1 when you received that call to get to the PIC U?

2 A. Ten or fifteen minutes.

3 Q. Did you pretty much go over directly once you
4 get the call like that?

5 A. Yes, and we also have residents that work with
6 us. It will kind of be the one on call that will take
7 a look at a consult and then the attending will also
8 follow to examine the patient.

9 Q. And is that what happened in this case?

10 A. Yes.

11 Q. Who was the first resident who went over there?

12 A. His name is Adam Chun.

13 Q. Now, anything that a resident does, when you get
14 there you then follow up on his checkup?

15 A. Anything the resident does I am responsible for,
16 so I do an exam myself as well.

17 Q. Do you recall about what time you got there?

18 A. In the vicinity of eleven o'clock.

19 Q. Did you have the opportunity to review any records
20 prior to seeing the infant?

21 A. I did not have but I was given some background in-
22 formation by our resident who had seen some records
23 and gave me a basic past medical history leading up
24 to the patient coming to the hospital.

25 Q. When you first entered the room, the patient

1 was Joshua Dial?

2 A. Yes.

3 Q. Do you remember how old he was?

4 A. Five months, from the record.

5 Q. When you first looked at him with the naked eye,
6 was anything visible with his eyes that you could see
7 with the naked eye?

8 A. No, other -- the only thing that was really strik-
9 ing was that his eyes were wide open, even though he
10 was not responding. There were no physical signs that
11 I could see.

12 Q. At the time you went in, Joshua still had a pulse?

13 A. Yes.

14 Q. Were there any other signs of life that you could
15 see at that time?

16 A. Joshua was not responsive to anything at that
17 time, no.

18 Q. In order for you to examine the eye, what do you
19 need to look at it?

20 A. What I need to look at the eye is we need to have
21 the pupils well dilated, because if the pupils are not
22 dilated you can only see the central portion of the
23 eye.

24 With the pupil dilated, you can see into the peri-
25 phery of the eye, and we use an instrument called an

1 indirect ophthalmoscope and we have a lens that is
2 at what is what is called twenty diopters or twenty-
3 eight diopters that allows us to focus in back of the
4 eye.

5 When you just look at the eye, you really can't
6 see in back of the eye.

7 Q. Dr. Cheeseman, an indirect ophthalmoscope, is
8 that something special to a pediatric ophthalmologist,
9 or is it something that is typically used by all eye
10 doctors and ophthalmologists?

11 A. It is typically used by all ophthalmologists to
12 do an examination of the back of the eye.

13 Q. And did you happen to bring one with you?

14 A. Yes, I did.

15 (Brief pause in proceeding)

16 WITNESS: Do you want me to model it?

17 MS. WEISS: Your Honor, is that permitted.

18 THE COURT: He can certainly show that to the
19 jury for demonstrative purposes only.

20 Do you have any objection, Mr. Floyd?

21 MR. FLOYD: No, I don't.

22 THE COURT: All right.

23 WITNESS: Usually when we're talking to someone
24 and trying to kind of get their attention, it holds the
25 head like this, and then we use a lens like this one

1 right here, and this is called a twenty diopter lens.

2 That, together with the dilated pupil, can bring
3 the back of the eye into clear focus.

4 The advantage of this instrument too is that it
5 has two eyes open so, therefore, you get a three dimens-
6 ional view where you get depth perception to appreciate
7 the depth in the back.

8 Q. Is there a light associated with that?

9 A. There is. It is not here but there is a power
10 source that projects the light out in front.

11 Q. And that is what is required in order to look into
12 the eye?

13 A. Yes.

14 Q. When you are looking into an average eye, an aver-
15 age child's eyes, with no trauma, what would you expect
16 to find?

17 A. Well, what we normally do is we do a step exam
18 to the front of the eye and then work our way back, so
19 we first make sure that the front of the eye is clear,
20 the cornea, lens of the eye.

21 Then we look in the back. With a dilated pupil,
22 we are looking at what's called petrius jelly. Back
23 to biology class, that's the jelly-type stuff that
24 makes up the substance in the back of the eye.

25 Then in the back of the eye you look at the optic

1 nerve, the blood vessels and the retina.

2 The retina kind of lines the inside of the eye,
3 like a garbage can liner lines the inside of a garbage
4 can.

5 Q. Did you happen to bring anything that may help
6 the jury to see what you're talking about?

7 A. Certainly.

8 Q. Okay.

9 THE COURT: Show that too -- Mr. Floyd, have you
10 seen this?

11 MR. FLOYD: No, I haven't.

12 THE COURT: Show him that, please.

13 WITNESS: Sure.

14 (Brief pause)

15 THE COURT: All right, then. Madam Attorney Gen-
16 eral, do you intend to use the item which appears to
17 be of an eye chart and a model of the human eye for
18 demonstrative purposes?

19 WITNESS: Yes, Your Honor.

20 THE COURT: Any objection, Mr. Floyd?

21 MR. FLOYD: Not if it's just for demonstration.

22 THE COURT: All right, you may continue.

23 MS. WEISS: Thank you, Your Honor. Your Honor,
24 may the witness step down and . . .

25 THE COURT: You may step down, Doctor. Just keep

DR. CHEESEMAN ON DIRECT

1 your voice up since you will be away from the micro-
2 phone, please.

3 WITNESS: Yes, sir.

4 THE COURT: Okay.

5 WITNESS: This is the front of the eye as we nor-
6 mally look at it, and the clear front part of the eye
7 is the cornea.

8 And this color part back behind there which is a
9 brown color on this eye is called the iris.

10 Right next to that in that center part there is
11 the pupil. That's where the lens sits.

12 So if I take that eye and cut it in half, right
13 down the middle there, and we look at the parts that
14 way, here is the front of the eye, the cornea, the
15 lens again, and the pupil is there.

16 Now we see the back of the eye. This cavity right
17 there is filled by that jelly which is called vitreus.

18 Then the ^{lining} inside of the eye right back in here is
19 called the retina. You can see some of the blood ves-
20 sels coming out of the retina.

21 The central part right here is the optic nerve
22 which actually goes back to the center of the brain.
23 The vision center of the brain is why you have vision.

24 And when looking at the back of the eye with the
25 ophthalmoscope, this is the view we get. This is the

DR. CHEESEMAN ON DIRECT

1 optic nerve right here. The blood vessels branch out
2 like this.

3 This right here is the breakdown to show that
4 the retina is more complex than just the single layer.
5 There are numerous layers of the retina.

6 BY MS. WEISS:

7 Q. And what are the layers of the retina?

8 A. Well, there is the neurosensory retina, the most
9 superficially. In front of that is what we call the
10 internal membrane which is various ganglion cells and
11 bipolar cells, many things.

12 Then all of these nerve fibers stream to the optic
13 nerve, go to the optic nerve.

14 Let's look at it from a different standpoint and
15 I'll put a plastic model here that is cut in half. If
16 you stand in front of the eye and take half away, this
17 is the iris in this case.

18 In this case it is brown and appears as glass.

19 When the lens is looking cloudy, you have a cat-
20 aract. That is when you have cataract surgery to take
21 that out.

22 As you look inside of there, you can see the ret-
23 ina. That is the large part with the various blood
24 vessels in there.

25 That is the optic nerve in the back and these are

DR. CHEESEMAN ON DIRECT

1 the capillaries, the chunky-looking material there.

2 Q. Thank you, Dr. Cheeseman.

3 The vitreous that you referred to, the jelly
4 that is in there, is that clear?

5 A. It's clear normally, yes.

6 Q. So you are looking through the pupils -- looking
7 through that but it's clear to the retina?

8 A. Correct.

9 Q. I'm going to show you what's been marked as State
10 Exhibit 28 and 29 for identification.

11 Do you recognize those photos?

12 A. Yes, those are photos of what appears to be a nor-
13 mal retina, in fact.

14 Q. These were taken with a Ret Cam?

15 A. Yes, maam.

16 MR. FLOYD: I have no objection.

17 MS. WEISS: Your Honor, . . .

18 THE COURT: And that is 28 and 29?

19 MS. WEISS: Yes, sir, they are.

20 THE COURT: Admitted without objection.

21 (Photos of normal eye admitted without objection
22 as State's Exhibits 28 and 29 in evidence)

23 BY MS. WEISS:

24 Q. Dr. Cheeseman, if you would, I would have you step
25 down one more time. I apologize.

DR. CHEESEMAN ON DIRECT

1 Could you explain to the jury what we are looking
2 at in these photos?

3 A. Yes.

4 THE COURT: Please refer to the numbers, Doctor.

5 A. This is 28.

6 THE COURT: You may continue. Thank you.

7 A. Looking at that picture, this orange part is the
8 retina, and you are looking at this through this Ret
9 Cam with a dilated pupil

10 You have to remember that the eye is shaped like
11 a ball, kind of like a ball. You can see inside of
12 there. The nerve fibers that are in the retina which
13 make up the optic nerve which goes back to the vision
14 center of the brain.

15 These are the blood vessels, arteries and veins,
16 which go like this and like that, all the way out in
17 each eye like this.

18 This central part right here is the area of cen-
19 tral vision which produces certain vision in terms of
20 color and clarity of vision.

21 Q. Thank you.

22 THE COURT: May I see those?

23 MS. WEISS: Yes, Your Honor.

24 (Brief pause)

25 THE COURT: All right.

1 BY MS. WEISS:

2 Q. And these are things you would see in a normal
3 eye?

4 A. Yes.

5 Q. Is that what you found when you looked into Joshua
6 Dial's eyes?

7 A. No.

8 Q. Now, when you look into a child's eyes or an in-
9 fant's eyes, and you see evidence of trauma, is that
10 evidence different from what you would see in an older
11 child or an adult?

12 A. Normally, yes.

13 Q. And why is that?

14 A. A child who is very young, just a couple of months
15 old, doesn't have much of instantaneous movement, so
16 if the head moves back and forth in any way it exerts
17 a lot of traction forces inside the eye, which can re-
18 sult in very significant bleeding.

19 Q. Are you aware of any injuries not related to the
20 eye on Joshua Dial prior to looking into his eyes?

21 A. No, I am not.

22 Q. What did you do first when you went to look into
23 Joshua's eyes?

24 A. I looked at Joshua and noticed that his pupils
25 were very widely dilated, about eight millimeters,

1 which is pretty large, and I asked the resident who
2 had seen him previously if he had put dilating drops
3 in his eyes, which that is so often due to drops given
4 to get a good view, but he indicated he had not.

5 They were already widely dilated to the point
6 where I could see clearly and did not do any further
7 form of dilation.

8 Q. What is the significance of that?

9 A. That is a common sight in significant neurologic
10 injury.

11 Q. And in layman's terms, what would you call it?

12 A. Brain injury.

13 Q. Now, when you used your indirect ophthalmoscope
14 and looked into Joshua's eyes, please explain for the
15 jury what you observed?

16 A. What I saw initially was, again going in that same
17 step by step fashion, front to back, his cornea was
18 clear. His lens was clear. The vitreous area was
19 relatively clear as well.

20 But the retinal area had too numerous to count
21 hemorrhages to both eyes in all quadrants to the back
22 of the eyes.

23 When I say all quadrants, up, down, left and
24 right.

25 Q. Let me show you what's been marked as State's

DR. CHEESEMAN ON DIRECT

1 Exhibits 53, 44, 43 and 37 for identification. Do you
2 recognize these photos?

3 A. Yes.

4 Q. What are they photos of?

5 A. Those are photos taken by the Ret Cam of Joshua
6 Dial's eyes.

7 Q. And does this accurately depict what you saw when
8 you looked into Joshua Dial's eyes?

9 A. It does.

10 MS. WEISS: Your Honor, at this time I would like
11 to enter State's Exhibits 53, 44, 43 and 37 into evi-
12 dence.

13 THE COURT: Mr. Floyd?

14 MR. FLOYD: No objection, Your Honor.

15 THE COURT: State's 37, 43, 44 and 53 are in evi-
16 dence without objection.

17 (Retinal photos admitted in evidence without ob-
18 jection as State's Exhibits 53, 44, 43 and 37).

19 MS. WEISS: Your Honor, may the witness step down
20 and over to the projector?

21 THE COURT: Certainly. You may step down but do
22 keep your voice up, please.

23 BY MS. WEISS:

24 Q. Dr. Cheeseman, if you would, describe please for
25 the jury what is depicted on the screen and use your

1 hand to show where you are describing?

2 A. This is the back of the eye.

3 Q. That is State's Exhibit 53. Okay.

4 A. You have looked at the pictures of a normal eye,
5 where you can make out the optic nerve and the orange
6 colored tissue which is the retina with the blood ves-
7 sels in the back of the eye.

8 In this particular picture, it is a little hard
9 to see the optic nerve but you can see it right there,
10 and you can see that this blood extends out as far as
11 you can see in all directions.

12 Q. What is the number of that exhibit?

13 A. I'm sorry. This one is number 37.

14 Even in this one it is a little hard to pick out
15 because there is so much blood in there. You can see
16 a lot more in the center, and it emanates on out as far
17 as you can see.

18 One of the things about these photographs too is
19 that when you look at the three dimensional view you can
20 see the different levels of this blood.

21 This blood is several layers from the retina. It
22 is in the retina initially and layers in the retina
23 at various levels.

24 This one shows more of the same thing, which is
25 the optic nerve, the blood which is more central and

1 in various layers going out in the retina of the eye.

2 This one right here is Number 44, and it shows
3 more -- that was 43, and this one is 44. You can see
4 the whitish area there, the optic nerve, and the blood
5 in the central part and then going out to the periphery
6 there, and 44 is more of the same thing.

7 There is an interesting finding, and that is that
8 this is an area where the traction has been placed on
9 the retina, the whitish area there. It lifts it up.

10 In other words, the traction exerted by that vit-
11 reous jelly -- in a young child, the vitreous jelly is
12 thick, and as we get older it thins.

13 That jelly placed more traction on the retina, and
14 then we get to the other photograph, Number 43, which
15 shows the hemorrhages and the layers of the hemorrhage.

16 Q. State's Exhibit 43 -- show the jury what you
17 were talking about, with that white line?

18 A. This is . . .

19 THE COURT: Keep your voice up for me, please.

20 A. Can you see that okay? Right along the bottom
21 there is hemorrhage which is actually elevated up, and
22 there is that white line.

23 It goes right along there like that, and that is
24 that tractional area.

25 Q. That white line or tractional area, is there a

1 medical term for that?

2 A. That is an area that is called the retinoschisis.
3 I have described it, and I will spell it for you. It
4 is R E T I N O S C H I S I S.

5 Q. Thank you.

6 A. That is an area where I think I described what I
7 saw. In Joshua, there was an elevated area of the ret-
8 ina and that is caused by the vitreous being fully ad-
9 hered to the retina in that area and not letting to or
10 giving way, and it generally results from a tractional
11 force being placed on the retina there and splitting
12 it, so that triangular layer of retina on the inside
13 there, it actually split, because that vitreous pulls
14 and it separates from the underneath layer.

15 Q. Of what significance is the retinoschisis?

16 A. In order to have that sort of retinaschisis, it
17 is rarely or uncommonly seen in anything other than a
18 back and force acceleration, similar to that.

19 Q. Could you receive a retinoschisis from a fall?

20 A. It's possible. There have been a couple of re-
21 ported cases but these falls have been severe and have
22 been associated with crushing type injuries of the
23 skull, with skull fractures.

24 Q. Did you see an injury similar to those in Joshua
25 Dial?

DR. CHEESEMAN ON DIRECT

1 A. I was not aware of any, nor did I see any myself.

2 Q. And you were able to -- you did observe Joshua?

3 A. I did while I looked at his eyes.

4 Q. When you say a back and forth motion, what does
5 that -- is there a lay term for what you are describ-
6 ing there?

7 A. Well, there are several terms I think that go along
8 with it. One is non-accidental trauma. One is non-
9 accidental trauma with impact.

10 Another one is shaken baby, a term that is commonly
11 used.

12 Q. Are you familiar with Dr. Levin?

13 A. Yes.

14 Q. And who is he?

15 A. Dr. Alex Levin is a well regarded pediatric oph-
16 thalmologist who is the Chief of Pediatric Ophthalmology
17 at the Melfi Hospital in Philadelphia, Pennsylvania.

18 Q. Are you familiar with his book, The Atlas of
19 Pediatric Ophthalmology?

20 A. I am.

21 Q. And in that book, did it discuss shaken baby syn-
22 drome?

23 A. Yes.

24 Q. Does the book provide, to your knowledge, textbook
25 evidence of . . .

1 MR. FLOYD: Your Honor, . . .

2 Q. . . retinal hemorrhaging?

3 MR. FLOYD: . . I'm going to object to this docu-
4 ment which is somebody's work on the shaken baby syn-
5 drome by this Doctor.

6 THE COURT: Yes, he is an expert in his field of
7 pediatric ophthalmology and, of course, it is limited
8 to findings within his field of expertise.

9 He can certainly testify to it with a properly
10 formed question.

11 All right. If you would rephrase and restate the
12 question for me, please?

13 BY MS. WEISS:

14 Q. Do you know whether this book has textbook examples
15 of retinal hemorrhaging?

16 A. I do. This is the textbook that shows many condi-
17 tions relating to pediatric ophthalmology with pictures
18 and a brief description.

19 It does have a portion in there that deals with
20 shaken baby syndrome, non-accidental trauma.

21 Q. I show you what's been marked as State's Exhibit
22 61 for identification. Do you recognize this photo?

23 A. I do.

24 Q. And what is that?

25 A. It is a photo labeled figure 12.6, shaken baby

1 syndrome with severe retinal hemorrhaging.

2 MR. FLOYD: Your Honor, may we approach?

3 THE COURT: Certainly.

4 (Conference at the bench between counsel and the
5 Court off the record)

6 THE COURT: Ladies and gentlemen of the jury, I'm
7 going to ask you to go to your jury room for a few min-
8 utes.

9 Don't discuss the case with your fellow jurors.

10 (Jury excused from Courtroom)

11 THE COURT: All right, Mr. Floyd, what is your
12 objection?

13 MR. FLOYD: Your Honor, it is my understanding
14 that they are going to use a medical text of some kind
15 to assist the testimony.

16 We object in that the procedure is improper and
17 should not be allowed.

18 THE COURT: All right. Madam Attorney General?

19 MS. WEISS: Your Honor, the line of questioning
20 is actually two more questions. This is a photo with
21 the text which I have provided to Mr. Floyd.

22 I would even be willing to keep the text out. We
23 wish to use it for demonstrative purposes to show the
24 photo from the book of severe retinal hemorrhaging as
25 compared to Joshua Dial.

DR. CHEESEMAN ON DIRECT

1 We would ask literally two more questions, Your
2 Honor, and move on from there.

3 THE COURT: All right. Mr. Floyd, if you are say-
4 ing that the basis of your objection is a discovery
5 issue, I am looking at 803 eighteen, as to learned
6 treatise, and it says it is not hearsay.

7 So I might be analyzing it differently than your
8 objection, Mr. Floyd.

9 If you will direct me to a rule you wish me to
10 refer to, I will be glad to analyze it in that regard.

11 MR. FLOYD: Yes, sir, I believe Rule Five would
12 prohibit using the learned treatise by this witness,
13 in that . . .

14 THE COURT: I know you are very familiar with Rule
15 Five, as I know the Attorney General is, but I under-
16 stood State's Exhibits 60, 61 and 62 had been provided
17 to you or that copies of it had been provided to you
18 That is, State's Exhibits for identification 60, 61 and
19 62.

20 It appears to me if the Doctor is going to testify
21 to it, it would be an exception under eighteen, but let
22 me look at Rule Five since you are referring to it.

23 (Brief pause in proceeding)

24 THE COURT: Are you referring to Rule Five A One,
25 C and D?

DR. CHEESEMAN ON DIRECT

1 MR. FLOYD: That's correct, Your Honor.

2 THE COURT: All right. Anything further, Mr. Floyd?

3 MR. FLOYD: Nothing further.

4 THE COURT: Yes, maam, Madam Attorney General.

5 MS. WEISS: Your Honor, as I said earlier, a copy
6 of the photo from the book that was given to Mr. Floyd
7 is being used for demonstrative purposes, and it is not
8 being admitted into evidence, not being offered for
9 evidence.

10 It is for demonstrative purposes for the expert,
11 and it would be from the learned treatise that Dr.
12 Cheeseman has already testified to, and it was turned
13 over to the Defense.

14 THE COURT: All right, you are speaking of State's
15 61, so it will be marked for identification.

16 MS. WEISS: Yes, Your Honor. I intend to use the
17 photo and cover up the written words.

18 (Brief pause in proceeding)

19 THE COURT: All right, the State is going to use
20 the photograph, State's Exhibit 61 for identification,
21 for demonstrative purposes?

22 MS. WEISS: Yes, Your Honor.

23 THE COURT: Mr. Floyd?

24 MR. FLOYD: Nothing further.

25 THE COURT: I will allow you to do that. However,

DR. CHEESEMAN ON DIRECT

1 as far as the language that I read on figure 12.6,
2 shaken baby syndrome, severe retinal hemorrhage, . .

3 MS. WEISS: Your Honor, I have no problem . .

4 THE COURT: . . I've just folded it over to where
5 it just shows that part.

6 I don't see a discovery violation. This Doctor
7 testified that it came from Dr. Levin's book?

8 MS. WEISS: Yes, sir.

9 THE COURT: Let's take a five minute recess. Doc-
10 tor, you may step down during the recess but you may
11 not discuss your testimony.

12 (Witness excused from stand. The Court took a
13 brief recess and the matter was resumed. The witness
14 then resumed the witness stand.)

15 THE COURT: All right, anything before we bring
16 our jury back in?

17 MS. WEISS: No, Your Honor.

18 THE COURT: Mr. Floyd?

19 MR. FLOYD: No, Your Honor.

20 THE COURT: Bring in our jury, please.

21 (Whereupon, the jury returned to the Courtroom)

22 THE COURT: All right, our jury is back in the
23 Courtroom. We will continue the Direct Examination
24 of Dr. Cheeseman by the State.

25 You may proceed.

DR. CHEESEMAN ON DIRECT

1 DIRECT EXAMINATION CONTINUED

2 BY MS. WEISS:

3 Q. Dr. Cheeseman, in your training, this would be
4 an example of severe retinal hemorrhaging?

5 A. Yes.

6 Q. How did the hemorrhaging in Joshua Dial compare
7 to that textbook evidence for severe retinal hemorrhag-
8 ing?

9 A. That particular image just shows the area around
10 the optic nerve, and I think you get a little bit better
11 detail here.

12 But it was on a par with that, clearly.

13 Q. You were given a history of what was reported by
14 the Defendant as to what happened that caused injuries
15 to Joshua Dial, is that correct?

16 A. Correct.

17 MR. FLOYD: Objection.

18 THE COURT: I'm sorry.

19 MR. FLOYD: I believe the file the case history has
20 come from is the only historian.

21 THE COURT: You can certainly lay a foundation
22 for that, Madam Attorney General. Rephrase.

23 BY MS. WEISS:

24 Q. In order to give your -- in order for you to do
25 your job and diagnose a child and the eyes, you have to

1 have a background or some background of what has hap-
2 pened in order to make that assessment?

3 A. Yes, I believe that's very important. I think
4 that, you know, retinal hemorrhages alone can be taken
5 out of context.

6 Q. Were you able to obtain that history?

7 A. Yes.

8 Q. What history were you able to obtain?

9 A. I was given some background information on Joshua's
10 age, the events leading up to his arrival at Palmetto-
11 Richland Hospital, and the fact that he had to undergo
12 some cardio-pulmonary resuscitation, and the fact that
13 he was admitted to the intensive care unit or pediatric
14 intensive care unit at Richland.

15 Q. And is a part of that history about the Defendant
16 tripping and falling while holding the infant child,
17 and the child hitting his head on a table?

18 A. That is the history as related to me, yes.

19 Q. And in your experience, based on the research,
20 how probable is it that the injuries you have related
21 to the jury is related to that history?

22 A. Without the skull fractures to accompany it, or
23 at least a crushing injury to the skull, I think it is
24 unlikely.

25 Q. With that type of history, what would you have

1 expected to see?

2 A. With a history of being struck in the back of the
3 head, a lot of the time we see this because children
4 fall.

5 I mean, children go down stair steps on walkers,
6 and things of this sort, and drop out of parents' arms.
7 It is relatively uncommon to see hemorrhages of this
8 magnitude from something like that, an accidental fall.

9 He had a number of hemorrhages in the space to the
10 very back of the eye.

11 Q. Based on your knowledge and your experience,
12 could these injuries be called by CPR or resuscitation
13 efforts to Joshua Dial?

14 A. No. There have been reports of CPR causing some
15 retinal hemorrhages, but virtually always they are iso-
16 lated in the very back part of the eye, and not out to
17 the periphery.

18 Q. Could these severe hemorrhages have been caused
19 by a medical condition such as Terson's Syndrome or
20 Purtscher's Retinopathy?

21 A. I'll spell those for you. Tersons is T E R S O
22 N S. Purtschers is P U R T C H E R S.

23 Both syndromes are syndromes that are related to
24 either head injury or decrease in inter-thoracic pres-
25 sure, a crushing type injury to the chest.

1 The chest one is Purcher's and the head one is the
2 Terson's.

3 There have been some reports of this, but they have
4 been very isolated and again not of the same magnitude
5 or averages that are shown in the photographs.

6 Q. And what about sub-acute endocarditis or anemia?

7 A. Well, any sort of tortuous process can sometimes
8 cause hemorrhages. For example, meningitis. Endocar-
9 ditis is an infection around the heart, and sometimes
10 that infection can spread to other areas.

11 There are remote incidents of having some mild
12 retinal hemorrhaging, again few in number.

13 When you get this it does not tend to cause that
14 much, in my experience anyway.

15 One thing that can cause fairly significant reti-
16 nal hemorrhages is leukemia, but to the best of my un-
17 derstanding there was no evidence of that in this young
18 man.

19 Q. And you do have other signs, other than just reti-
20 nal hemorrhaging?

21 A. Yes, the laboratory work would be consistent with
22 leukemia.

23 Q. What you are basically saying is, the severity of
24 the retinal hemorrhaging is what you are basing your
25 opinion on?

1 A. Yes. Another feature of importance as we're look-
2 ing at the pictures, as I was saying, is that area of
3 retinoschisis.

4 Q. Could the severe retinal hemorrhaging have occurred
5 after EMS arrived on the scene?

6 A. Generally what is discussed in the literature is
7 acceleration and deceleration forces, like back and
8 forth movements of the head, will cause hemorrhaging in
9 the back of the eyes.

10 Q. Could this hemorrhaging have been present for days
11 or weeks?

12 A. To this degree I think it would be really unlikely
13 but I will be honest with you and tell you though it's
14 difficult to actually date hemorrhaging right to the
15 minute or to the second in which it occurred.

16 But I think it would be unlikely that it would be
17 present for days or weeks prior to his admission to the
18 hospital.

19 Q. Why would you think that?

20 A. Because generally when it is to this degree or is
21 associated with significant traumatic brain injury af-
22 filiated with it, the more severe the hemorrhaging, the
23 more severe the brain injury tends to be.

24 Generally, you would not expect the child with this
25 degree of injury to be walking, talking, happy and be

1 behaving like a normal child for weeks.

2 Q. So these hemorrhages that we've been talking about
3 in the photographs, State's Exhibits 43, 37, 53 and 44
4 -- these hemorrhages appear at the same time as the
5 head trauma you were describing?

6 A. Again, it is difficult to date the hemorrhages ac-
7 tually, but it is agreed and the literature suggests
8 that the tractional forces, because that's what the
9 treatise on retinal vessels says causes the injury --
10 at the time that those forces are applied.

11 Q. So a child with those types of injuries are typi-
12 cally not going to be asymptomatic for an extended per-
13 iod of time?

14 A. No.

15 Q. Have you ever in your career as a pediatric op-
16 thalmologist seen these types of injuries, full qua-
17 drant, multi-layer, too numerous to count hemorrhages,
18 with an accidental fall?

19 A. I have not.

20 Q. In your expert opinion as a pediatric ophthalmolo-
21 gist, what was your diagnosis of the cause of these
22 injuries?

23 A. As I wrote in my notes, I think it is my obliga-
24 tion as a pediatric ophthalmologist if I see something
25 like this, I think the non-accidental cause of trauma

1 had to be, and I consider it in this case, to be a back
2 and forth shaking motion of the child's head.

3 Q. Was the description you just gave really the shaken
4 baby syndrome?

5 A. Yes.

6 Q. Thank you, no further questions.

7 THE COURT: Thank you, Doctor. Mr. Floyd?

8 MR. FLOYD: Thank you, Your Honor.

9 CROSS EXAMINATION

10 BY MR. FLOYD:

11 Q. Dr. Cheeseman, you don't know when the hemorrhag-
12 ing you saw in the retina occurred?

13 A. No, sir. You really can't get a time-line exactly
14 if that's what you're asking.

15 Q. And you don't even know whether all the hemorrhag-
16 ing that you saw occurred at the same time?

17 A. In our literature -- the answer to your question
18 is, no, I don't.

19 Q. And the -- how large -- can you demonstrate for
20 us?

21 We saw the model you had, but just how big is the
22 retina?

23 A. It is very thin, sir. It is microms thin.

24 Q. And so all these blood vessels that we are looking
25 at, or that there is bleeding from, is very, very small?

1 A. They are small in the pathologic specimen, but
2 with the retinal ophthalmoscope they have a size that
3 is very comparable to the photos you saw.

4 Q. But if you were to look at them, could you even
5 see them with the naked eye?

6 A. No, not with the naked eye. You would need the
7 instrument to see them.

8 Q. So they are very, very, very small vessels or veins?

9 A. Small, very small.

10 Q. And you couldn't see them with the eye?

11 A. Unless you had a post-mortem specimen that you had
12 sectioned to look.

13 Q. And what you're saying is that this bleeding that
14 we see here on this disc we see here is the result of
15 these very, very small body parts which had some kind of
16 breach in their integrity?

17 A. And the contents have spilled out.

18 Q. Right. Now, were you aware also that the young
19 child had a coagulation problem at the time he was ad-
20 mitted?

21 A. No, I wasn't. I just looked at the eyes.

22 Q. Now, a coagulation problem -- if you have a coag-
23 ulation problem, it means his body was not able to
24 coagulate blood and so it would continue to bleed. Is
25 that right?

1 A. It would depend on the extent of the coagulopathy.

2 Q. But if he had a coagulopathy, a significant coagu-
3 lopathy, then these minute body parts whose integrity
4 had been compromised would continue to bleed, would it
5 not?

6 A. To some degree, although I will tell you that there
7 is a pressure inside the eye which is somewhere between
8 twelve and twenty millimeters of mercury generally, and
9 that pressure can hamper the bleeding after the episode
10 occurs.

11 Q. And in this instance, in this case, we have learned
12 that he was on artificial blood pressure stimulation?

13 A.. Not when I examined him.

14 Q. What was his blood pressure when you examined him?

15 A. I looked at his eyes, again.

16 Q. Were you aware that he had been provided chemical
17 assistance to . . .

18 A. I was aware . . .

19 Q. . . . elevate his blood pressure?

20 A. I was aware he was on life support measures, but
21 I don't know the specific medications.

22 Q. Now, this supposes there was an incident or inci-
23 dents that occurred sometime earlier, resulting in some
24 bleeding?

25 A. To the retinal area.

1 Q. And if the child were not properly coagulated and
2 artificial means were used to continue his blood pump-
3 ing through his body, that would continue to bleed?

4 A. Again, I think that the pressure in the eye tends
5 to tamp down on bleeds. For example, a diabetic tends
6 to bleed but it tends to be tamping on and off after
7 time.

8 The other thing I think is important is to look at
9 it in the context of the severity in a young child. A
10 young child will very often have a coagulopathy.

11 Q. And are there other areas or things that would add
12 to or cause hemorrhaging, other than an accident?

13 A. Yes, sir.

14 Q. And some of those are, for example, CPR?

15 A. Yes, small hemorrhages.

16 Q. Are you aware of how much CPR was done or conducted
17 on this child?

18 A. I was told it was thirty to forty-five minutes,
19 but I don't know, you know, how many times his chest
20 was compressed.

21 Q. And were you aware that some of the people doing
22 the CPR were not trained?

23 A. No, sir, I wasn't aware of that.

24 Q. And in fact, those that are trained they do the
25 CPR with their fingertips?

DR. CHEESEMAN ON CROSS

1 A. On a young child, yes.

2 Q. On a child this young?

3 A. Yes.

4 Q. And in fact someone who is not trained may use
5 their full force of the hands, is that correct?

6 A. I can't speak to that.

7 Q. And if they do, that can cause some increase of
8 pressure, intercranial pressure in the brain?

9 A. Well, that would be more of increasing thoracic
10 pressure as discussed before.

11 Q. And that could cause some retinal hemorrhaging,
12 couldn't it?

13 A. It could. Small.

14 Q. Is it small always or does it depend on the force
15 used?

16 A. If you are asking me from my experience, I have
17 only seen small.

18 Q. And in fact some infants are born with retinal
19 hemorrhages, are they not?

20 A. Yes, they are.

21 Q. And those infants also can re-bleed later, can't
22 they?

23 A. It is very unusual. Generally, bleeds from a vag-
24 inal delivery will respond spontaneously within maybe
25 six weeks max.

1 Q. Dr. Cheeseman, there are other -- can you date
2 a retinal hemorrhage?

3 A. It is very difficult to date.

4 Q. In fact, could a retinal hemorrhage occur some
5 days before it comes to light?

6 A. I'm not sure what you're asking me. Do you mean
7 . .

8 Q. Well, before the symptoms appear or require medi-
9 cal attention?

10 A. Most retinal hemorrhages are small and . .

11 Q. But isn't it true that there can be a period of
12 time between when they were -- when an incident causing
13 retinal hemorrhaging occurs until the effects are ob-
14 served?

15 A. Observed or experienced by the patient?

16 Q. Observed.

17 A. It all depends on the interval between the event
18 and the examination time.

19 Q. Have you experienced that personally?

20 A. Have I experienced it?

21 Q. Personally.

22 A. It depends on the extent. If an adult patient pre-
23 sents to ICU with hemorrhages like those seen in the
24 photographs, they would know immediately because the
25 vision would decline precipitously.

1 Q. How about in an infant?

2 A. An infant can't communicate with you clearly, so
3 that is why an exam is so important if a suspicion
4 exists.

5 Q. Isn't it true that often some type of injury can
6 occur to an infant that can be significant but the
7 only thing you can see is the infant is drowsy or ap-
8 pears drowsy?

9 A. Can you give me some specific example?

10 Q. A concussion.

11 A. I'm sorry?

12 Q. A concussion.

13 A. Well, I think in most concussions, you know, a
14 child will be drowsy fairly quickly after the event but
15 it can be over a period of time, yes.

16 Q. How about with a fall where the head is hit?

17 A. It would depend on the degree of the fall, the
18 height, severity of the fall, that sort of thing.

19 Q. How about a shaking incident?

20 A. A shaking incident can affect -- I think it is
21 really always important to put this in context, the type
22 of patient you are talking about, because if I was to
23 come over there and shake you, nothing is going to
24 happen.

25 But a lot would depend on the muscle tone in your

1 neck and the traction forces creating the acceleration
2 and deceleration, and injury may occur right there on
3 the spot.

4 Then if you were examined shortly thereafter, you
5 would see them.

6 Q. If a doctor were to examine and see me soon after
7 that?

8 A. Yes.

9 Q. But there could be an interval of time before it
10 could be observed that an examination was necessary?

11 A. Obviously there is a period of time, because when
12 an incident occurs usually the first step is EMS and
13 going to the hospital, so that there is a period of time
14 that goes by before an ophthalmologist examines.

15 Q. Doctor, have you heard the term coup, contrecoup?

16 A. Yes, sir, I have. Coup is C O U P and C O N T R
17 E C O U P. Coup and contrecoup is a brain, for example,
18 that is incapped in the skull and as the head goes back
19 and forth the brain moves.

20 So it will move to the front part of the skull and
21 then reverse to go the other direction. This shooting
22 back and forth can result in hemorrhages in the brain.

23 Q. And the same can occur with an impact to the skull?

24 A. If it is severe enough, yes.

25 Q. All right. For example, in a motor vehicle accident?

DR. CROSSMAN ON CROSS

1 A. Yes.

2 Q. If there is enough force?

3 A. Yes.

4 Q. Or a back and forth . .

5 A. Yes.

6 Q. Or if there is a fall from a significant height?

7 A. Not a significant height. There have been many
8 studies done on falls, incidental falls, falls of four
9 feet, and those don't show much in the way of hemor-
10 rhage.

11 Q. Are you talking about falls in the cases of bab-
12 ies?

13 A. I'm talking about the kind of fall when a baby
14 falls down stairsteps and hits concrete, and other things,
15 such as a baby being dropped out of a parent's arms and
16 onto the floor.

17 Q. And how about when the parent falls with the child
18 down to the floor?

19 A. . .

20 Q. Would that cause some rotation movement of the
21 head on the way down?

22 A. I'm not sure about the way down, but certainly
23 there can be impact of the parent's body on top of
24 the child but I think if you saw severe injury then you'd
25 probably see a skull fracture too.

DR. CHEESEMAN ON CROSS

1 Q. But not necessarily?

2 A. No, not necessarily, I guess.

3 Q. You don't think if you grab up the child after
4 a sudden fall it might cause some bleeding . .

5 A. To the extent we are talking about, the cause of
6 those sorts of eye findings, no.

7 Q. But usually when you have what you would call a
8 severe injury to the baby, there are other parts of
9 the body injured also?

10 A. Actually, the characteristic -- yes, sir, to the
11 brain.

12 Q. And also the neck, is that correct?

13 A. Sometimes, but the neck is fairly supple in a
14 child so not so much.

15 Q. And the ribs?

16 A. And, in fact, if the child was grasped very force-
17 fully on the ribs, in a crushing type movement, yes,
18 he could have rib fractures.

19 Q. And arm fractures or leg fractures?

20 A. Well, I think what you are alluding to, and cor-
21 rect me if I'm wrong, is the whole spectrum of child
22 abuse.

23 Certainly one of the things you always want to
24 look at if you have a suspicion is to do a skull or a
25 survey where you look at all the bones in various states

1 of healing, or whether there have been any other issues
2 that can contribute.

3 Q. And that was done in this case?

4 A. That's my understanding, that it was done.

5 Q. And it was negative?

6 A. I didn't hear the outcome.

7 Q. If there was some bleeding in the brain, that can
8 or would increase the pressure on the brain in a child?

9 A. It could, depending on the extent.

10 Q. And that increased pressure could contribute to
11 the retinal hemorrhages?

12 A. There is -- there is some suggestion that the pres-
13 sure from the brain can be transmitted down the optic
14 nerve to the retina, and can actually cause some swell-
15 ing of the optic nerve in some cases or some hemorrhages
16 in the immediate -- around the nerve area.

17 Q. Can the optic nerve itself be injured through a
18 shaking motion?

19 A. Yes, it could, and there are some mechanisms where
20 that could happen.

21 Q. It did not happen in this case, did it?

22 A. In the photographs, the optic nerve is a little
23 difficult to see clearly, but to the best we could see
24 there was not any swelling on the one side, and on the
25 other side you really couldn't see at all because of

1 the blood.

2 Q. Thank you, no further questions.

3 THE COURT: Redirect?

4 MS. WEISS: Just briefly, Your Honor.

5 REDIRECT EXAMINATION

6 BY MS. WEISS:

7 Q. Dr. Cheeseman, Defense Counsel mentioned to you
8 about the parent falling with the child to the floor
9 and grabbing the child to break the fall.

10 In those instances, what would you expect to see
11 in your experience as an ophthalmologist, pediatric
12 ophthalmologist, in the retina?

13 A. In the instance of a skull fracture, you might
14 see some small hemorrhages in this central area, but not
15 the wide-spread, multi-layer hemorrhages in all quad-
16 rants of the eye.

17 Q. And when you talk about small hemorrhages, did you
18 say there was no way you could count them?

19 A. In cases where there are some . .

20 Q. Small hemorrhages.

21 A. You can usually count them if there is just a min-
22 imal number in just the posterior part, right back of
23 the eye.

24 Q. And that is what you described as hemorrhages that
25 are as a result of CPR?

1 A. Yes.

2 Q. Say, with thirty to forty-five minutes of CPR, you
3 believe you would be able to count those hemorrhages?

4 A. There have been studies that have been done on the
5 effect of CPR, and in virtually all cases they were
6 limited in number to just a few and you could count
7 them.

8 Q. In your experience, how many times have you ever
9 seen hemorrhages from CPR?

10 A. I haven't seen many.

11 Q. And even if CPR causes small hemorrhaging, could
12 that account for State's Exhibit 43, the hemorrhages
13 you see in that eye?

14 A. Not in my experience nor in the literature am I
15 aware of that.

16 Q. You have said in your testimony that you can't
17 necessarily tell whether they occurred at the same
18 time.

19 Can you explain a little bit more about that?

20 A. Well, I just mentioned in my testimony that it
21 is very difficult to date the actual time of vessel
22 hemorrhages.

23 What I recall there is he was asking me about in
24 children after childbirth, but those generally clear
25 up after about six weeks from studies that have been

1 done where they did MRIs of the children's brains when
2 they suspected some retinal hemorrhages, and there was
3 never findings on MRIs.

4 Q. And it is a very small area, a pediatric eye?

5 A. Yes, and in any eye it is quite small. Actually,
6 the optic nerve is one point five microns in size.

7 In the picture it appears a fairly good size, but
8 if you look at them with the naked eye they are minis-
9 cule.

10 Q. Even though it is very small, severe retinal hemor-
11 rhaging -- would you say it's rare?

12 A. Yes.

13 Q. And it takes a lot to cause even the small blood
14 vessels, very small parts of the eye, to show hemor-
15 rhage?

16 A. It takes a good force.

17 Q. One thing that counsel did not object to was the
18 statement. Would you say that that -- that you used
19 that in addition to the severe hemorrhaging you found
20 to make your findings?

21 A. The elevation of the retina, which it is elevated
22 in that area of bleeding there with that white line, it
23 is very uncommon to see in other mechanisms than a back
24 and forth acceleration, deceleration movement, in the
25 absence of a skull fracture or other trauma like an auto

1 accident or something severe like that.

2 MS. WEISS: May I have one moment?

3 (Brief pause in proceeding)

4 BY MS. WEISS:

5 Q. So you have taken into consideration the CPR and
6 the ill child coagulopathy, and the other situations
7 that you have been presented by Defense Counsel, and
8 does your opinion remain the same?

9 A. My opinion is that the acceleration-deceleration in-
10 jury is the most likely cause of what we see photograph-
11 ically and what I saw in the exam.

12 Q. And the severe hemorrhaging, do you believe that
13 acceleration-deceleration injury to be accidental?

14 A. . . .

15 MR. FLOYD: Your Honor, I don't think I covered
16 that on Cross Examination.

17 THE COURT: You can rephrase the question, please,
18 Madam Attorney General.

19 BY MS. WEISS:

20 Q. Based on the history you were provided, what is
21 your diagnosis in this case?

22 A. Based on the factors of the history and what I
23 saw in the exam, my immediate diagnosis was severe non-
24 accidental trauma.

25 Q. Thank you. No further questions.

DR. CHEESEMAN ON RECROSS

1 THE COURT: Recross?

2 MR. FLOYD: Just a couple of things.

3 RECROSS EXAMINATION

4 BY MR. FLOYD:

5 Q. Dr. Cheeseman, did we establish that what you ob-
6 served here may not in fact all come from the same
7 incident?

8 A. Could you rephrase?

9 Q. What you observed here, the retinal hemorrhaging,
10 . . .

11 A. Right.

12 Q. . . is it possible that it could have come from
13 more than one incident?

14 A. That is possible.

15 Q. And could there be a period of time between those
16 incidents in what you observed?

17 A. With the findings I see right there, not over a sig-
18 nificant period of time.

19 Q. Could these incidents have occurred as much as
20 twenty-four hours earlier?

21 A. Yes.

22 Q. Could they have occurred as much as forty-eight
23 hours earlier?

24 A. Yes, they could.

25 Q. Seventy-two hours earlier?

DR. CHEESEMAN ON RECROSS

1 A. Possible. Hemorrhages like this don't occur im-
2 mediately.

3 Q. A week? Ninety-six hours?

4 A. Still possible.

5 Q. Two weeks?

6 A. I wouldn't say in the cases that I've seen, but I
7 really can't comment.

8 Q. So let's say at least a week earlier, this hemor-
9 rhaging could have begun?

10 A. I'd probably go with the ninety-six hour one but
11 again I would stress the importance of a good eye exam
12 as early as possible.

13 Q. Ninety-six hours?

14 A. I would probably go with that.

15 Q. And, in fact, couldn't there have been an incident
16 that occurred up to ninety-six hours earlier that was
17 exacerbated by a fall?

18 A. As an example?

19 Q. If you are given a history that you were given
20 in this case, the fall by the parent with the child in
21 his arms, hitting the table, could that have exacer-
22 bated, say, a previous shaking incident sometime earlier?

23 A. If within a few days before. I don't know about
24 exacerbating but it could add to minimal type hemorrhag-
25 ing that may have occurred.

1 Q. And that could have been up to several days before?

2 A. Yes, sir, just based on my own experience.

3 Q. Thank you. No further questions.

4 THE COURT: Thank you very much. You may step
5 down, Doctor.

6 (Witness excused from stand)

7 MS. WEISS: May Dr. Cheeseman be excused?

8 THE COURT: Mr. Floyd?

9 MR. FLOYD: No objection.

10 THE COURT: You may be excused, Doctor.

11 (Witness excused)

12 THE COURT: All right. I believe now would be a
13 good time for us to take our evening recess.

14 Madam Attorney General, do you still have an issue
15 that we need to take up or has it been resolved?

16 MS. WEISS: No, Your Honor. If we could just pro-
17 ceed normally.

18 THE COURT: Please recall my earlier instructions
19 to you. Do not discuss the case with anyone and that
20 includes your fellow jurors, family, friends, or anyone
21 else.

22 Do not read, watch, listen to any news reports about
23 the case.

24 Do not do any investigation on your computer or cel-
25 lular phone to obtain or disclose any information.

1 That is prohibited, which is the following, but
2 not exclusive: Information about a party, a witness,
3 an attorney, a Court officer; news accounts of the case;
4 information on any topics raised or testimony offered
5 from a witness.

6 Or information on any other topic that you think
7 might be helpful in deciding the case at all.

8 You must decide the case based on the evidence
9 and the testimony you hear in this Courtroom from a
10 witness who has testified under oath and any documents
11 or exhibits.

12 You need to keep an open mind and do not begin
13 your deliberations until you are instructed to do so
14 by the Court.

15 I would ask that when you leave that you leave
16 your notebooks upside down in your chair, and the
17 Clerk's Office will secure them after you leave.

18 Please be back promptly at nine thirty in the morn-
19 ing, promptly at nine thirty in the morning.

20 The Alternate -- Madam, if you would wait for a
21 moment, please.

22 With that, you are now excused. Have a good even-
23 ing, and thank you very much.

24 (Jury excused for the evening)

25 THE COURT: All right, as to the Juror, Ms. Binau,

1 what is your position at this time, Madam Attorney
2 General?

3 MS. WEISS: Your Honor, I would leave it in the
4 discretion of the Court.

5 THE COURT: And, Mr. Floyd, your position?

6 MR. FLOYD: May we approach?

7 THE COURT: You may.

8 (Conference at the bench between counsel and the
9 Court off the record)

10 THE COURT: All right, you noted some concerns
11 earlier about being a single mom and having a nine month
12 old, I believe. Is that correct?

13 JUROR: Yes, sir.

14 THE COURT: Have those issues changed in any way?
15 You still have your financial responsibilities that you
16 must attend to and your child, Ms. Binau?

17 JUROR: Yes, I do.

18 THE COURT: All right, I'm going to release you
19 from your jury service. I would advise you that you
20 are not to discuss this case with anyone.

21 JUROR: Yes, sir.

22 THE COURT: You are still subject to being recalled
23 throughout this week if the case were to be completed
24 and I started another trial.

25 So you need to call back and listen after six

1 o'clock at night. I will probably advise those jurors not
2 on this case to call back after six o'clock tomorrow
3 night.

4 Thank you for being with us. Your notes will be
5 secured by the Clerk's Office. You may leave and thank
6 you for being with us.

7 JUROR: Thank you.

8 (Juror Binau excused)

9 THE COURT: Anything further from the State?

10 MS. WEISS: No, Your Honor.

11 THE COURT: From the Defense?

12 MR. FLOYD: No, Your Honor.

13 THE COURT: Madam Attorney General, do you think
14 you will rest tomorrow? Can you give me an idea?

15 MS. WEISS: Your Honor, I hesitate to say. It
16 will probably go on all day tomorrow but hopefully we
17 will be able to rest by the end of the day.

18 THE COURT: All right. Thank you very much. Court
19 will be in recess until nine thirty in the morning.

20 (Court stood in recess for the evening, and the
21 matter was resumed on April 13, 2001, at nine thirty
22 A.M.)

23 THE COURT: Anything from the State before we
24 bring in our jury?

25 MR. WATERS: Very briefly, Your Honor.

1 THE COURT: All right.

2 MR. WATERS: Just in follow-up, we would raise
3 this issue at this time.

4 It is very likely that the victim's mother will
5 testify today, and we are not aware of any prior in-
6 stances of abuse or anything of that nature, and we
7 think that any such inquiry along those lines would be
8 inappropriate and would not be appropriate for any
9 purpose, and it would be oppressive and prejudicial
10 to that particular witness.

11 If Mr. Wayne has any intention of going along that
12 line of questioning, or if there any inquiry he would
13 like to make along those lines, we would request that
14 we take that up now, as to whether or not it is admis-
15 sible.

16 Any sort of prior incident is clearly not admis-
17 sible, but we would like to discuss that now rather
18 than in front of the jury.

19 THE COURT: Mr. Floyd?

20 MR. FLOYD: Your Honor, I don't think that we have
21 to reveal our strategy to them before we examine the
22 witness.

23 There is a ninety-six hour window where he was
24 residing with the witness, so I think we can certainly
25 inquire into any actions that took place during that

1 time period or any previous actions, because there
2 would be some time that she was alone with the
3 child in that ninety-six hour window.

4 We would be able to examine her about that.

5 THE COURT: Any response to that, Mr. Waters?

6 MR. WATERS: Your Honor, in response to that, the
7 testimony of Mr. Cheeseman admitted certainly it is the
8 case that retinal hemorrhaging in and of itself can
9 last for a period of time.

10 With retinal hemorrhages there are the telltale
11 signs, but they are not the cause of the child's injury
12 or the child's death.

13 In this particular case, it is clear that those
14 retinal hemorrhages were related to and a part of the
15 neurological injury that this child suffered.

16 There is no evidence whatsoever that says that the
17 child had any brain injury during the ninety-six hours
18 or prior to that ninety-six hours, and that is taken
19 out of context. It is not what the evidence says.

20 He was just focusing at that point on discussing
21 retinal hemorrhaging and not the total amount of in-
22 juries that we have. There is no evidence whatsoever
23 that the child had any brain injury or that he was
24 essentially brain dead prior to this event taking place.

25 THE COURT: Well, the Prosecutor has made a motion

1 in limine to exclude evidence relating to allegations
2 of injuries inflicted on the child prior to 19 January
3 of 2010.

4 I agree you did not have to reveal your strategy
5 unless, of course, it was violative of appropriate rules
6 or such as that.

7 I am assuming that it is not that. However, that
8 type of testimony is very difficult to -- very diffi-
9 cult for the Court to rule on, not knowing what the
10 testimony would be.

11 It should be subject to an in-camera hearing prior
12 to it being asked in front of the jury. There are
13 certain standards that must be met for either third
14 party guilt, which I assume would be the theory, or say-
15 ing, well, tracking it, say, at twelve o'clock on the
16 20th of January -- I assume that is about the time Dr.
17 Cheeseman examined Joshua -- that takes us back to Tues-
18 day at noon, Monday at noon, Sunday at noon, I think.

19 If it is within that time frame, I would have to
20 hear that testimony to determine whether or not any injury
21 was inflicted during that time, and, of course, the De-
22 fendant is saying, as I understand his theory right now,
23 that I didn't intentionally inflict any injury; that it
24 was an accident.

25 That I was holding my child and I tripped and my

1 child fell, hitting his head on a coffee table, which
2 broke the table, and I fell on my child.

3 That is my understanding of what the testimony is
4 through some of the cross examination of some witnesses
5 and, through the statements that Mr. Dial gave to him
6 and to Detective Steele, I believe.

7 Obviously, I have heard no testimony that retinal
8 hemorrhage is the cause of death. Retinal hemorrhage is
9 a symptom of the traumatic brain injury, as the Court
10 understands it.

11 The other testimony I heard was from the EMT was
12 the child appeared to be healthy, thriving, well-cared
13 for, so I don't see an indication right now that there
14 were medical issues of a negative nature with the child
15 prior to the 19th.

16 As I say, Mr. Floyd, I haven't heard all of the
17 testimony. All I'm saying is as far as the motion in
18 limine I would take it under advisement until such time
19 as I heard that testimony out of the presence of the
20 jury.

21 All right.

22 MR. FLOYD: Thank you, Your Honor.

23 THE COURT: Do you understand that?

24 MR. FLOYD: I understand.

25 THE COURT: Is that responsive to your motion in

1 limine at this juncture, Mr. Waters?

2 MR. WATERS: Absolutely, Your Honor.

3 THE COURT: Any other matters?

4 MR. WATERS: No, sir.

5 THE COURT: Mr. Floyd, any matters?

6 MR. FLOYD: No, Your Honor.

7 THE COURT: All right, I hope everyone has their
8 telephones off or not with them, including any of our
9 witnesses.

10 The other gentleman got his phone back?

11 SHERIFF: Yes, sir.

12 THE COURT: Thank you, and I thank everyone for
13 their continued comportment and demeanor in the Court-
14 room.

15 All right, bring us our jury.

16 (Jury returned to the Courtroom)

17 THE COURT: Good morning, Madam Forelady, ladies
18 and gentlemen of the jury.

19 We have lost one of your number. I have excused
20 one of our alternates, but our other alternate and
21 everybody else looks very well this morning, so we're
22 going to press on with our testimony.

23 Also, Madam Foreman, I'm not sure if you are
24 lining everyone up and marching them in in perfect or-
25 der, but I don't notice the usual jury personality or

1 jury personality, I would say, of moving around a lot.

2 As you recall, we are continuing the trial of the
3 case by the presentation of testimony by the State in
4 its case in chief.

5 As I watched you yesterday, you gave all the
6 parties your undivided attention, and I would ask you
7 to continue this as we continue with the trial of the
8 case.

9 Having said that, Mr. Attorney General, you may
10 call your next witness.

11 MR. WATERS: We'd call Dr. Greta Harper to the
12 stand.

13 THE COURT: All right, Dr. Harper, please come
14 around and be sworn.

15 GRETA HARPER, being duly
16 sworn, testified as follows:

17 CLERK: Please have a seat on the witness stand,
18 and when you are seated give us your name for the re-
19 cord. Spell your last name, please, maam.

20 WITNESS: Greta Spencer Harper, H A R P E R.

21 DIRECT EXAMINATION

22 BY MR. WATERS:

23 Q. Dr. Harper, how are you doing today?

24 A. Fine, thank you.

25 Q. Doctor, tell the jury and the Court, if you would,

DR. HARPER ON DIRECT

1 what your profession is?

2 A. I am a pediatric intensivist. That means I am a
3 pediatric critical care specialist.

4 My current full time job is that of a health care
5 administrator, and I am a part time clinician.

6 Q. And could you give us a little history of your
7 educational background and your career and position so
8 that we can understand what you do?

9 A. I attended schools in North Carolina. After grad-
10 uating from high school, I attended college at UNC,
11 Chapel Hill.

12 After graduating from Chapel Hill, I came here and
13 did a family practice residency. I only did one year
14 of that residency before deciding to go into pediatrics.

15 So I switched over to pediatrics and graduated
16 from the pediatric residency at Columbia Health-Richland,
17 and after completing the residency training I went to
18 Jacksonville, Florida, and graduated from a fellowship
19 in pediatric critical care medicine.

20 After completing my fellowship training in pedia-
21 tric critical care, I returned to the Children's Hospital
22 and helped started the pediatric intensive care unit.

23 Q. Okay, and when did you finish your residency?

24 A. I finished my residency in 1987.

25 Q. In 1987, and when did you come to the Children's

1 Hospital to start the pediatric . .

2 A. I returned in 1990.

3 Q. And how long -- were you there from 1990 on to the
4 present, or describe from 1990 on?

5 A. From 1990 until present, and I was the first pedia-
6 tric intensivist in this area there at the Children's
7 Hospital.

8 I helped develop the pediatric critical care medi-
9 cine program as far as my entire career until I switched
10 over to health care administration in October.

11 I was called Medical Director of the Pediatric
12 Critical Care Services at Palmetto Health-Richland.

13 Additionally, I served as Associate Senior Medical
14 Director for that Hospital.

15 Q. And back in January of 2010, were those the rules
16 that you had at that time?

17 A. Yes, very much. Co-medical Director of Pediatric
18 Critical Care Services which encompasses the pediatric
19 ICU, taking care of patients there.

20 And then administratively playing a leading role
21 with how the unit functioned in terms of management and
22 operations.

23 Also, in my role as Co-medical Director for Pediatric
24 Critical Care Services, I was Director for our transport
25 team as well.

1 I played a lead role with co-management and opera-
2 tions of our pediatric sedation unit.

3 Q. And so you have had in addition to residency over
4 twenty years of pediatric critical care, is that cor-
5 rect?

6 A. That is correct.

7 Q. Now, you mentioned the term pediatric intensive
8 care as an intensivist. Can you tell us what that
9 means?

10 A. I'm a pediatric intensivist, which means that I
11 am a general pediatrician as a general pediatrician
12 first, and do not practice as a general pediatrician
13 but I did a residency so I could have if I had wanted,
14 but I meant to specialize in taking care of critically
15 injured children.

16 The purpose of that fellowship was to get addi-
17 tional training in that area, so I spent two years just
18 dealing with critically ill and injured children.

19 That is how you become a pediatric intensivist. I
20 am a general pediatrician that specializes in taking
21 care of little sick babies.

22 Q. Does that include children that have suffered some
23 sort of trauma?

24 A. It does. That is a large part of it or a signifi-
25 cant part of it.

DR. HARPER ON DIRECT

1 Q. All right.

2 MR. WATERS: Your Honor, I would at this time ask
3 to qualify Dr. Harper as an expert as a pediatric inten-
4 sivist and in pediatric critical care.

5 THE COURT: Mr. Floyd?

6 MR. FLOYD: No questions.

7 THE COURT: All right, Madam Forelady and ladies
8 and gentlemen of the jury, again I tell the jury that
9 normally a person cannot give opinion testimony.

10 Always when a person testifies they testify as to
11 what they saw or heard or sensed by smell or some thing
12 of that nature.

13 However, there is an exception when someone is qual-
14 ified because of education, experience or background or
15 training in a particular field or science.

16 They are permitted to give their opinion if the
17 Court qualifies them that way.

18 This witness, Dr. Greta Spencer Harper, will be
19 qualified in the area of pediatric intensivism -- is
20 that a correct term?

21 WITNESS: Pediatric critical care and I'm a pedia-
22 tric intensivist.

23 THE COURT: And in pediatric critical care and can
24 give opinion testimony in those areas.

25 That does not mean you must accept the opinion, but

1 it is evidence for you, the jury, to use in any way
2 you see fit.

3 You may proceed, Mr. Waters.

4 BY MR. WATERS:

5 Q. Back in January of 2010, what was your role speci-
6 fically with the pediatric hospital?

7 A. I was practicing as a pediatric intensivist. I served
8 as Co-medical Director for Pediatric Critical Care Med-
9 cine, and also served as Associate Medical Director for
10 the Children's Hospital.

11 Q. And as a part of those roles there, when a particu-
12 larly serious case came into the pediatric intensive care
13 unit, did you have any involvement with those?

14 A. Yes.

15 Q. How did that work?

16 A. I was on call. We had at that time five pediatric
17 intensivists who shared taking call and covering the
18 service.

19 Generally, the way the service worked was that our
20 work was based on one week service blocks, and I happened
21 to be the intensivist on call when Joshua presented.

22 Q. That's Joshua Dial?

23 A. Joshua Dial.

24 Q. Quickly, you would be what is called the attending
25 physician?

1 A. Yes.

2 Q. And would you explain the relationship between the
3 attending physician and the resident physician, or the
4 resident, if you will?

5 A. Yes. The attending physician is the lead physician.
6 The attending physician meets the critical care team in
7 the ICU. We work as a team.

8 Every team has a leader, and by default the most
9 experienced physician is the leader.

10 We train medical students at Children's Hospital.
11 We are a teaching hospital, like most tertiary care
12 hospitals are.

13 Residents are doctors who have graduated from medi-
14 cal school. Upon graduating from medical school, they
15 select a residency that they would like to train, that
16 they would like to specialize in, and so in my area we
17 had pediatric residents.

18 So it was doctors who had graduated from medical
19 school and wanted additional training in pediatrics,
20 and then after graduating from the residency program
21 they would have the option to be a baby doctor, a pedia-
22 trician, or doing just like I did and selecting a sub-
23 speciality to go into.

24 So for our team, we had the pediatric intensivist
25 or attending physician, and working under that would be a

DR. HARPER ON DIRECT

1 pediatric resident. The pediatric intensivist directly
2 supervised the doctors that are training, the residents.

3 Q. Okay, and those residents, particularly by the
4 time they've reached their third year -- is that typically
5 the program, three years?

6 A. Yes.

7 Q. By the time they reach their third year, do they
8 still have significant responsibility in offering a patient
9 diagnosis and care?

10 A. They do.

11 Q. And at this time that Joshua was presented, was the
12 third year resident that was under you, was that Dr.
13 Sarah Webb-Wood?

14 A. Yes.

15 Q. Could you describe to us your initial assessment of
16 Joshua when he came into the pediatric intensive care
17 unit?

18 A. Yes, sir. I will refer to my notes just to make
19 sure I have complete accuracy as I recorded this.

20 I saw Joshua at the time that he presented. I de-
21 scribed him as a previously healthy five month white
22 male that was transferred from Lexington's emergency
23 department via transfer team.

24 The child had experienced a cardio-pulmonary ar-
25 rest at home and at the hospital, according to a team

1 and physician there. He had had some problems with
2 shock, with low blood pressure, and he had a low temp-
3 erature of eighty-nine.

4 He also had an abnormal brain CT scan which showed
5 that he had some bleeding around his brain and also dural
6 hematomas.

7 Joshua was very sick outlying hospital in Lexington,
8 and he was so sick that they were unable to get an IV
9 in him.

10 He was transported without an IV. Those are circum-
11 stances when children are critically ill and unstable,
12 and the team is unable to get an IV in. Then we do what
13 is called an interosseus line.

14 An interosseus line goes into a bone, so he had an
15 osseus line and had had a couple of interosseus lines in
16 place which served the purpose of an IV.

17 Too, he had bilateral thrombolysis lines attempted
18 as well unsuccessfully.

19 When I . . .

20 Q. Let me stop you right there. When some of the med-
21 ical resuscitation efforts were attempted, they would
22 leave a mark of some sort, I guess? Is that correct?

23 A. That is correct.

24 Q. Okay, and since I've stopped you, you mentioned
25 that he was previously healthy. Aside from his obvious

1 arrest, did he display any source of maltreatment or
2 anything of that nature?

3 A. No. As I recall, and according to my notes, he
4 was a big -- I describe him as a chunky beautiful baby.
5 When I saw him, he had his airway in place by an endo-
6 trachael tube. He was unable to breathe on his own and
7 was on a breathing machine.

8 When I actually met him, the team was bagging him
9 which is a way of admitting oxygen to a patient who
10 does not have the ability to breathe.

11 Q. Is that the kind of squeeze thing?

12 A. Yes, it is.

13 Q. You put a mask over the mouth and you squeeze it?

14 A. We actually had an airway in place, but we had to
15 proceed slowly to intubate him.

16 So he had a plastic tube going into his mouth and
17 into his airway, and the airway is connected to the
18 lungs.

19 Therefore, oxygen can be administered.

20 Q. Okay. You started on this, but Joshua wasn't
21 breathing on his own, correct?

22 A. No, Joshua was in a coma. At the time that I
23 saw him, he was just -- he had no tone, and I call
24 that flaccid -- and comatose, which means that he was
25 totally out of it.

1 He was totally unaware and I could not rouse him
2 from the coma.

3 Q. And what sort of tests did you do to determine
4 the neurological impairment?

5 A. I just did my usual neurologic examination, and
6 the child was in a coma.

7 We also did a few additional things as well, but
8 -- and the usual things are to try to rouse the patient.
9 He did not respond to my voice. We gave him a painful
10 stimulus which he did not respond to either.

11 And that painful stimulus is usually a pinch with
12 the needle on the leg or a pinch on the shoulder. If it
13 is -- those things, if done with enough force, then the
14 patients who had the ability to respond would respond.

15 Q. Okay.

16 A. Also, we put a tongue plate in the back of his
17 throat as well, to see if he would gag, and he had no
18 gag.

19 I checked his pupils and, again, his pupils were
20 big and non-responsive.

21 Because of the severity of the situation, and since
22 he appeared lifeless I did something that is called
23 doll's eyes, which meant that I moved the head in cer-
24 tain directions to see what would happen, and he gave
25 me no response.

DR. HARPER ON DIRECT

1 I also did a special test called an ice water test
2 where I squirted some water in his eyes and looked to
3 see if I could get any type of eye movement.

4 Patients that are still living will have some type
5 of eye movement, abnormal eye movement, in the face of
6 a brain injury, but if a patient is brain dead there is
7 no movement of the eyes with the squirting of water in
8 the ears.

9 Joshua had no movement of his eyes, which made me
10 wonder if his lifeless state did indeed represent brain
11 death.

12 Q. And that is in laymen's terms, but the lack of
13 neurologic functioning would be brain death?

14 A. That is correct.

15 Q. And all the indicators at this point were not fav-
16 orable in that regard, is that fair to say?

17 A. Everything was consistent with him being brain
18 dead. I could not say with certainty, however, because
19 his temperature was low. His temperature was eighty-
20 nine.

21 The normal temperature, as you know, is ninety-eight
22 point six or so, so if you have a low temperature it is
23 not unusual for patients with severe brain injury to
24 have a low body temperature.

25 There is another special test that I do as well to

DR. HARPER ON DIRECT

1 help me confirm brain death called the Apnea Test, where
2 we take the patient off the machines, those patients who
3 do not have the ability to breathe or we're administer-
4 ing supplemental oxygen with the bag that we squeeze --
5 with those patients, we sustain them in the ICU by put-
6 ting them on a ventilator or the breathing machine.

7 One of the things that I do to confirm brain death
8 clinically is to disconnect the patient from the breath-
9 ing machine.

10 When I disconnect them, I look and see if the pa-
11 tient makes any breathing efforts.

12 Joshua was so sick from a shock perspective that I
13 did not do that at that point.

14 So everything during my examination was consistent
15 then with brain death. He appeared to be lifeless. He
16 appeared to be brain dead, and I would have liked to have
17 done that Apnea Test and take him off the breathing machine
18 but he was too unstable for that.

19 Q. You mentioned a little bit about hematoma and that
20 sort of thing.

21 Did you examine his body in regards to his brain, any
22 injury to his brain, and, if so, what were those?

23 A. According to the CT scan that he had performed at
24 Lexington, he did have some hemorrhage on the brain that
25 we call subdural hematomas, and this was consistent

DR. HARPER ON DIRECT

1 with traumatic brain injury.

2 Q. And just so we're clear, hemorrhage is essentially
3 bleeding?

4 A. Bleeding, yes.

5 Q. Can you describe where the bleeding was? Was it
6 bilateral or was it just on one side or . . .

7 A. My recall is that they were bilateral subdural hema-
8 tomas.

9 Q. All right, and we've heard some testimony about
10 differentiation of grey-white matter. Can you explain
11 what that is in this particular case and whether you saw
12 that in this particular case?

13 A. That means that he had brain swelling, which is
14 one of the findings that we locate or look for on a CT scan.
15 The radiologists when they read CT scans will refer to
16 loss of the grey and white matter, and that occurs when
17 the brain cells are injured and they swell, and that
18 swelling obscures that grey matter.

19 So usually there is grey and white on the CT scan
20 and there is less of that because of brain swelling.

21 Q. When you saw the hemorrhaging in the brain and the
22 loss of grey-white differentiation, does that -- is that
23 related in any way to neurological function that you ob-
24 served in Joshua?

25 A. It just told us that we were in a situation

1 with a child who was critically ill, unstable, and who
2 had a severe traumatic brain injury.

3 Q. Did you ask for a skeletal survey in Joshua?

4 A. Our plan was to order one for the following day, and
5 my recall is that we see Joshua late on the 19th, and we
6 had scheduled one the following day.

7 However, I don't think that was actually done since
8 he expired.

9 Q. All right, and you had earlier said that Joshua had
10 otherwise appeared to be healthy and well-nourished when
11 he came in.

12 Did you see any injuries on the outside of Josh or
13 any other injuries outside of the internal injuries that
14 you've described?

15 A. Well, he had the retinal hemorrhages.

16 Q. Explain that a little bit, how you determined that?

17 A. We had a copy called an ophthalmoscope, and that
18 scope is used for looking at the back of the eye. The
19 way you use the ophthalmoscope to look at the back of
20 the eye is simply to get close to the patient, shine it
21 in the patient's eye and visualize the optic nerve which
22 is the main nerve of the eye, the background surrounding
23 that nerve, and usually you see very thin, crisp blood
24 vessel.

25 Joshua had hemorrhages outside. He had bleeding in

DR. HARPER ON DIRECT

1 the background of the eye that we call retinal hemor-
2 rhages, and that was consistent with a severe brain in-
3 jury.

4 When you put the combination of the healthy child
5 without any problems, who is acutely ill, with the
6 history of sometime something happened and at home -- some-
7 times you don't have a history of what actually might
8 have led to it, but the bruise here, the child in a coma
9 where we couldn't wake him up; he's unresponsive, my assess-
10 ment was that he was the victim of a non-accidental trauma
11 which is commonly known as shaken baby.

12 Q. Okay, and commonly known as shaken baby?

13 A. Syndrome. Shaken baby syndrome.

14 Q. Going back to the retinal hemorrhage, I notice in
15 the record you have diffuse retinal hemorrhaging.

16 What does the diffuse mean?

17 A. I saw the hemorrhages in both eyes, and they were
18 obvious. They were not just spotty and restricted to a
19 certain area of the eye, but all over the background of
20 both eyes.

21 There were obvious retinal hemorrhages.

22 Q. Okay. You mentioned a bruise on the chin. Did you
23 see any other evidence of bruising or anything such as
24 that on Joshua?

25 A. Not that I noted. However, I did note that in the

1 records, but not that I noticed or that I recall.

2 Q. What about the concept of acidosis? Was that noted
3 in Joshua and can you explain what that was?

4 A. Yes, my recall is that Joshua did have some signifi-
5 cant acidosis. The blood can be described as having a
6 normal PH, and the PH tells us about the acidity of the
7 blood.

8 The blood can be acid or basic. Joshua's blood PH
9 was acidic. You see that in a situation where there
10 is prolonged arrest or a situation where a patient has
11 some shock where the circulation is poor.

12 Shock can manifest itself as a low blood pressure,
13 hypotension, low blood pressure.

14 Joshua had low blood pressure at the outside hos-
15 pital and he also had low blood pressure at our hos-
16 pital.

17 It is -- and under those circumstances, where the
18 cells are deprived of blood flow, and blood carries cer-
19 tain nutrients, it turns to acid.

20 So he had some acidity in his blood.

21 Q. Okay.

22 A. Or acidosis.

23 Q. And could that be related to the brain injury that
24 he suffered?

25 A. Oh, yes. It is very common for patients who have a

DR. HARPER ON DIRECT

1 significant brain injury to have poor circulation and to
2 develop some shock.

3 Q. And his lack of spontaneous respiration or breathing,
4 could that be related to the brain injury which he
5 suffered?

6 A. Absolutely.

7 Q. How about coagulopathy? Can you explain that and
8 whether you saw that in Joshua?

9 A. He did have some coagulopathy as well. When I pa-
10 tient sustains a brain injury, it affects blood clotting,
11 and blood clotting is described as being abnormal.

12 Basically, the blood is thin. It doesn't clot the
13 way it should. There is something that is very common
14 for patients who have a brain injury to develop, something
15 that we call IVC for short, intravascular coagulation, and
16 products are released which disrupt the usual clotting of
17 blood, and Joshua had that.

18 Q. Okay, but did you make efforts to try and treat that
19 as well?

20 A. We did. We gave him the standard med of Vitamin K
21 and also some fresh frozen plasma.

22 Q. Given these injuries that Joshua suffered you said
23 that you found and the conditions that they caused in
24 him, was he in stable or unstable condition?

25 A. Joshua was unstable. He required medication to

1 support his blood pressure, Dopamine and Epinephrine.

2 Q. And when you did the assessments before he died,
3 was your prognosis of his likely survival favorable or
4 unfavorable?

5 A. Unfavorable.

6 Q. Did you expect him to survive these injuries?

7 A. No, because my initial concern was that Josh showed
8 no -- my assessment was, was he living; was he brain dead?
9 Brain death means consistent with death, and based on the
10 monitors he is on life support that is being provided
11 to the patient.

12 Joshua was gravely ill, injured, when he showed up,
13 and unstable.

14 Q. Okay. What is the concept of coding, and can you
15 explain that to us?

16 A. A code just means that a patient has a combination
17 of not breathing and the heart is not beating.

18 Q. And was the heart . . .

19 A. The heart can be beating but there is funny heart
20 beat where blood flow is significantly impeded. Basic-
21 ally, it just means a combination of not breathing and
22 heart not beating.

23 Q. And when that happens, do alarms go off?

24 A. Yes.

25 Q. And what do the doctors and nurses do at that point?

DR. HARPER ON DIRECT

1 A. We call it a code blue, and we respond urgently
2 to the patient as a team. We are all running to the
3 bedside to try to resuscitate or so we can initiate
4 resuscitation efforts to try to revive the patient.

5 Q. Did that happen to Joshua?

6 A. Yes, it did. Unfortunately, Joshua did progress to
7 a code blue, and we were not successful in resuscitat-
8 ing him.

9 As a matter of fact, we were very concerned. The
10 following day -- you will recall that Joshua came in on
11 the 19th, and then the following day, the 20th, there
12 was concern that the patient was brain dead.

13 We already had neurosurgery involved. The neuro-
14 surgery service was involved for two reasons.

15 Number one, I had a child with a horrific brain
16 injury, and he had blood in his head, so I needed to
17 have the answer confirmed. I wanted the neurosurgeons
18 to confirm that indeed that was the case, and they had
19 done that.

20 Also, I had a patient with a devastating brain in-
21 jury who appeared lifeless, and I like to have another
22 service involved, another attending physician involved,
23 to get a second opinion because of the gravity of the
24 situation.

25 My initial thought was that this child had been a

1 victim of the shaken baby syndrome, some non-accidental
2 trauma, and was brain dead.

3 Let me get another service involved, the other ser-
4 vice being neurosurgery, to make sure that there is no-
5 thing they can do surgically; that he was not a surgery
6 candidate, and there was nothing that they could do to
7 fix him.

8 Secondly, I wanted them involved to confirm the
9 clinical impression later down the road that he was indeed
10 brain dead, and that was the situation we found ourselves
11 in on the 20th.

12 But before we could get everything done in the se-
13 quence we wanted to have it done in, Joshua, unfortu-
14 nately, digressed to critical.

15 Q. And he ultimately expired after that, is that cor-
16 rect?

17 A. Yes.

18 Q. And now you have the unfortunate result that you
19 expected from the injuries he had suffered?

20 A. Yes.

21 Q. Does your record reflect at what time he expired?

22 A. Yes, it does. Let me find it. A code blue on the
23 20th at fourteen O six, and called at fourteen O six.

24 So he was pronounced at six minutes after two.

25 Q. Being two P.M.?

1 A. Yes.

2 Q. At two P.M. on January 20, 2010?

3 A. Correct.

4 Q. You said -- you testified earlier you have had over
5 twenty years of pediatric experience?

6 A. Yes.

7 Q. During the course of that experience, how many crit-
8 ical patients do you think you have seen?

9 A. . .

10 Q. If you could give a . .

11 A. Hundreds if not in the thousands.

12 Q. In your experience, training and education, and
13 from all the critical care patients you have seen, could
14 the injuries, retinal hemorrhaging and bilateral bleed-
15 ing that Joshua had come from falling from an adult
16 height?

17 A. No. That history is not consistent with the life-
18 threatening injuries and actually the fatal injuries
19 that Joshua sustained.

20 Q. What about the child falling from such a height
21 and hitting his head on a table, could that possibly
22 produce the injuries Joshua was suffering?

23 A. You are asking for my opinion, and my opinion, of
24 course, is shaped by history as well that Joshua was
25 perfectly healthy, and then was in this unfortunate life

1 threatening situation that ultimately took his life.

2 And I am --I'm also persuaded by the retinal hemor-
3 rhages that were there as well, but no.

4 Q. No?

5 A. No.

6 Q. These retinal hemorrhages, are they a symptom of
7 the injury, or are they a cause of brain injury?

8 A. The retinal hemorrhages are secondary to the brain
9 injury. Secondary to the brain injury, and . .

10 Q. So they . .

11 A. . . a part of the mechanism of the brain injury,
12 so this forceful to and fro shaking; grabbing the child
13 by the shoulders or grabbing the child by the arms or
14 legs, shaking them back and forth -- children have not-
15 ably large skulls in comparison to the torso.

16 When you get that whiplash-type action going on
17 with that severe shaking, the vessels in the back of
18 the eye are set up, and the way they are made with pres-
19 sure going up, of bleeding and hemorrhaging.

20 And that is the reason why they get those retinal
21 hemorrhages.

22 Q. The force you were talking about a minute or so
23 ago, is that casual force, or does it need to be signi-
24 ficant force?

25 A. It would take significant force.

DR. HARPER ON DIRECT

1 Q. Significant shaking force?

2 A. Yes.

3 Q. If the child was shaken in the manner you have de-
4 scribed, and is ultimately slammed into some surface,
5 would that change your opinion as to the significance
6 of the shaking event?

7 A. It does not change my opinion.

8 Q. In regards to the injuries that Joshua suffered?

9 A. Right.

10 Q. And your final diagnosis in this case was . . .

11 A. Non-accidental trauma which is the same as shaken
12 baby syndrome.

13 Q. Thank you very much, Dr. Harper.

14 Please answer any questions that Mr. Floyd may have
15 for you.

16 A. Sure.

17 THE COURT: Thank you. Mr. Floyd?

18 MR. FLOYD: Thank you, Your Honor.

19 CROSS EXAMINATION

20 BY MR. FLOYD:

21 Q. Dr. Harper, what time did you first see the child?

22 A. I saw Joshua on the 19th, and I think it was
23 around -- shortly after eleven P.M.

24 Q. Eleven P.M.?

25 A. Yes.

DR. HARPER ON CROSS

1 Q. On the 19th?

2 A. Yes.

3 Q. Okay.

4 A. We can look at the nursing notes and tell exactly
5 what time he was admitted to the ICU.

6 The nurses documented twenty-three forty or eleven
7 forty.

8 Q. Did you see him immediately or some time thereaf-
9 ter?

10 A. Immediately.

11 Q. So roughly about the same time?

12 A. Yes, sir.

13 Q. Now, you said there was a bruise under the chin?

14 A. Yes.

15 Q. Do you have any idea what caused that?

16 A. No.

17 Q. Were you aware that EMS was called and saw the
18 child in the house?

19 A. Was I aware? No.

20 Q. Were you aware that an intubating procedure was
21 done by EMS which collapsed the child's left lung?

22 A. No.

23 Q. Do you know how long the child had a collapsed
24 left lung?

25 A. Only from a look at his x-ray reports. I don't

DR. HARPER ON CROSS

1 know or recall that he had a collapsed left lung when
2 he showed up at our place.

3 Q. Do you know how long it took them to uncover that
4 situation?

5 A. No. It usually takes an x-ray to diagnose the
6 collapsed lung. I assume you are referring there to
7 atelectasis, which just means occurring because a tube
8 is displaced when it is put in and results in one lung
9 being inflated with air and the other one not.

10 When that happens, you pull it back and that fixes
11 the problem.

12 Q. And if the tube remains displaced, would it inter-
13 fere with the child's ability to take in oxygen at this
14 point? The ability of his lungs to function?

15 A. The ability to function. I don't understand the
16 question, because when you say ability to function, the
17 reason the tube was placed was because he wasn't breath-
18 ing. Okay? So he had no ability to breathe and so the
19 tube was placed there.

20 There are tubes that can be left on the one side
21 and work fine in terms of having an acceptable oxygen
22 level.

23 As well, the tube being not optimally placed would
24 have nothing to do with neurologic function.

25 Q. And there are many causes of retinal hemorrhages,

1 correct?

2 A. Yes.

3 Q. In fact, a child can be born with them, can he
4 not?

5 A. Yes, but when you say born, with a traumatic de-
6 livery, but not born that way. If there is a . .

7 Q. I mean from the birth, itself.

8 A. Yes. If there is a traumatic . .

9 Q. It can be a result of a vaginal delivery, can it
10 not?

11 A. Yes.

12 Q. And oftentimes they cannot breathe, or do anything,
13 if they are born in that situation?

14 A. I am not familiar with that.

15 Q. Now, you are aware that CPR was administered to
16 this child?

17 A. Yes, but I am not aware of the exact amount of time
18 though.

19 Q. Were you aware of when the child was first brought
20 in to the Lexington Hospital?

21 A. I'm sorry.

22 Q. Were you aware what time the child was brought in
23 to the Lexington Hospital?

24 A. No, I don't have that exact time that he was
25 brought into the Lexington Hospital. I was told he had

DR. HARPER ON CROSS

1 a down time of twenty to thirty minutes.

2 Q. So you don't know how many hours it had been since
3 he came into the Lexington Hospital ER and when you saw
4 him?

5 A. No, sir. I do not recall that time. I would have
6 to go to the records.

7 Q. Do you recall -- did you know that there was a
8 red area on the back of his head when he came into the
9 Lexington ER?

10 A. Based on a reading of my resident's notes, yes, I
11 saw a note that there was some bruising there as well.

12 Q. Now, can CPR cause retinal hemorrhaging?

13 A. Most experts agree that CPR can generally cause ret-
14 inal hemorrhages. Rarely . . .

15 Q. But it can, can it not?

16 A. It rarely . . .

17 Q. It can, can it not?

18 A. Rarely one might see retinal hemorrhages after CPR.
19 Rarely.

20 Q. And can retinal hemorrhaging be caused by sub-acute
21 endocarditis?

22 A. Yes. Usually not the type retinal hemorrhages that
23 we saw in Joshua. Usually it is not such a profuse
24 picture of blood as we saw with Joshua.

25 Q. Now, if a child's intercranial area is very small

1 . . .

2 A. I'm sorry. A child's . . .

3 Q. Intercranial space.

4 A. I guess I just hadn't thought about it that way.

5 I guess I usually think of children having relatively big
6 heads as compared to small bodies.

7 Q. But compared to adults.

8 A. If you are just talking about actual size, yes,
9 if you think that a child's head grows normally. So, yes.

10 Q. And if a -- do you know how much blood there was
11 in the retinal hemorrhaging?

12 A. We hadn't measured the -- I don't know anybody has --
13 -- I don't understand that question of do I know how
14 much blood.

15 That question doesn't make sense. I usually don't
16 measure it.

17 Q. I mean, if you didn't measure it, I understand
18 you don't know.

19 A. Uh hm.

20 Q. And that blood would increase the pressure in the
21 brain?

22 A. It very well could. We had evidence that he had
23 some intercranial pressure.

24 Q. And that intercranial pressure could impact upon
25 the hemorrhaging, could it not?

1 A. From the hemorrhaging? Your questions are not
2 the usual physiology that I think of.

3 Q. I'll ask it another way. If there has been --
4 if there is any retinal hemorrhaging, would you agree
5 that there has been some disruption in the integrity of
6 the small vessels in the eye?

7 A. Yes.

8 Q. Now, once you have that disruption, would the hemor-
9 rhaging continue?

10 A. It's possible, but let me share what I would usu-
11 ally see or what I've seen for years.

12 It is that picture of looks the same from day to day.
13 You don't see more blood in the background of the eye as
14 time passes. That is what I've seen throughout the
15 years.

16 Q. You saw him several hours after the alleged in-
17 cident?

18 A. And the next day as well.

19 Q. And . . .

20 A. It was the same both days that I looked at it.

21 Q. Now, the child also had coagulopathy?

22 A. Yes.

23 Q. And acidosis?

24 A. Yes.

25 Q. Would both of those conditions contribute to the

1 inability of his body to stop the bleeding?

2 A. I want to be clear about the way you are analyzing
3 the term bleeding. Generally with retinal hemorrhages,
4 they are there and you don't see ongoing bleeding as
5 if you cut your skin and there is a significant cut and
6 you hemorrhage.

7 That is -- those are two different types of situa-
8 tions.

9 With retinal hemorrhages, you get them from the in-
10 jury, and there is a picture that is stagnant, as opposed
11 to if I make an incision in someone's skin and I look
12 at it and don't do anything. Then you are likely to
13 have -- think if I cut an artery, it would continue
14 to bleed.

15 Q. But with retinal hemorrhaging, there has to be dis-
16 ruption in the integrity of the small vessels, is that
17 correct?

18 A. I agree completely with that statement.

19 Q. And in a normal situation where there's disruption
20 in the integrity of the vein or the capillary, the body
21 tends to repair that with the coagulation process, is
22 that correct?

23 A. Yes

24 Q. And . . .

25 A. That's one thing that happens. The vessels themselves

1 also will try to clamp the area to stop the bleed-
2 ing there.

3 Q. Okay, but when the body's ability to coagulate is
4 compromised, the patient is at a risk for coagulopathy?

5 A. . .

6 Q. When it is unable to stop that bleeding with the
7 normal situation, is that correct?

8 A. That is as to one type bleeding, but there is where
9 we disagree.

10 Q. And the . . .

11 A. In retinal hemorrhages, you don't see on-going
12 bleeding, as opposed to if a patient has an ulcer, and
13 we've heard about bleeding ulcers before where you can't
14 do anything about it and they continue to bleed.

15 That is a different kind of situation, and we don't
16 think of it in the way of your line of questions.

17 Q. But that -- well, let me ask you another question.
18 The child -- the fact of Joshua's blood pressure being
19 so low -- in fact, it was somewhere around sixty-one,
20 is that right?

21 A. That was the initial one that was written down.
22 Shortly thereafter, when we started treatment, his blood
23 pressure increased.

24 Q. Had that blood pressure been artificially increased?

25 A. I'm sorry.

1 Q. Had that blood pressure been artificially increased?

2 A. It was -- I'm not sure I know what you mean by arti-
3 ficially increased.

4 Q. Were there medical procedures involved to get the
5 blood pressure to come up?

6 A. It is my recall that he was not on Dopamine or Epi-
7 nephrine. Those are two medications that we gave -- that
8 we actually gave to Joshua at one time because of shock
9 and his low blood pressure.

10 Q. You are saying he was not on Dopamine -- he was not
11 given Dopamine?

12 A. At the time that initial blood pressure was taken,
13 he was not on the medications.

14 Q. So he had a fairly normal blood pressure?

15 A. Yes. At that point in time it was written down he
16 had a normal blood pressure, but, as I said, his blood
17 pressure subsequently dropped.

18 Blood pressure in a dynamic process. You can have
19 a blood pressure one minute that is normal and you have
20 a blood pressure the next that is very abnormal.

21 Q. He wasn't given any stimulent such as Dopamine?

22 A. If you will let me look in the records, I can tell
23 you exactly when he got that.

24 Q. You don't know?

25 A. I don't recall.

1 Q. All right.

2 A. And according to my notes, he had resuscitation
3 medications but was not on them continually. He was
4 not on a Dopamine drip when he arrived, but certainly
5 he had had medication. I don't recall exactly what
6 medications he had been administered.

7 Q. Isn't it true that a fall in which a child's head
8 strikes an object can cause subdural hematomas?

9 A. It is true.

10 Q. And a subdural hematoma can cause a massive bleed
11 into the brain?

12 A. I'm going to try to make sure that your lay ter-
13 minology is consistent with the scientific way that I
14 think about things, but a hematoma is -- the dura is
15 the lining to the brain. Underneath that the brain has
16 an entry underneath the brain inside the dura.

17 So, yes, when you say -- your question is can you
18 get bleeding where?

19 Q. In the cranial cavity.

20 A. Yes.

21 Q. And there is a subarachnoid space?

22 A. Subarachnoid.

23 Q. And that can be open space in a small child?

24 A. What do you mean by open space?

25 Q. Not completely filled.

1 A. I don't know what you mean by that question.
2 It doesn't sound scientific to me.

3 Q. I'm sorry. I don't claim to be a scientist.

4 THE COURT: You may ask your next question.

5 BY MR. FLOYD:

6 Q. Are there differences in the makeup of the internal
7 cavity of a child as opposed to an adult?

8 A. Generally speaking, things just aren't as mature.
9 Actually, there is a size difference.

10 Q. Now, you mentioned a term called shaken baby syn-
11 drome, but that is really not a term favored in the
12 medical science, is it?

13 A. I see the term still frequently used. I use the
14 term non-accident trauma generally. That's my preferred
15 term to use.

16 Q. Now, isn't it true that some babies that have been
17 shaken to the extent that serious injury results often-
18 times have collateral injuries other than to the brain?

19 A. Collateral injuries -- I don't know what you mean.

20 Q. Injuries such as broken ribs, cracked ribs, and
21 fractures?

22 A. Yes. Children that are abused will sometimes have
23 other injuries as well.

24 Q. Because the child's musculature is not as deve-
25 loped as in an adult?

DR. HARPER ON CROSS

1 A. That is correct.

2 Q. So oftentimes if there is a violent shaking, you will
3 have some neck injury?

4 A. Generally in young infants you don't see it. An asso-
5 ciated neck injury can happen.

6 Q. Cracked ribs?

7 A. Cracked ribs are secondary sometimes to the shaking.
8 Yes, you can have other injuries as well.

9 Q. And . . .

10 A. Fractured ribs is one of the things that we look
11 for, as well as internal injuries.

12 Q. I appreciate your answer, but if a person violently
13 shakes a child and they grab them by the chest area,
14 that could produced cracked ribs?

15 A. Yes.

16 Q. And you would see some bruising in that area?

17 A. Eventually you might see some bruising, but you
18 have to understand that bruises evolve over time.

19 Q. And if you grab their arms and do it, they may have
20 some broken bones or cracked bones in the arms?

21 A. You might, but not necessarily. It's unusual.

22 Q. There were no skeletal injuries in Joshua, were
23 there?

24 A. I'm hesitating because I am trying to recall if
25 we actually got the skeletal survey, and my recall is

DR. HARPER ON CROSS

1 -- well, let me just say that when a child expires un-
2 der those circumstances we will still do those x-rays,
3 after death, and I don't know the answer to that, as
4 to whether those x-rays were actually done.

5 Q. Okay.

6 A. And I never saw his -- I don't recall seeing his
7 post-mortem. The post-mortem is the autopsy results.

8 Q. A post-mortem is a comprehensive examination where
9 the cause of death is actually decided, is that correct?

10 A. That's where a comprehensive exam is performed, and
11 during that comprehensive exam they review the history
12 and medical records that we provide.

13 Then they come up with a final diagnosis for the
14 death.

15 Q. So do you have any information or knowledge that
16 Joshua Dial had any cracked ribs?

17 A. I don't know the answer to that. I do not recall if
18 the x-rays were done, and I don't recall the results.

19 Q. I guess I wasn't clear in that question. Do you
20 have any knowledge as to whether or not Joshua had any
21 skeletal injuries?

22 A. No.

23 Q. Do you have any knowledge as to when the retinal
24 hemorrhages occurred?

25 A. I don't know exactly when they occurred, but I do

1 know that the way I put things together, . .

2 REPORTER: I'm sorry. I didn't get that with someone
3 coughing. The way I put things together . . .

4 A. The way I put things together is that Joshua had an
5 insult that led to a traumatic brain injury, and that the
6 retinal issues were secondary to that.

7 The way to pinpoint what happened was around the
8 time that he presented or at least when EMS was called
9 to his home.

10 BY MR. FLOYD:

11 Q. Looking at -- just looking at the hemorrhages, can
12 you tell when they occurred?

13 A. No, with retinal hemorrhages I can just generally
14 say they can be there for, you know, two to three weeks.

15 Q. That's what I was trying to find out, and you don't
16 know by looking at it whether the retinal hemorrhaging
17 you saw occurred from one, two or three different in-
18 stances?

19 A. I can't say with certainty, but using sound judg-
20 ment one has to look at the total picture. The picture
21 involves taking a picture when Joshua was a healthy child,
22 and then the history was that there was a significant
23 event at home, and whatever that was, then looking at
24 his real life devastation as he was when he showed up,
25 his bruise, his retinal hemorrhages, his respiratory

1 failure, inability to breath, his coagulopathy, and put-
2 ting that all together I came up with the non-accidental
3 trauma.

4 Q. I understand all that.

5 A. And adding them together, the other thing is as it
6 relates to your question about the retinal hemorrhages,
7 Joshua had no history of being sick otherwise, to explain
8 those hemorrhages.

9 Q. How do you know that?

10 A. From the history, and I talked to the parents there
11 when they showed up.

12 Q. Lexie Dial?

13 A. Lexie Dial, the father, and my recall is that he
14 was not there when I took my initial history, but I did
15 talk with him later on in the PIC U.

16 Q. In fact, can't there be some passage of time be-
17 tween an incident in which an injury occurs and signifi-
18 cant symptoms appear?

19 A. I'm thinking really hard here to try to go with
20 you, but it is hard for me to do that, because the com-
21 mon sequence is this type setting.

22 The child was doing perfectly well and then he sus-
23 tained a traumatic brain injury, and the retinal hemor-
24 rhages are secondary to the traumatic event.

25 That is how we should be looking at this. It is

1 the logical way to look at it. The way that things
2 usually happen, the way things usually transpire.

3 Q. Let me ask . . .

4 A. And you can ask me questions about other things
5 that could cause retinal hemorrhages, but we know he
6 didn't have the bacterial endocarditis, for example.

7 That's what I'm saying. He had not been sick other-
8 wise with any of the things that you mentioned.

9 He did require CPR, and we said that normally child-
10 ren do not get retinal hemorrhages from CPR.

11 So you have the thing about putting things together
12 and the totality of the situation, as opposed to picking
13 off bits and pieces and trying to string them together in
14 logical way.

15 Q. Let me ask you in a different way. Isn't it true
16 that a person can experience a blow to the head and
17 initially have only minor symptoms and later pass away?

18 A. Yes.

19 Q. For example, a person can have a blow to the head and
20 no symptoms right away but later have serious injury?

21 A. Yes. It wasn't that they didn't have any symptoms
22 but nothing that made them seek care.

23 Q. Okay. Because, for example, a child can have a blow
24 to the head and maybe he just seems a little drowsy, but
25 then after passage of some time become lifeless?

- 1 A. It's entirely possible.
- 2 Q. And how much time would you think that could be?
- 3 A. My experience has been less than a day.
- 4 Q. Less than a day?
- 5 A. Yes.
- 6 Q. Okay.
- 7 A. And my experience has also been in children, and
- 8 we are talking about epidural hematoma as opposed to
- 9 subdural hematoma.
- 10 Q. But it is possible that could occur?
- 11 A. It is possible.
- 12 Q. Just looking at the child, there is no way you can
- 13 determine whether or not what you saw was the result of
- 14 one or more incidents?
- 15 A. My assessment was that it was a singular incident.
- 16 I can't say that with a hundred percent certainty, but
- 17 being a prudent clinician and common things being com-
- 18 mon, the fact that the child was a picture of health
- 19 with no history of having had any significant signs or
- 20 symptoms of illness or sickness or anything at home prior
- 21 to this, it points to the fact that it was a singular
- 22 incident.
- 23 Q. Of course, your history may not be complete, is
- 24 that not correct?
- 25 A. My history was as complete as it gets being the

1 human beings that we are.

2 Q. Well, you -- I'm not criticizing you.

3 A. And I am not taking it that way. I'm trying to
4 point out how we work in medicine. No, I'm not taking
5 it personally but I'm just pointing out that I had a
6 conversation with the care-takers, the parents, and
7 that is the history. That's what we go with, from the
8 child's parents.

9 Q. And although the parent may not recognize a child's
10 drowsiness or listlessness as being a symptom of con-
11 cern, . . .

12 A. That can happen, but most parents start out inex-
13 periented and most parents, even though it is natural
14 to be inexperienced as a first time mom or whatever,
15 recognize when their child is in need of medical help.
16 Most parents recognize when their child is sick.

17 They might not be able to tell you exactly what's
18 going on. I've had parents who show up and say, some-
19 thing is not right with my baby.

20 Q. The child may sleep more than it normally does?

21 A. It's possible.

22 Q. And that could be for non-emergency reasons? I
23 think that is significant.

24 A. It can but when we say that we have to look at it in
25 terms of what's the time line.

1 A parent may initially dismiss the child being a
2 bit more sleepy or drowsy, but at some point later, say
3 an hour later, a day later, they pick up on it.

4 So certainly you always have to interpret that.
5 What is the time line associated with recognizing that
6 something wasn't quite right.

7 Q. Thank you. No further questions.

8 THE COURT: Redirect, Mr. Waters?

9 MR. WATERS: Yes, sir.

10 REDIRECT EXAMINATION

11 BY MR. WATERS:

12 Q. Dr. Harper, you were asked a few questions about CPR
13 and potentially other causes for retinal hemorrhage.

14 Is there something about the nature or the extent of
15 the hemorrhaging in this case that would aid your decision
16 in whether other causes had any relationship to this
17 particular case?

18 A. Yes. Again, the retinal hemorrhages were diffuse.
19 Generally with severe traumatic brain injury, non-acci-
20 dental trauma or shaken baby syndrome, that is what we
21 see, as opposed to impact on one side of the head or
22 the other.

23 You generally don't see these retinal hemorrhages
24 like Joshua had. That is seen more with shaken baby
25 syndrome.

1 Q. You were asked about bruising on Josh, and your notes
2 show a small bruise right here, is that correct?

3 A. Yes.

4 Q. There was discoloration or something on the back of
5 Josh's head. Are there other explanations -- and on
6 the back. Are there other explanations other than a bruise
7 from sort of trauma or blunt force being applied?

8 A. Yes. He was five months old and obviously we look
9 at the soft tissue, the fact he had been on his back for a
10 while, and he was in a shock-type state, with blood flow
11 or circulation that is poor.

12 It could just be mottling that comes because of
13 spine blood flow. It could be that as opposed to start
14 of a bruise.

15 Q. And you were asked a lot about the history that
16 you obtained?

17 A. Uh hm.

18 Q. And you told him you had talked with the mother and
19 father, the Defendant in this case. Correct?

20 A. Yes. The dad was not there when I took my origi-
21 nal history but I did speak with him later.

22 Q. And the mother, do you remember -- did she have to
23 be brought to the hospital?

24 A. I don't know.

25 Q. But you at least spoke to the Defendant, and did

1 he say anything to you about any prior injury before the
2 baby falling and hitting his head?

3 A. From my recall -- I don't recall exactly the speci-
4 fics of what he said, but he said the baby was dropped
5 in some way.

6 Q. Did he say anything about any prior event before
7 then?

8 A. Definitely not.

9 Q. With the nature and extent of the injuries that
10 Josh had, what is the most likely outcome as to when
11 he would become symptomatic?

12 A. Shortly after -- shortly afterwards.

13 Q. And with this type injury, he would become symp-
14 tomatic shortly after the incident?

15 A. Correct.

16 Q. So it had to be -- it is very unlikely it would
17 be a long period of time before he became symptomatic,
18 is that correct?

19 A. That's correct.

20 Q. We're talking about symptomatic with the loss of
21 brain function, in arrest, not breathing, all the rest
22 of it?

23 A. Correct.

24 Q. You were asked about your terminology, non-accidental
25 trauma or shaken baby, and you said you preferred non-

DR. HARPER ON REDIRECT

1 accidental trauma?

2 A. That's what I personally prefer.

3 Q. And was that your diagnosis in this case?

4 A. Yes.

5 Q. And non-accidental means not an accident, correct?

6 A. Right.

7 Q. Nothing further.

8 THE COURT: Recross, Mr. Floyd?

9 MR. FLOYD: Just a few, Your Honor.

10 RE CROSS EXAMINATION

11 BY MR. FLOYD:

12 Q. Dr. Harper, when do you say it is certain listless-
13 ness would occur?

14 A. I can't give you a time by looking at a clock. I
15 can tell you that the injuries were of a life-threatening
16 nature and it would have occurred shortly after the insult
17 -- occurred shortly after the traumatic event.

18 Q. And when you say shortly, do you mean within hours?

19 A. I would say within an hour or so.

20 Q. And do you know whether it was more than one inci-
21 dent?

22 A. Based on the history when they saw the findings, I
23 think it points to a singular event.

24 Q. And other than the history, can you say with cer-
25 tainty this was one incident?

1 A. Based on the interpretation of the CT scan which
2 -- my recall is that this was acute bleeding, not sub-
3 acute.

4 Acute meaning that it had occurred within a few
5 hours as opposed to several hours or days. The radiolo-
6 gist can give you an opinion about the age of the bleed-
7 ing they see on the CT scan.

8 Their reading was an acute subdural hematoma.

9 Q. Acute meaning within how many hours?

10 A. Within a few hours. Most people would think within
11 six hours or so.

12 Q. Within six hours or so?

13 A. Uh hm.

14 Q. Could it be eight to ten?

15 A. If you just take a CT scan and take it away from
16 the history and all of that, perhaps, but, again, the
17 way we function in medicine is that we look at patients,
18 we look at the laboratory data, we look at the imaging
19 space, and we put it all together.

20 Q. I understand this was very important to you, your
21 diagnosis, but sub acute -- an acute subdural hematoma
22 could occur anywhere within the last eight to ten hours
23 of presentation?

24 A. It's possible. However, taking the history in the
25 case, I think that it certainly wasn't that long.

1 The dad gave a history that something happened to the
2 child, there were life-threatening injuries, a severe
3 brain injury. He had the retinal hemorrhages, had the
4 coagulopathy, had the bruise under the skin. He wasn't
5 able to breathe.

6 He developed shock, respiratory failure, and he
7 ultimately died.

8 Something traumatic happened, and that is what I
9 think. That's what my history tells me.

10 Q. Now, we've established, have we not, that there
11 can be some period of time between the incident and the
12 development of a life-threatening situation?

13 A. Yes.

14 Q. And we have established, have we not, that an acute
15 subdural hematoma could have existed anywhere from eight
16 to ten hours prior to presentation?

17 A. Possible, but not likely in this situation. The
18 history tells us that, and experience tells us that.

19 This child was fine, had the acute event at home,
20 and showed neurologic devastation shortly after the
21 event occurred.

22 Q. But we don't know, do we, if there could not have
23 been a shaking incident earlier and then a falling inci-
24 dent later?

25 A. I think we do know that. We know that based on

DR. HARPER ON RE CROSS

1 the history and based on the child's presentation. I
2 think that the child would have presented earlier had
3 he had a shaking type incident earlier.

4 Q. But if the child had a shaking type insult earl-
5 ier, there still may have been some period of time when
6 the child would have been mildly symptomatic until it
7 developed into an emergency situation?

8 A. I think that is possible but unlikely.

9 Q. Thank you. No further questions.

10 MR. WATERS: Nothing further, Your Honor.

11 THE COURT: Thank you very much for being with us
12 today. You may step down.

13 Any objections to the Doctor being excused?

14 MR. FLOYD: No, Your Honor.

15 THE COURT: Thank you again.

16 (Witness excused)

17 THE COURT: We'll take our recess now of fifteen
18 minutes. If you'll leave your pads upside down on your
19 chairs, the Clerk will secure them.

20 Everyone else remain seated until the jury has
21 gone.

22 Do not discuss the case.

23 (Jury excused from Courtroom)

24 THE COURT: Court will be in recess for fifteen min-
25 utes.

1 (Whereupon, the Court took a brief recess, after
2 which the matter continued)

3 THE COURT: Anything before we bring in our jury?

4 MS. WEISS: No, Your Honor.

5 THE COURT: Defense?

6 MR. FLOYD: There is a matter. I understand the
7 State now intends to submit a video they say was shown
8 to the Defendant and the mother of the child at the
9 hospital.

10 We would object as to the relevance of the video,
11 Your Honor.

12 THE COURT: All right. Madam Attorney General.

13 MS. WEISS: Yes, Your Honor. Actually, what we
14 were mainly wanting to introduce was a form about the
15 video; verifying that Lexie Dial and Misti Richard saw
16 the video when Josh was born, and a print of the shaken
17 baby education and verification statement that they
18 both signed.

19 THE COURT: All right. Did you have it marked?

20 MS. WEISS: It does not have a number yet.

21 REPORTER: Exhibits 84 and 85 for identification.

22 MS. WEISS: I have the video and I would like to
23 lay the foundation for the video, but I am not -- it
24 is not known at this point whether it will be published
25 to the jury.

1 I just want to lay a foundation at this point.

2 THE COURT: Well, if you are not going to offer
3 the evidence I don't see any purpose in laying a founda-
4 tion, number one.

5 Number two, Mr. Floyd isn't objecting to the form
6 He has objected to the video.

7 If the video is not going to be offered then, quite
8 frankly -- I don't want to tell you how to try your
9 case, but I'm not going to rule on evidence that is
10 not going to be offered.

11 I'm just not going to do that.

12 MR. FLOYD: Well, sir, if all they are going to
13 offer is the verification, I would certainly object to
14 that, Your Honor.

15 THE COURT: Well, nobody has shown it to me. The
16 Attorney General said it is showing where they were
17 educated on the shaken baby syndrome, but I haven't seen
18 it.

19 You hadn't before objected to the form.

20 MR. FLOYD: I assumed the form was going to be
21 offered at the time they offered the video or when it
22 was shown.

23 We would move to exclude any evidence that says a
24 form was signed or the video.

25 THE COURT: Let me see the form.

1 MS. WEISS: Yes, Your Honor.

2 THE COURT: All right, the form is now marked State's
3 Exhibit 84 for identification.

4 (Brief pause in the proceeding)

5 THE COURT: What's the relevancy of State's 84?

6 MS. WEISS: It is a form signed by Lexie Dial, the
7 Defendant in this case, and we will have witnesses ob-
8 viously to establish that he viewed the video and was
9 educated against shaking a baby and the consequences
10 thereof.

11 In the Defendant's opening, he used the language of
12 lack of knowledge of a parent, and this goes directly
13 to that, Your Honor, to what the Defendant did actually
14 know about the dangers of shaking the baby.

15 It is directly related to intent and extreme in-
16 difference to human life.

17 THE COURT: Mr. Floyd?

18 MR. FLOYD: Your Honor, I don't see the relevance of
19 it. Suppose a person is charged with shooting someone
20 with a gun. Of course, he would know it would cause
21 harm, but that doesn't mean he would intentionally harm
22 the child and it isn't relevant on that point as to
23 shaking a baby.

24 THE COURT: This form just says that he has been --
25 he and she have been -- assuming this is their

1 signatures -- that they have been offered the opportun-
2 ity to view the video presentation on the dangers asso-
3 ciated with shaking small children; that they have
4 been given information about the importance of learning
5 infant CPR.

6 If they voluntarily signed the statement acknowledg-
7 ing that they had received, read and understood the
8 information and were offered the opportunity . .

9 MS. WEISS: Yes, Your Honor.

10 THE COURT: It doesn't say they or anyone else
11 viewed it.

12 MS. WEISS: Your Honor, other witnesses have been
13 set up to tie this to the actual viewing of the video
14 and the form to show relevance.

15 THE COURT: Why is the bar code on the bottom of
16 this -- who is R I F E common B O Y?

17 MS. WEISS: Boy Rife?

18 THE COURT: Yes.

19 MS. WEISS: That would be Joshua Dial when he was
20 born. He was born to Misti Rife and that would be the
21 name given to him at the hospital.

22 (Brief pause)

23 THE COURT: Is this a statute? Does it come from
24 a statute under the health regulations, Title 44?

25 MS. WEISS: Yes, Your Honor.

1 THE COURT: Forty-four 37 50, is that right?

2 MS. WEISS: Yes, Your Honor.

3 THE COURT: How is this relevant to his Indictment
4 and what occurred January 19 and 20, 2010?

5 MS. WEISS: It goes to his knowledge and intent,
6 Your Honor, to show -- it was a situation where he,
7 the Defendant, is alleged to have shaken a baby and
8 a defense which has been alleged that he was an inex-
9 perenced father and didn't know.

10 THE COURT: The opening statement is not evidence.

11 MS. WEISS: No, Your Honor, but the State is pre-
12 pared to show knowledge that he intentionally did this.

13 THE COURT: You would have to show extreme indif-
14 ference to human life which is akin to intent.

15 MS. WEISS: Yes, Your Honor, and that would show
16 that he knew that shaking the baby would endanger or
17 kill the baby:

18 THE COURT: All right, at this time 84 is not ad-
19 missible.

20 Anything further?

21 MS. WEISS: Beg the Court's indulgence.

22 (Brief pause)

23 MS. WEISS: Your Honor, just so you know, the victim
24 is about to estify. The victim's mother is about to
25 testify.

1 THE COURT: All right.

2 MS. WEISS: And she was going to testify that she
3 and Lexi did watch a video about shaking a baby and
4 what could happen if you shake a baby.

5 We intend to offer that testimony.

6 THE COURT: There has been no objection as to that.

7 MR. FLOYD: The objection . . .

8 THE COURT: I only rule on objections made, and
9 the objection has made to the document and the video.

10 MS. WEISS: Yes, Your Honor.

11 THE COURT: So that -- I don't mean to cut you off,
12 Madam Attorney General. The issue -- that's a motion
13 in limine as to whether or not she can testify to that.
14 Perhaps I'll retrace those steps, if Mr. Floyd has objec-
15 tions.

16 MR. FLOYD: Yes, Your Honor. We move in limine
17 to prevent any examination of Misti Richard to the ef-
18 fect that they were shown the video in the hospital in
19 2009.

20 THE COURT: I'll allow the testimony. I will allow
21 her to testify about that. The document itself and the
22 video itself are at this point inadmissible.

23 All right, anything further?

24 (No audible response)

25 Bring in our jury, please.

1 (Jury returned to Courtroom)

2 THE COURT: Welcome back, ladies and gentlemen. We
3 will continue with the trial of the case by the presenta-
4 tion of testimony and evidence by the State in its case
5 in chief.

6 Call your next witness, Madam Attorney General.

7 MS. WEISS: The State would call Misti Richard.

8 THE COURT: All right, come around and be sworn
9 for us.

10 Let me stop you just a minute, please. Ladies
11 and gentlemen, please leave your notes upside down on
12 the table and step out.

13 (Jury excused from Courtroom)

14 THE COURT: Ms. Richard, is that right? What do
15 you have in your hand?

16 WITNESS: Joshua's urn.

17 THE COURT: All right. I will not allow you to
18 get on the witness stand with that in your hand. All
19 right.

20 WITNESS: What about his picture? I just kind of
21 have it so I can look down at it . . .

22 THE COURT: Leave the picture in your pocket. There
23 are some cases out there, State versus Livingston and
24 others, that do not authorize the display of his pic-
25 ture until I have the opportunity to rule on it.

1 I'm not fussing at you, Ms. Richard. I don't want
2 you to take it like that whatsoever.

3 The way you approached the witness stand in a very
4 low-grade manner, I don't believe any members of the
5 jury would have seen it or know what it was, but I can-
6 not allow it.

7 All right, do you want to entrust that to someone,
8 and it would be my preference that that not be in the
9 Courtroom at any time during the presentation of testi-
10 mony.

11 WITNESS: I'm sorry.

12 THE COURT: That's all right. I'm not fussing at
13 you, Ms. Richard. Have a seat just a moment before I
14 bring the jury back out.

15 Mr. Floyd?

16 MR. FLOYD: Your Honor, at this point we would for
17 a dismissal for prosecutorial misconduct. Her walking
18 down to the jury with the child's ashes in an urn is an
19 obvious ploy to gain the sympathy of the jury.

20 My guess is, Your Honor, that they figured out what
21 it was. When they saw her put it down they realized
22 what it was.

23 There is no way that the Defendant can get a fair
24 trial when the child's ashes were in place in the Court-
25 room.

1 THE COURT: Well, thank you, Mr. Floyd.

2 Madam Attorney General.

3 MS. WEISS: Your Honor, I would disagree with Mr.
4 Floyd.

5 I knew that Ms. Richard had that in her pocket. I
6 now know what it was, but I had no idea what it was, even
7 when I met with her at appropriate stages.

8 I didn't know and I don't think the jury knows what
9 it is. I apologize for not making sure it stayed out
10 of sight, but I don't think there is any way the jury
11 knows what's in there.

12 I don't think there has been any prejudice in this
13 case at all by the mere walking up. She has a drink-
14 ing problem or what appears to be a drinking problem.

15 THE COURT: Madam Clerk, do you have a ruler?

16 CLERK: Do I have a ruler?

17 THE COURT: Yes, maam.

18 CLERK: I may have one in the office down there,
19 and I'll be glad to get one for you.

20 THE COURT: I have one in my office. I'll let my
21 Law Clerk get it. (Speaking to Law Clerk)

22 LAW CLERK: Yes, sir.

23 (Brief pause)

24 THE COURT: Do you object, Ms. Richard, if the
25 Clerk measures the dimensions of that article?

1 WITNESS: No, sir.

2 THE COURT: All right. When you have measured it,
3 turn back around and put it in the record, Madam Clerk,

4 CLERK: Just shy of three inches across in width,
5 Your Honor, and about two and a half inches in length.

6 THE COURT: And what's the depth?

7 CLERK: About an inch deep.

8 THE COURT: And the color?

9 CLERK: Bronze in color.

10 THE COURT: All right, thank you.

11 All right, given the size, the small size, of the
12 item, and the fact of the manner in which the witness
13 would have approached the Clerk to be sworn in, her left
14 side and left posterior would have been toward the jury.
15 She had it in her hands, cupping it with both hands, and
16 although I did not recognize the item and had no know-
17 ledge that Ms. Richard had the item, I did recall at the
18 prior hearing -- I think at a bond hearing in the past --
19 motion to review the bond or something of that nature
20 -- that she had that item present.

21 And I wasn't -- even myself, I wasn't sure and I
22 had a much better view of her than any member of the
23 jury panel -- I wasn't sure that was what it was but out
24 of an abundance of caution I directed the jurors outside
25 the Courtroom to take the matter up.

1 I am going to, based on the statement of the Prose-
2 cutor, which I find to be credible -- not that I find
3 Mr. Floyd's statement not credible -- the Prosecutor
4 indicated to me that she had no knowledge that she had
5 that in her hand. She knew it was in her pocket from
6 time to time, but didn't know she had it in her hands.

7 I do not find any prosecutorial misconduct, and I,
8 therefore, would deny the motion to dismiss.

9 Were there other motions, Mr. Floyd?

10 MR. FLOYD: Well, the quandry it puts us in, Your
11 Honor, is -- the next motion obviously is to ask for a
12 mistrial.

13 However, on the other hand, it is like we are kind
14 of forced to make a mistrial motion, which we don't want
15 to do.

16 We'd already had one episode of crying in front of
17 the jury in the Courtroom, and now she has been holding it
18 in her hands as she walked in front of the jury with it,
19 placed it on the table. It's shaped like a heart, and
20 obviously some of the jurors were likely to figure out
21 what that was.

22 I think our chances of having a fair trial has been
23 severely prejudiced.

24 THE COURT: I'm not sure I heard a motion in there,
25 Mr. Floyd.

1 MR. FLOYD: Well, we moved for mistrial because of the
2 State's actions and now we wish to move for a mistrial be-
3 cause of her actions.

4 THE COURT: Looking at this very recent case that was
5 decided March 14 of this year, State versus Parker, the
6 Supreme Court -- the allegations were that the Petitioner
7 Parker argued the Solicitor who initially prosecuted the
8 Petitioner provoked Defense Counsel into moving for a mis-
9 trial.

10 I do not believe there was any intentional misconduct
11 or any misconduct whatsoever on behalf of the State's at-
12 torneys.

13 My observation was that the State was as surprised as
14 perhaps everyone else in the Courtroom that Ms. Richard had
15 that item.

16 I would also point out that Parker was the case where
17 the jury is deadlocked and it was coming to a mistrial, and
18 it becomes kind of a double jeopardy issue, as I understand
19 Parker.

20 In the first trial, the Judge granted a mistrial based
21 upon prosecutorial misconduct.

22 Of course, the Defendant's motion for a mistrial con-
23 stitutes a deliberate election on the part of the Defendant
24 to forego his valued right to have his guilt or innocence
25 determined by this tryer of facts.

1 Again, Mr. FLOYD, I will be glad to give whatever cur-
2 ative instructions you would like me to give to the jury.
3 However, again, it is the Court's observation that I do
4 not agree with your assessment that the jury knows what that
5 is.

6 I do not agree necessarily that the jury even saw the
7 item. Now, I wasn't sitting where the jury was. I am just
8 saying that from my position in the Courtroom.

9 That is not to question you or assault your credibil-
10 ity. It is just a different opinion in that regard.

11 I will be glad to give the jury any curative instruc-
12 tion. I have told them on previous occasions that their
13 verdict may not be based on passion, prejudice, sympathy
14 or any other arbitrary factors, but only upon the evidence
15 produced in this Courtroom.

16 I will be glad to reiterate that. I recall your say-
17 ing at some time that you have no magic words. There are
18 no magic words during the course of a trial necessarily for
19 any particular issue, but I'll be glad to advise them of
20 that or I'll be glad to not say anything.

21 I deny the motion for mistrial.

22 MR. FLOYD: If I might add for the record, and I know
23 you are up there and couldn't see down here, but I would
24 like the record to reflect that she placed the urn on the
25 table where the exhibits are, which is right in front of

1 the jury there.

2 As they stood up -- it was placed on this corner
3 here -- so that as they stood up to leave their attention
4 was directed right to the object, so they had a clear
5 view of the object.

6 Your Honor, I think that balance should extend to
7 the victims. I know victims have rights, significant and
8 sufficient rights that are afforded them, but with those
9 rights come some responsibilities also.

10 So I think the actions of the victims and the victims'
11 assistance people are significant, and that any actions
12 of the victims are attributable to the prosecution.

13 So I think it is a proper analysis that the prosecut-
14 ing attorney actually knew that she had the item when she
15 walked over there.

16 THE COURT: All right. Again, do you want me to give
17 any curative instructions?

18 MR. FLOYD: We would ask the Court to instruct the
19 jury that the actions of a witness in trying to take the
20 urn to the witness stand was a blatant attempt to gain the
21 sympathy of the jury, and that they are to specifically
22 disregard that and those efforts by the witness.

23 THE COURT: Any others?

24 MR. FLOYD: No, sir, Your Honor.

25 THE COURT: Did you want to respond, Madam Attorney

1 General?

2 MS. WEISS: No, Your Honor. You have already ruled
3 so I don't think it's necessary.

4 THE COURT: If you want to put anything in the record,
5 you are certainly welcome to do that.

6 MS. WEISS: I would just like to say for the record
7 that I was actually standing up exactly here when you had
8 asked the jury to leave, and I couldn't even see what she
9 was holding or what was put on the table.

10 I would object to that curative instruction, Your
11 Honor.

12 THE COURT: With regard to that curative instruction,
13 you know, if we -- we have discussed previously in the trial
14 these types of cases cause high emotion for all the parties
15 -- to both sides in the Courtroom.

16 You have the mother and maternal family. You have the
17 father and a paternal family. They are left. I'm sure it
18 engenders intensive motions for all the parties.

19 I have not questioned Ms. Richard and cannot assume
20 that her bringing that item with her was a blatant attempt
21 to gain sympathy from this jury panel.

22 I think I would perhaps in that regard be misleading
23 the jury. That may be correct or incorrect, and I don't
24 have the answer as to whether it is correct or incorrect,
25 nor do I have any evidence in that regard.

1 It may be a mother's bond to her deceased child. It
2 may be the manner in which she steels herself from the task
3 of testifying in a case in which it is alleged that her
4 child was the victim of a homicide by child abuse.

5 I don't have a way of determining that, Mr. Floyd. I
6 just don't have a way of specifying that at this time, so
7 in that regard I will give a general curative instruction,
8 if you would like, but I will not give the requested in-
9 structions.

10 Would you like for me to give a general instruction,
11 or none at all?

12 MR. FLOYD: We would ask just for the general instruc-
13 tion then, Your Honor.

14 THE COURT: All right.

15 MR. FLOYD: And we would prefer the one that we have
16 requested.

17 THE COURT: I understand, and you are certainly pro-
18 tected on the record in that regard.

19 In my discretion, I think that is beyond what the
20 Court should comment on, and I'm not sure of the factual
21 efficacy of that proposition.

22 MR. FLOYD: Your Honor, I believe that might change
23 the wording of the pleadings.

24 THE COURT: You know, I don't know that it's -- well,
25 I guess the easy answer for me is I may change my mind,

1 if you want that in the record. You can certainly have
2 that in the record, Mr. Floyd.

3 MR. FLOYD: Thank you. Just to get a proper refer-
4 ence point as to that position, Your Honor.

5 THE COURT: All right. Anything further you would
6 request, Mr. Floyd?

7 MR. FLOYD: Not at this time.

8 THE COURT: Madam Attorney General?

9 MS. WEISS: No, Your Honor.

10 THE COURT: All right. Just so the ground rules are
11 clear, the most prudent thing would be for the urn not
12 to be in the Courtroom; that it be entrusted to someone
13 else while Ms. Richard is in the Courtroom.

14 Not only is that the prudent thing, but it is my Or-
15 der.

16 MS. WEISS: May we have a minute before we bring in
17 the jury to take care of that?

18 THE COURT: Yes, maam.

19 (Brief pause)

20 THE COURT: Now, to address the issue of the photo-
21 graph, you can -- a witness can't get on the stand and
22 just bring an item with them such as a photograph to be
23 displayed to the jury.

24 If a witness wants to have a photograph in his or
25 her pocket, I do not that I'd ever know that, to start with.

1 Many of us carry photographs of our loved ones in our
2 wallets or purses or bags -- now we've got man bags and
3 everything else -- and I don't know I have objections to
4 that, but if -- I don't want anything that is going to mis-
5 direct the jury from its task of determining what the facts
6 are and the inferences and the law as I tell them the law
7 is.

8 Mr. Dial is entitled to a jury trial by a fair and
9 impartial jury. He has a constitutional right to that,
10 and I have the duty and responsibility to see and I will
11 continue to see that it is strictly, strictly adhered to.

12 Again, I realize the back drop of peoples' emotions,
13 but there is a different task that faces individuals from
14 this witness stand from emotions.

15 So, please, all witnesses will keep that in mind
16 during your testimony.

17 Anything further before we bring in the jury, from
18 the State, Madam Attorney General?

19 MS. WEISS: No, Your Honor.

20 THE COURT: Mr. Floyd?

21 MR. FLOYD: Nothing further.

22 THE COURT: Bring in our jury.

23 (Jury returned to Courtroom).

24 THE COURT: All right. Welcome back, ladies and gen-
25 tlemen.

1 Thank you again for indulging me. Of course, I did
2 warn you all at the first of the trial that your time is
3 very important to me but sometimes I don't manage it very
4 well. I will continue to try to do so.

5 Again, I would advise you that you may not allow
6 yourself to be governed by sympathy, prejudice, passion,
7 public opinion, emotions, any improper conduct or any
8 other arbitrary factors.

9 Both the State and the Defendant have a right to ex-
10 pect that each of you will carefully and impartially con-
11 sider all of the evidence in the case and that you will
12 follow the law as I instruct it to you.

13 The State has the burden of proving its case beyond
14 a reasonable doubt. The Defendant is presumed to be in-
15 nocent. He does not have to prove his innocence. He
16 does not have to present evidence or testimony in any man-
17 ner.

18 He is entitled under the Constitution of our State and
19 United States Constitution to a fair and impartial trial,
20 based on the law and evidence from the witnesses testifying
21 under oath, and any inferences that you may properly draw
22 from that evidence.

23 With that back drop and, of course, your good judg-
24 ment and common sense, I would ask that you please
25 call the witness.

1 SOLICITOR: Misti Richard.

2 THE COURT: All right, Ms. Richard, if you would come
3 around and be sworn, please.

4 MISTI RICHARD, being duly
5 sworn, testified as follows:

6 CLERK: Take a seat in the witness box and state
7 your full name for the record, and spell your last name,
8 please.

9 WITNESS: Misti Richard, R I C H A R D.

10 DIRECT EXAMINATION

11 BY MS. WEISS:

12 Q. Misti, please introduce yourself to the jury. Tell
13 them where you are from.

14 A. My name is Misti Richard, and I have lived pretty
15 much my whole life in South Carolina.

16 Q. Did you go to high school here?

17 A. Yes.

18 Q. Did you finish?

19 A. No, ma'am, I did not.

20 Q. When did you leave high school?

21 A. Eleventh grade.

22 Q. How old are you?

23 A. I'm twenty-three years old.

24 Q. How many children do you have?

25 A. I had two, and I am currently pregnant with my third.

MS. RICHARD ON DIRECT

1 one.

2 Q. When you left high school in the eleventh grade, what
3 did you do?

4 A. I got a job and started working at Sonic.

5 Q. And did you have any other jobs after that?

6 A. I have had several jobs. I have worked at Wild Wing
7 Cafe. I have worked at WalMart. I worked for a model-
8 ing company. I . . .

9 Q. And during that time, is that when you had your
10 first child?

11 A. I'm sorry.

12 Q. Is that when you had your first child?

13 A. I was unemployed then.

14 Q. And what is his name?

15 A. Darrell Lee Rice.

16 Q. And how old is he?

17 A. He is going to be four this July.

18 Q. Who is his father?

19 A. Scott Rice.

20 Q. And your name then was Misti Rice?

21 A. Yes.

22 Q. You were married to Scott?

23 A. Yes.

24 Q. When did you marry Scott?

25 A. In 2006.

MS. RICHARD ON DIRECT

- 1 Q. And how old were you when you had Lee?
- 2 A. I was nineteen.
- 3 Q. Subsequently, did you separate from Scott?
- 4 A. Yes.
- 5 Q. And you said you had Lee in 2007?
- 6 A. Yes, maam.
- 7 Q. And did you have your second child?
- 8 A. Yes, maam.
- 9 Q. What was his name?
- 10 A. His name is Joshua Hunter Dial.
- 11 Q. And when was he born?
- 12 A. August 2nd, 2009.
- 13 Q. Who was his father?
- 14 A. Lexie Dial, the Third.
- 15 Q. And you said you are pregnant now?
- 16 A. Yes, maam.
- 17 Q. And who is the father of that child?
- 18 A. Steven Michael Richard.
- 19 Q. And your name now is Misti Richard?
- 20 A. Yes, maam.
- 21 Q. You are married to Steven Richard?
- 22 A. Yes, maam.
- 23 Q. You have three children by three fathers?
- 24 A. Yes, maam.
- 25 Q. Is a lifestyle or something you would recommend?

MS. RICHARD ON DIRECT

1 A. No, ma'am, it isn't.

2 Q. Does that take away from how much you love those
3 children?

4 A. It does not.

5 Q. Misti, at what point did you start living with Lexie
6 Dial?

7 A. I'm not exactly sure of the date. It was a little
8 before I had gotten pregnant with Josh.

9 Q. So sometime in 2009?

10 A. Yes.

11 Q. And were you staying just with Lexie?

12 A. No, we were staying with his father and his step-
13 mother.

14 Q. And at what point did you move to Oakey Springs
15 Drive?

16 A. As soon as I had Josh, we moved out and then we
17 at the time were staying with his grandmother, and then
18 we got our own place on Oakey Springs.

19 Q. And you had a mortgage to pay?

20 A. Just rent.

21 Q. Just rent?

22 A. Yes.

23 Q. And utilities?

24 A. Electric and that was it.

25 Q. You had bills?

MS. RICHARD ON DIRECT

1 A. Yes, maam.

2 Q. And you stated the jobs you had had, but at that
3 time where were you working?

4 A. At that time I was working Heartbreakers.

5 Q. And we heard the name earlier, but what is Heart-
6 breakers?

7 A. A strip club.

8 Q. How often at that time were you working at Heart-
9 breakers?

10 A. Anywhere from two to three days a week.

11 Q. And was it a set schedule? Did they tell you when
12 to come in and when to leave?

13 A. No, maam.

14 Q. So you could set your own schedule?

15 A. Yes, maam.

16 Q. And then did you stop working at Heartbreakers dur-
17 ing that period?

18 A. Right after Josh was deceased.

19 Q. When you got pregnant with Josh?

20 A. I started working there when I was pregnant, yes,
21 maam.

22 Q. Were you working anywhere at that point?

23 A. No, maam.

24 Q. Were there any complications, prenatal complica-
25 tions, when you were pregnant with Josh?

MS. RICHARD ON DIRECT

- 1 A. Nothing major, no, ma'am.
- 2 Q. And he was born in August of 2009?
- 3 A. Yes, ma'am.
- 4 Q. At some point after Josh was born, did you go back
5 to work at Heartbreakers?
- 6 A. Yes.
- 7 Q. How soon after?
- 8 A. I believe it was four to five weeks afterwards.
- 9 Q. And who usually took care of Josh when you were at
10 work?
- 11 A. It varied. Between Reba Hill, Lexie Dial, and --
12 I'm sorry.
- 13 Q. Anyone else?
- 14 A. Christina Hagens, and my parents, Jessica and Rich
15 Campbell.
- 16 Q. And Lexie Dial being the father, he also watched
17 Josh?
- 18 A. Yes.
- 19 Q. Did he watch him a lot?
- 20 A. Yes, ma'am, he did.
- 21 Q. And how often at that point were you going in to
22 work?
- 23 A. Just a couple of days a week.
- 24 Q. And how long would you usually stay when you went
25 in to work?

MS. RICHARD ON DIRECT

1 A. Depending on the -- if it was a good day, I would
2 leave within a couple of hours. If it was kind of a
3 slow day, I would stay until later on into the night
4 shift.

5 Q. And your job allowed you that ability?

6 A. Yes, maam.

7 Q. You decided what days you'd go in and how long to
8 stay?

9 A. Yes, maam.

10 Q. How long to work?

11 A. Yes, maam.

12 Q. Did you structure that somewhat around whether you
13 were going to get help with Josh?

14 A. Yes, maam.

15 Q. If you would, describe for us a little bit ahead
16 to January of 2010. How old was Josh in January?

17 A. In January he was four months old and five months
18 old. He would have been five months old two days after
19 he was deceased.

20 Q. Four months old and . . .

21 A. And twenty-some days.

22 Q. And how would you describe Josh?

23 A. A very enjoyable, happy, loveable baby. He was
24 always active and loved to be held, loved attention,
25 loved to play.

MS. RICHARD ON DIRECT

1 Q. During his first four months, had he had times when
2 he wasn't feeling so well?

3 A. He was never sick. Even when he was cutting his
4 teeth, he was still a happy baby. He was young cutting
5 teeth, but he had a couple of them.

6 Q. And did you have a pediatrician?

7 A. Yes, maam.

8 Q. Who was that?

9 A. Dr. Cope at Sand Hills Pediatric.

10 Q. And you would take Josh in to see Dr. Cope?

11 A. Yes, maam.

12 Q. You took him in at times even if he wasn't feel-
13 ing ill?

14 A. Yes, maam.

15 Q. And on January 19, right around that time, of 2010,
16 what, if anything, was Josh doing?

17 A. He was watching TV, eating normal, using the bath-
18 room normal, and he was playing normal.

19 Q. He was playing -- what type of things would he
20 play?

21 A. We would do tummy time with him, where he'd lay
22 on his tummy and try to push up, trying to strengthen
23 his arms.

24 He would try -- I would hold his fingers -- lay him
25 on his back and hold his fingers, and I would pull him

1 up, sit him up.

2 Q. Did he look you in the eye?

3 A. Yes, maam.

4 Q. Did you ever notice him following you around the
5 room?

6 A. Yes, maam.

7 Q. Could Josh walk at this time?

8 A. No, maam.

9 Q. What else could he do?

10 A. He could hold his own head up pretty good for a
11 short amount of time. Then it would get too heavy and
12 then he would have to lay it back down.

13 He was in the process of being able to sit up on
14 his own.

15 Q. You said something about teething. Had he started
16 teething?

17 A. Yes, maam.

18 Q. How would you describe that process?

19 A. Well, when he first started he had fever and the
20 first part of the tooth I noticed, and . .

21 Q. How high a fever?

22 A. It wasn't high. He was just really warm.

23 So from experience of taking care of my sister and
24 other children, and my older son, I felt his gums and
25 felt the lump he had from the tooth coming.

1 So I would rub it with a cloth and try to get the
2 pain to go away by doing that.

3 Q. But he didn't have any extreme fever?

4 A. No, maam.

5 Q. And would you even describe him as fussy?

6 A. He would get fussy but not to the point where he
7 was like freaking out fussy.

8 Q. On the morning of January 19th, 2010, who was
9 living with you at that point?

10 A. It was me, Lexie Dial, Third, Lexie Dial, Junior,
11 and occasionally Lexie Dial, Junior, would have his
12 girlfriend there, Christina Hagens.

13 Q. And when you walked in your residence, were your
14 rooms close to each other or far away?

15 A. Mine and Lexie's room, Lexie the Third's room,
16 was on one end of the house, and his father's room was
17 on the complete opposite side.

18 Q. What were you all going through at that point as
19 far as your household?

20 A. Um, . . .

21 Q. Were you getting ready to move?

22 A. Yes, we -- Lexie had gotten some kind of loan to
23 be able to move to a bigger house with a fireplace, so
24 we were going to move into that home. We were moving
25 that week.

1 Q. So you were in the process of packing at that
2 time?

3 A. Yes, maam.

4 Q. And where were you planning to move?

5 A. To Reba Hill's -- to the trailer next to Reba
6 Hill, his grandmother's.

7 Q. Why were you moving stuff out during the week?

8 A. Just to get it out of the way.

9 Q. And on January 19th, 2010, that morning, do you
10 remember what time your day started that day?

11 A. I woke up at four o'clock, around four o'clock in
12 the morning, for Josh's feeding.

13 Q. And what was Joshua eating at that point?

14 A. Just formula, Similac Advanced, the blue container.

15 Q. And that was at four o'clock?

16 A. Yes, maam.

17 Q. Okay.

18 A. And then after I fed him, I put him in his seat
19 in front of the TV, and he was watching a little bit of
20 television.

21 Q. And what did you do while he was watching televis-
22 ion?

23 A. I laid down to try to take a little bit of a nap,
24 but I was watching TV with him.

25 Q. And where was the Defendant, Lexie Dial?

1 A. Lexie Dial was sleeping.

2 Q. So the child was up bright and early, at four A.M.,
3 eating and watching television?

4 A. Yes, maam.

5 Q. And when was Joshua moved from that seat?

6 A. Around nine o'clock.

7 Q. Was that long for him?

8 A. Well, he didn't finish his bottle all the way, and
9 he usually didn't. He usually left a little bit in
10 there, so he would finish it later on.

11 Q. And did he have the next feeding at nine?

12 A. Yes, maam.

13 Q. Had you gotten up before nine?

14 A. I was up and down. I would check on him, go to
15 the restroom, go to the kitchen to get something to
16 drink, and then I would lay down.

17 Q. And at nine o'clock, after his feeding, what did
18 you do?

19 A. I put him down for a nap in his playpen.

20 Q. And did he take a nap at that point?

21 A. Yes, maam. He slept for about an hour.

22 Q. After his nap, what did you all do?

23 A. Before I went to work, I would spend a little time
24 playing with him and trying to bond with him before I
25 would go to work.

1 Q. Can you describe the sort of playing you did with
2 him?

3 A. I would lay him down on the bed and tickle his
4 belly, tickle his feet.

5 Q. What would he do when you did that?

6 A. He would squirm and laugh.

7 Q. So was he looking at you?

8 A. Yes, ma'am.

9 Q. How would you describe his demeanor and how he was
10 when you were playing with him at that point?

11 A. He was like every day.

12 Q. How long did you play with him?

13 A. Um, for a couple of hours. I still had to get
14 ready for work, so in between getting ready for work.
15 You know, I would come and tickle him and then go back
16 and finish getting ready.

17 A. Where was he when you were getting ready?

18 A. In the back of the bedroom from the bathroom where
19 I was getting ready.

20 Q. Do you remember about what time you had to leave
21 for work that day?

22 A. It was around three thirty.

23 Q. Where was Lexie during this time?

24 A. Lexie was a couple of different places around. He
25 had walked from the bedroom to the kitchen and got him

MS. RICHARD ON DIRECT

1 something to eat, and then back to the living room.

2 Q. Did he play with you and Josh?

3 A. I mean, we had our family times when all three
4 would play together. Yes, maam.

5 Q. Do you remember him playing that morning?

6 A. No, maam.

7 Q. Do you remember those hours before you left for
8 work specifically?

9 A. Yes, maam, I do.

10 Q. and how did you go to work that day?

11 A. Christina Hagens picked me up.

12 Q. Did you normally have someone pick you up?

13 A. We had a vehicle but the transmission had messed
14 up in it, so Lexie Dial's father had said that Christina
15 could start taking me to work, and I was, like, okay,
16 and I started working around her schedule.

17 Q. Now, you talked a lot about Josh being in the house.
18 Where was Lee living at that point?

19 A. Lee was living with Scott Rice. He would come
20 over to the house and spend some time with me, Josh and
21 Lexie.

22 Q. And today does he live with Scott?

23 A. Yes, maam.

24 Q. So Christina Hagens came and picked you up?

25 A. Yes.

1 A. Yes, maam.

2 Q. And did you all go anywhere?

3 A. We went around the corner to BiRite Gas Station
4 to get some cigarettes so I could split a pack of cig-
5 arettes with Lexie and then go to work.

6 Q. Do you recall what Josh was wearing when you left
7 for work?

8 A. As a matter of fact, I have it in my bag. Yes,
9 it was a footed sleeper. I actually have it in my
10 bag.

11 Q. So he was wearing a footed sleeper?

12 A. Yes, maam.

13 Q. And when you left for work, was there anything
14 awry in your house?

15 A. I'm sorry.

16 Q. Was there anything wrong or anything going on in
17 your house?

18 A. We had trash bags that were full of trash and
19 boxes. That was pretty much it.

20 Q. And did you have a table in your house, in your
21 living room?

22 A. We had an end table, yes, maam.

23 Q. How many tables were in your living room when you
24 left?

25 A. I don't recall.

MS. RICHARD ON DIRECT

1 Q. How many would you normally have?

2 A. Normally there was two.

3 Q. And when you left what do you remember specifi-
4 cally was there?

5 A. I remember a couple of boxes, a bunch of trash
6 bags, the recliner, love seat, the TV and entertain-
7 ment center.

8 Q. Do you remember the end table?

9 A. I remember the end table, yes, maam, being there.

10 Q. What type table was that?

11 A. It was a cheap Dollar General end table but it
12 held things.

13 Q. What did it hold?

14 A. I believe that we had a lamp on it and we had paper
15 work and a phone book on it.

16 Q. And where was it situated in the room?

17 A. It was usually beside the couch.

18 MS. WEISS: I would ask the Court's indulgence for
19 a moment.

20 (Brief pause in proceeding)

21 BY MS. WEISS:

22 Q. So you and Christina went to the BiRite and brought
23 cigarettes back to the house?

24 A. Yes.

25 Q. Are you a smoker?

1 A. Yes.

2 THE COURT: I didn't hear the answer. I'm sorry.

3 A. Yes, maam.

4 Q. And you were a smoker at the time?

5 A. Yes, maam.

6 Q. What did you do with the cigarettes?

7 A. I split the pack with Lexie. I had stayed in
8 Christina's car and Lexie had came outside and grabbed
9 half the pack of cigarettes and went back inside.

10 Q. And did he smoke in your home?

11 A. Only when Josh was not there or if he was completely
12 isolated in the living room and he would smoke in the
13 opposite end, where it could ventilate.

14 Q. Did you have any pets?

15 A. Yes, maam, we did.

16 Q. What did you have?

17 A. We had a pit bull.

18 Q. And what was his name?

19 A. Blue.

20 Q. What was his demeanor?

21 A. He was friendly and loved kids. He was a big baby
22 himself.

23 Q. So when you and Christina left, Lexie had his cig-
24 arettes, and Josh was fine?

25 A. Yes, maam.

MS. RICHARD ON DIRECT

1 Q. You had seen him giggling and looking in your eyes
2 right before you left?

3 A. Yes.

4 Q. And you went to work?

5 A. Yes, ma'am.

6 Q. Do you recall about what time you got to work?

7 A. I would say around four or four thirty.

8 Q. How late -- do you remember how late you were sup-
9 posed to work?

10 A. I was going to stay on until Christina got off work.
11 She had gotten off work about, I believe, ten o'clock,
12 but the investigator had come and picked me up be-
13 fore she had gotten there.

14 Q. And so were you still working when someone came
15 and got you?

16 A. I was still working whenever the EMS guy came and
17 got me. He had told my manager that he needed to talk
18 to me and for me to get dressed to go to the hospital;
19 that something was wrong with one of my children.

20 Q. And you say that was sometime after ten o'clock?

21 A. Around ten thirty, I want to say.

22 Q. And did the investigator give you any specifics
23 about anything?

24 A. He didn't know anything about what happened or any-
25 thing but I needed to go to the hospital.

MS. RICHARD ON DIRECT

1 Q. And at that point, did you know which child he was
2 talking about?

3 A. No, maam.

4 Q. What did you do at that point?

5 A. I pretty much went to panic mode. I went and got
6 dressed and left with him, and we headed to the hospital.

7 Q. Which hospital did you go to?

8 A. Lexington.

9 Q. When you got there, what did you do?

10 A. They took me back to -- it looked like a back wait-
11 ing room, and I met up with Reba Hill and Richard Hill.

12 Q. And who are Reba and Richard Hill?

13 A. Lexie's grandparents.

14 Q. And that was the first point that you knew which
15 child?

16 A. Yes, maam.

17 Q. And did they know anything at that point?

18 A. No, maam.

19 Q. What did you all do?

20 A. We were crying, we were praying.

21 Q. Were you able to see Josh at that point?

22 A. No, maam.

23 Q. How long was it before you could see Josh?

24 A. I wasn't able to see Josh until we got in the
25 ambulance.

MS. RICHARD ON DIRECT

1 Q. Okay.

2 A. At that time they were rushing him to Richland.

3 Q. And did you talk to any doctors at Lexington?

4 A. Yes, maam. I asked them what was going on, and
5 they said that they couldn't tell me anything; they had
6 took me in to an investigator in a room where they
7 were trying to talk to me, and all they could say was
8 that he had some head trauma and that they didn't know
9 what it was caused by or what was going on; that that's
10 why they were having to rush him to Richland.

11 Q. You were allowed to ride in the ambulance with
12 him?

13 A. Yes, maam.

14 Q. And when you got to Richland, where did you go?

15 A. Um, we went straight -- they had took him straight
16 to the -- I don't know what's it called, where they take
17 people who need help immediately.

18 They took him there, and they had brought me to a
19 conference room so that I could speak with one of the
20 doctors.

21 Q. Were you by yourself?

22 A. I don't remember.

23 Q. And do you remember who you talked to at that
24 point?

25 A. I remember speaking with one of the doctors.

1 Q. And then -- I don't want you to tell what they
2 were saying, but you spoke to one of the doctors?

3 A. Yes, maam.

4 Q. And at that point, do you remember their asking
5 you about Josh?

6 A. They were asking me about his health history, his shot
7 records, my family history, Lexie's family history, and
8 how he was acting prior to this incident.

9 Q. When you say this incident, did you have any idea
10 at this point . . .

11 A. They still wouldn't tell me anything about what was
12 going on.

13 Q. At what point were you able to . . .

14 A. It was . . .

15 Q. How long was it before you were able to go to
16 Josh?

17 A. It was about an hour. I'm not sure if it was
18 exactly an hour or if it just felt like an hour.

19 Q. Were you able to go to Josh at that time?

20 A. Yes, I was.

21 Q. And is that basically where you stayed?

22 A. On and off. They would have to run tests, and they
23 would need me to leave. So while they were doing that
24 I would go to the waiting room.

25 I was either in there or the conference room, and

MS. RICHARD ON DIRECT

1 they would let me come back in once they were done with
2 the test.

3 Q. And were you in there by yourself?

4 A. Every now and then, yes, maam.

5 Q. At some point, were -- at some point in time, were
6 you joined by Lexie?

7 A. I'm sorry.

8 Q. At some point were you joined by Lexie?

9 A. Yes, maam. Erica Owens brought him to the hospital.
10 I'm not sure what time it was that he got there.

11 Q. And what happened when he came in?

12 A. He wouldn't really talk. He kind of looked like
13 a zombie, and he did ask me what was going on, was Josh
14 still alive, and I told him, yes, he's still alive; that
15 I didn't know what was going on yet.

16 He had made the phrase to me quite often that he
17 was really, really tired; that he needed to go and lay
18 down.

19 Q. Did you ask him any questions about what had hap-
20 pened?

21 A. I had asked him -- I said, quote-unquote -- I said,
22 Lexie, did you do this on purpose, and he said, no, and me
23 being Josh's mother and Lexie's fiance at the time --
24 I didn't believe he had did this on purpose.

25 Q. Did you ask him what happened?

1 A. I did, yes, maam, while Ms. Erica Owens was in the
2 room with me.

3 Q. And what did he say?

4 A. He had had a couple of stories. One of his stor-
5 ies was -- he had told me that he was eating and feeding
6 Joshua at the same time, and that he had sat his plate
7 on the floor in front of him and went to stand up to go
8 grab something to wipe Josh's mouth with and slipped on
9 the plate and fell and hit the table and with his elbow
10 he hit the table and it came up and smacked Joshua in the
11 back of the head.

12 On his next -- the next thing he said was that he
13 had tripped on something on the floor and Joshua fell,
14 and his story had kept changing up a couple of times.

15 Q. You said his story had kept changing. Did you notice
16 that at the time?

17 A. At the time I was pretty much -- I was pretty
18 much in zombie mode. I couldn't -- I kept praying and
19 nothing really was making sense.

20 It all felt like a dream, and I just kept pray-
21 ing that it was a dream; that I was going to wake up.

22 No, maam, at the time it did not click that his
23 story kept changing.

24 Q. And at the time did you believe that he had inten-
25 tionally done anything?

MS. RICHARD ON DIRECT

1 A. At the time I did not. I just couldn't see him
2 doing this to our child. I can't see anybody doing
3 this to their own child, but -- at the time I did not
4 feel that he was guilty, at the time.

5 Q. In fact, after Josh was born, did you and Lexie
6 have an opportunity to talk about shaking babies?

7 A. Yes, maam. As a matter of fact, we were instructed
8 to watch a video before we left the hospital. We were
9 not able to leave the hospital until we had watched a
10 video and signed a paper stating that we had watched
11 the video about shaken baby syndrome and what the effects
12 were; how to do CPR if that had occurred.

13 Q. And it showed you how to do the CPR as well?

14 A. Yes, maam.

15 Q. And do you remember talking to Lexie at that time
16 you watched the video?

17 A. He was very upset at the video, which is why at first I di
18 not want to believe it. He was extremely upset with the video
19 and I was too.

20 He made the comment that he couldn't see how anybody
21 could harm a child, period, much less their own.

22 Q. Did Lexie stay with you in the room with Josh?

23 A. No, maam, he did not.

24 Q. Do you know where he went?

25 A. No, maam, I do not. Are you referring to the hospital

1

Q. The hospital room.

3

A. . . where Joshua lay at?

4

Q. Yes.

5

A. No, maam. He was sleeping in the waiting room.

6

Q. Who was in the room with you and Josh?

7

A. His father would come in. Lexie Dial's father

8

would come in, Reba Hill would come in, my mom and dad

9

would come in.

10

Ms. Christina Hagens would come in. Courtney Dial

11

would come in.

12

It was pretty much they were alternating and on

13

who could come in. You could only have a certain

14

amount of people in there at one time.

15

Q. At some point, did investigators come in to talk

16

to you?

17

A. They did, but I'm not sure. I don't recall much

18

of what happened in that conversation.

19

Q. Did you talk to them in the room, or did you then

20

leave?

21

A. I'm not sure.

22

Q. You said the doctors kept pulling you out to a

23

separate room?

24

A. Yes, while they were running the tests that they

25

needed to run.

MS. RICHARD ON DIRECT

1 Q. And in between, were you able to stand next to
2 Josh?

3 A. Yes, maam.

4 Q. And who would be in there with you?

5 A. Like I said, it varied. My mother, my father,
6 Lexie's side of the family. They would all alter-
7 nate on coming in.

8 Q. Was there an extended period of time when Lexie
9 was not in there?

10 A. From what I can recall, he only came in there a
11 couple of times.

12 Q. Do you remember when the alarm started going off?

13 A. Yes, maam, I did.

14 Q. Where were you when that happened?

15 A. I was in the conference room, and there were a
16 couple of other people in there. I remember Lexie
17 Dial came in there with me, and I remember the two of-
18 ficers in there and the doctor in there.

19 Q. And you all were talking about . . .

20 A. We were talking about his stability and what was
21 going on.

22 Q. And you say Lexie was in there at that point?

23 A. Yes, maam.

24 Q. Were you able to go back into Josh's room?

25 A. Can I get off the stand?

MS. RICHARD ON DIRECT

1 THE COURT: I'm sorry.

2 WITNESS: Can I get off the stand?

3 THE COURT: Yes. Madam Forelady, ladies and gentle-
4 men of the jury, please turn your notes upside down and
5 go to your room momentarily.

6 Do not discuss the case among yourselves during this
7 brief recess.

8 (Jury excused from Courtroom)

9 THE COURT: All right. You may step down for a few
10 minutes, Ms. Richard. Do not discuss your testimony
11 during this very brief recess.

12 (Witness excused from stand)

13 THE COURT: We'll be in recess for about ten min-
14 utes.

15 (Whereupon, the Court took a brief recess, after
16 which the matter was resumed)

17 THE COURT: All right, Ms. Weiss, how long do you
18 think you will be on Direct?

19 MS. WEISS: I think I will have about three more
20 questions.

21 THE COURT: How long are you going to be on Cross,
22 Mr. Floyd?

23 MR. FLOYD: Your Honor, fifteen to thirty minutes
24 is all I can say. It's hard to say.

25 THE COURT: All right.

1 MR. FLOYD: If you are asking for some --if you
2 are asking me whether or not I would object to break-
3 ing between . . .

4 THE COURT: I think I'm going to press on. If
5 it goes a little too long then we will -- I didn't
6 think you would or that you would necessarily have a
7 preference.

8 But I think we will press on. We do have one
9 member of the jury who is diabetic and, of course, I
10 told her she could eat in the Courtroom. I wanted
11 to let the Clerk know that. I don't let people eat
12 in the Courtroom generally.

13 But I may go another thirty minutes or so, and
14 I'll give them a little heads-up so if they want to
15 take a break I'll be governed by them.

16 All right, bring us our jury.

17 (Witness resumed witness stand)

18 (Jury returned to Courtroom)

19 THE COURT: All right, our jury is back with us
20 in the Courtroom.

21 We will press on for another thirty to thirty-
22 five minutes, and if anyone needs to break, ladies
23 and gentlemen, before then please raise your hand
24 and we will go on and take our luncheon recess.

25 I want to try to finish with this witness before

MS. RICHARD ON DIRECT

1 we break but, again, if anyone needs to break just
2 let me know. It's not a marathon.

3 Thank you very much for your complete and undi-
4 vided attention.

5 Madam Attorney General?

6 DIRECT EXAMINATION CONTINUED

7 BY MS. WEISS:

8 Q. Going back, I know the alarm went off when you
9 and Lexie were together?

10 A. Yes, maam.

11 Q. And you were able to go into the room?

12 A. Yes, maam.

13 Q. And were you able to stay in the room until Josh
14 passed away?

15 A. That was what the alarm was for. They kept us
16 in the room until the alarm stopped, in the conference
17 room, and once it stopped that meant they had to take
18 him off life support; that his heart had stopped.

19 And after that we were able to go back in there
20 to say our final goodbyes.

21 Q. And you were both given a few minutes with
22 Josh?

23 A. Me and Lexie were given a few minutes together
24 with Josh.

25 Q. And then what happened?

MS. RICHARD ON DIRECT

1 A. They swaddled -- they took the tubes out of him,
2 took the -- all the stuff they had hooked to him,
3 they took all of it off, swaddled him up in a blanket
4 and I got to hold him.

5 Q. And they left you for a few minutes?

6 A. Yes, maam, for a few minutes. Momentarily, they
7 did leave us to spend our last couple of minutes to-
8 gether with our son.

9 Q. And then you left the room?

10 A. Yes, maam.

11 Q. And where did you go from there?

12 A. As soon as we walked out of the room, a couple
13 of officers -- I don't remember exactly -- it's kind
14 of fuzzy, but there were a couple of officers pulling
15 Lexie to the side and to a separate room, and I seen
16 him put handcuffs on him, and he calmly let them.

17 He didn't freak out or anything like that, and
18 they had took me to a room separately, asked me a
19 couple of questions, and to calm me down.

20 Q. Thank you. I have no further questions at this
21 time.

22 THE COURT: Thank you very much, Madam Attorney
23 General. Mr. Floyd.

24 MR. FLOYD: Thank you, Your Honor.

25 CROSS EXAMINATION

1 BY MR. FLOYD:

2 Q. Ms. Richard, when did you and Lexie begin living
3 together?

4 A. I don't remember the specific date but it was a
5 couple of months prior to me getting pregnant with
6 Josh.

7 Q. So if Joshua was born in August of 2009, then it
8 would have been sometime in '08?

9 A. Yes, sir.

10 Q. And how old was Lexie at that time?

11 A. From what I had thought, nineteen, but his act-
12 ual age was sixteen.

13 Q. He was sixteen?

14 A. Yes, sir.

15 Q. And you knew that?

16 A. No, sir, I did not.

17 Q. You knew he was getting a social security check
18 from his mother's death, didn't you?

19 A. Yes, sir, after his mother passed away. Then I
20 found that out.

21 Q. When did she pass away?

22 A. In January.

23 Q. Of 2010?

24 A. Of the year before that.

25 Q. And you all were living where, with Lexie's

1 grandmother?

2 A. At the time we were living with his mother. When
3 his mother passed away, we moved to his grandmother.

4 Q. And his mother never told you he was sixteen?

5 A. I found out he was sixteen, I want to say, when I
6 was pregnant with Josh. I'm not really positive how
7 far along I was, but I found his ID which he pretty
8 much kept locked up or on him, and I saw his date of
9 birth.

10 Then I asked him about it and . .

11 Q. And when you were living with him, was he going
12 to school?

13 A. Um, occasionally. Not really -- he would go to
14 school a few times.

15 Q. He was in the tenth grade?

16 A. I'm not sure what grade he was in. When it came
17 to school, he didn't really discuss it with anybody.

18 Q. How old were you at that time?

19 A. At that time, I was twenty-one.

20 Q. Now, once Josh was born, Lexie started going
21 to internet school, didn't he?

22 A. He had gotten on the internet and gotten all the
23 books but, no, sir, he had not started the internet
24 school.

25 Q. Are you saying he was still going to regular

1 school?

2 A. No, sir. He dropped out of regular school, and
3 he had had the books and the internet to start school
4 for a couple of weeks without physically starting it.

5 Q. And then when Josh was born, Lexie kept him while
6 you worked?

7 A. On occasion, yes.

8 Q. On almost every occasion, didn't he?

9 A. No, sir, not on almost every occasion.

10 Q. How many times did he not keep him?

11 A. I don't have any specific number, but not on
12 every occasion.

13 Q. Where would you take him then?

14 A. We would take him to Reba Hill's house, to my
15 parents' house, or his father would be at the house
16 to watch him, Lexie Dial, Junior.

17 Q. And you are saying you took Josh to . . .

18 A. Me and Lexie together would.

19 Q. And you took the child to your own mother's
20 house?

21 A. Yes, sir.

22 Q. Did you have a driver's license?

23 A. No, sir.

24 Q. So you didn't take the child anywhere, did you?

25 A. Me and Lexie did.

1 Q. And did you take him to your mother's house on
2 one occasion and . . .

3 REPORTER: I'm sorry. I cannot hear you.

4 Q. Did you in fact take the child to your mother's
5 house on one occasion and then not take the child
6 back because of an abusing situation?

7 A. No, sir. He had been there quite a few times.
8 My mother had watched him quite a few times.

9 Q. On January 19th, isn't it true that Lexie left
10 the house to go make a phone call to arrange a ride
11 to work?

12 A. No, sir. Christina Hagens was already coming
13 to the house, and she knew to be there. She was
14 pretty much there all the time because at the time
15 she was seeing his father.

16 She would spend the night there on many occas-
17 ions and me and her previously, the day before that,
18 had talked.

19 Q. So you are saying he did not go to the store to
20 call someone?

21 A. No, sir.

22 Q. Now, you have told the officers there was no
23 way Lexie would hurt his child, haven't you?

24 A. Yes, sir. I felt that at that time.

25 Q. In fact, I'm going to ask if you can identify

1 something or a copy that has been provided?

2 A. Yes, sir, I know what these are.

3 Q. Tell us what those are.

4 A. When I was on Lexie's side and couldn't possibly
5 believe that his father would kill him, that he was
6 not violent or whatever the case might be, I had writ-
7 ten -- I had stayed up night after night doing research
8 on shaken baby syndrome, and subdural hematoma, on
9 how it was caused, on all of the causes of it, on all
10 the effects from it, all of the effects from shaken
11 baby syndrome.

12 I had a couple of concerns or questions, and not
13 just me, but I, Reba Hill, Lexie Dial, Junior,
14 Kayla and Mackenzie Hill, Lexie himself when we had
15 talked to him when he was in Lexington County, and a
16 couple of other family members had.

17 I had written them all down so he could take it
18 to his attorney.

19 Q. And that's what those are?

20 A. Yes, sir.

21 MR. FLOYD: Your Honor, if I could just have
22 these marked as Defense Exhibits.

23 THE COURT: Any objection?

24 MR. FLOYD: I'm not introducing them but just
25 marking them.

MS. RICHARD ON CROSS

1 THE COURT: All right. How many of them are there?
2 Actually, you can just mark them as one.

3 (Fourteen index cards marked Defense Exhibit 1
4 for identification purposes)

5 BY MR. FLOYD:

6 Q. You actually prepared these, and they are in your
7 writing?

8 A. Yes, sir, it is.

9 Q. And you prepared these to assist him because you
10 did not believe he would intentionally hurt Josh?

11 A. Yes, sir. Like I said, at the time I felt in my
12 heart he couldn't possibly have done it, so I prepared
13 this. Yes, sir.

14 Q. Because you had never seen him lose his temper
15 with Josh?

16 A. Never with Josh, no, sir.

17 Q. Have you ever lost your temper with Josh?

18 A. I'm sorry.

19 Q. Have you ever lost your temper with Josh?

20 A. No, sir, I haven't.

21 Q. Both you and Lexie, you all loved Josh?

22 A. Yes, sir.

23 Q. And Lexie tried to be a good father and help you
24 with the child?

25 A. From all I had seen while I was there, yes, sir.

MS. RICHARD ON CROSS

1 Q. And you left Josh with Lexie that day without
2 any question in your mind?

3 A. I left Josh . .

4 Q. I'm asking did Lexie ever do anything that
5 would make you question leaving Josh with Lexie?

6 A. I thought Josh was safe with Lexie.

7 Q. No further questions.

8 THE COURT: Redirect, Madam Attorney General?

9 MS. WEISS: No further questions.

10 THE COURT: Thank you very much, Ms. Richard.

11 (Witness excused from stand)

12 THE COURT: All right, Madam Forelady and ladies and
13 gentlemen of the jury, now would be a good time for
14 us to take our luncheon recess.

15 I will remind you during this recess that you are
16 not to discuss this case with anyone, and that in-
17 cludes your fellow jurors, luncheon mates, family,
18 friends or anyone else.

19 If anyone tries to talk with you about the case,
20 let me know immediately.

21 Remember, do not do any research on the inter-
22 net or otherwise. Do not watch, listen to or read
23 any news reports about the case.

24 Remember to keep an open mind and do not begin
25 your deliberations until you are instructed to do so

1 by the Court.

2 Please leave your notes upside down on your
3 chairs and the Clerk will secure them during the
4 luncheon recess.

5 I will ask you to be back in your jury room at
6 two thirty. Please be back promptly at two thirty,
7 and I hope you have a very pleasant lunch.

8 (Jury excused from Courtroom for lunch recess)

9 THE COURT: Anything from the State before we
10 take our recess?

11 MS. WEISS: No, Your Honor.

12 THE COURT: From the Defense?

13 MR. FLOYD: No, Your Honor.

14 THE COURT: Thank you very much.

15 (Whereupon, the Court stood in recess for the
16 lunch recess, and the matter thereafter resumed)

17 THE COURT: All right, anything from the State
18 before we bring in our jury?

19 MR. WATERS: If we could have just a minute, Your
20 Honor?

21 THE COURT: Yes, sir.

22 (Brief pause)

23 THE COURT: Anything further?

24 MS. WEISS: Yes, sir, Your Honor. At this time,
25 we are going to move on to the pathologist in the

1 case, and we have the photos related to that witness.

2 We have gone through with the witness and pared
3 down the photos. If I could have this marked?

4 THE COURT: I thought they were all marked.

5 REPORTER: This one wasn't, Judge. It's Number
6 86.

7 THE COURT: What was 85?

8 REPORTER: A DVD, for identification.

9 MS. WEISS: Your Honor, at this time the pictures
10 that we will be intending to introduce are State's
11 Exhibits 86 which is the only one that is new, and,
12 Your Honor, the reason for setting this one out is
13 we realized that the photo -- one photo we intended
14 to use showed the wrong side.

15 The one that we had showed the Y incision -- it
16 doesn't show the incision but it shows flaps on the
17 body which certainly I did not intend to use, but we
18 found a smaller picture that Dr. Ross had that we
19 think would be more appropriate.

20 It shows the back flap of the head, Your Honor,
21 which is -- which would have been the skin as far as
22 the bruise.

23 Exhibit Number 1 shows the back of the infant's
24 head which Dr. Ross would testify to, the outside of
25 the head.

1 Exhibit 8 for identification shows the subarach-
2 noid hemorrhaging that the Doctor will be testifying
3 to.

4 State's Exhibit 7 shows the subdural hematoma,
5 and State's Exhibit 13 shows the bruise on the chin
6 of the child.

7 Your Honor, . . .

8 THE COURT: Yes, maam.

9 MS. WEISS: . . I apologize, but I have been
10 looking at it as giving it to the jury from the prose-
11 cutor's view. I just realized that the arachnoid
12 picture also, if you look further, shows where the
13 body had been autopsied, and, if I may, I think we
14 have a photo that doesn't show that.

15 THE COURT: That's Exhibit 7?

16 MS. WEISS: Number 8, Your Honor.

17 THE COURT: Number 8. All right. Let me see if
18 I've got this correct.

19 State's 2 -- just a minute. State's 2, 3, 4,
20 5, 6, 9, 10, 11 and 12 you are not offering?

21 MS. WEISS: One minute, Judge. Two, 5, 9, 10,
22 6, 4, 3, 12 and 11. Correct.

23 THE COURT: And you are not offering 2 because it
24 is basically the same photograph as what?

25 MS. WEISS: Your Honor, 2 shows the back and the

1 -- with the area the testimony would be focusing on,
2 it is not needed to have the back.

3 THE COURT: The back of the child?

4 MS. WEISS: Yes, Your Honor.

5 THE COURT: And 3 and 4 are of the retinal hemor-
6 rhages, and you are withdrawing those?

7 MS. WEISS: The optic nerve hemorrhages, and in
8 speaking with the expert she and I both felt that al-
9 though she recognizes what she would be looking at in
10 those it would be hard for a jury to really understand
11 so we are not using those.

12 THE COURT: And 5 and 6 you are withdrawing?

13 MS. WEISS: Yes, Your Honor, although I'm wonder-
14 ing now if I might have some judicial guidance.

15 (Brief pause)

16 These show the right and left side but we will
17 use Exhibit 8.

18 THE COURT: So out of State's 1 through 13, you
19 are now only intending to offer State's 1, 7, 8 and
20 13?

21 MS. WEISS: Out of those originals, yes, Your
22 Honor, and Exhibit 86.

23 THE COURT: Hand me State's 14 also.

24 Mr. Floyd, subject to a proper foundation being
25 laid, do you have objection to State's 1?

1 MR. FLOYD: I'm not sure what Exhibit 1 is.

2 THE COURT: So you would not have any objection to
3 State's 1?

4 MR. FLOYD: No, Your Honor.

5 THE COURT: Then State's 7, again assuming a
6 proper foundation?

7 MR. FLOYD: We would object to Number 7, Your
8 Honor, and it's our position that the prejudicial na-
9 ture of that photographs outweighs any potential
10 probative value.

11 It is gross in its appearance and would be shock-
12 ing to the jury.

13 THE COURT: And State's Exhibit 8?

14 MR. FLOYD: Objection for the same reasons.

15 THE COURT: Solicitor, what is the difference be-
16 tween -- excuse me. Madam Attorney General, what is
17 the difference between 7 and 8 as far as what they
18 show?

19 MS. WEISS: Your Honor, 7 shows the hematoma
20 which is of the dura, and 8 shows the arachnoidal
21 bleeding. There are actually two separate sets of
22 bleeds.

23 It is my understanding that there is an arachnoid
24 belt that goes over that like a clear lining, and
25 that actually is bleeding below that.

1 It is sort of like the cap that goes on, and they
2 have actually taken that off, so that is bleeding up
3 under clear felt.

4 MR. FLOYD: Your Honor, I have another basis
5 for objecting to the photographs. There has been
6 ample testimony that there could have been some bleed-
7 ing subsequent to the injury from administration of
8 various medical procedures.

9 Accordingly, it is our position that the evidence has
10 failed or could not show an accurate representation
11 of the injury itself, if in fact he had such an injury.

12 THE COURT: All right. Well, I would have to
13 hear hear the doctor's testimony in regard to 7 and 8.

14 And 13, Mr. Floyd?

15 MR. FLOYD: I don't object to that one, Your
16 Honor.

17 THE COURT: All right, State's 13, subject to a
18 proper foundation.

19 Then State's 86 for identification, what does
20 this show?

21 MS. WEISS: Your Honor, that is the back flap of
22 the child's head and further down, to show that there
23 was no bruising. The Defense in Cross Examination
24 has been asking about bruising, and there has been
25 questions as to bruising on the back of the head.

1 That actually is a definitive answer as to whe-
2 ther there was bruising on the back of the head.

3 THE COURT: Is this the back?

4 MS. WEISS: The smaller piece is the back of the
5 head between the ears, folded down, and the larger
6 piece is the front of the head.

7 THE COURT: All right, so this is right to left?

8 MS. WEISS: The direction it was taken, that is
9 right, Your Honor.

10 THE COURT: And this is the back and this is the
11 left ear?

12 MS. WEISS: Yes, sir.

13 THE COURT: Do you have objection to State's 86?

14 MR. FLOYD: I think so, Your Honor. Yes, the
15 same objection, Your Honor.

16 This is a gruesome picture with the ear folded
17 back and the interior of the brain. We think the
18 prejudicial nature of that photograph outweighs again
19 the probative value.

20 THE COURT: Well, it depends on the testimony of
21 the pathologist.

22 So that would be 7, 8, and 86, correct?

23 MR. FLOYD: Yes, sir.

24 THE COURT: All right, are we ready for the jury?

25 MS. WEISS: Yes, Your Honor.

1 THE COURT: All right, anything from the Defense,
2 Mr. Floyd?

3 MR. FLOYD: Nothing further, Your Honor.

4 THE COURT: All right, bring us our jury, please.
5 Well, first off, do you have a matter you want to
6 put on the record, Mr. Floyd?

7 MR. FLOYD: That's correct, Your Honor.

8 It is my understanding that the Attorney General's
9 Office is bout to introduce evidence of the patholo-
10 gist, Dr. Ross, and this would be the first evidence
11 that would be post-arrest type evidence.

12 Your Honor, it is our position that the arrest
13 was unlawful, and we would therefore move to exclude
14 the evidence secured after the arrest as fruit of the
15 poisonous tree, including the testimony of Dr. Ross,
16 Your Honor.

17 THE COURT: All right, Mr. Floyd. Thank you.

18 We have heard testimony previously in camera con-
19 cerning the arrest.

20 Madam Attorney General, would you call your next
21 witness as far as the foundation on the photographs,
22 7, 8, and 86?

23 MS. WEISS: Yes, Your Honor.

24 THE COURT: One and 13 also, to which there are
25 no objections.

1 MS. WEISS: Yes, sir. The State would call Dr.
2 Janice Ross.

3 THE COURT: Come around, please, Dr. Ross, and
4 be sworn.

5 JANICE ROSS, being duly sworn,
6 testified as follows, out of the presence the jury:

7 CLERK: Have a seat, maam, and when you are seated
8 give us your full name, spelling your last name for
9 the record.

10 WITNESS: Janice Edwards Ross, R O S S.

11 DIRECT EXAMINATION

12 BY MS. WEISS:

13 Q. Dr. Ross, what is your occupation?

14 A. I'm a forensic pathologist.

15 Q. And what does a forensic pathologist do?

16 A. A pathologist studies diseases and how to iden-
17 tify different diseases or various injuries. We
18 use the autopsy and laboratory work to do such.

19 A forensic pathologist works on legal matters,
20 which is homicides, accidents, rapes.

21 Q. Dr. Ross, do you -- you stated an autopsy is a
22 common form of how you are able to do your work?

23 A. Yes:

24 Q. And as a part of that autopsy is it a practice
25 to take photographs?

DR. ROSS IN CAMERA

1 A. Yes.

2 Q. A common practice?

3 A. Yes.

4 Q. For what reason do you take photographs?

5 A. For documentation of the evidence as to the
6 kinds of injury.

7 Q. And those photographs, do they aid you in being
8 able to explain to people the findings that you make?

9 A. Yes.

10 Q. And do you commonly use those photographs in
11 doing that?

12 A. Yes.

13 Q. As a forensic pathologist, in autopsies, what is
14 oftentimes your purpose? For being able to testify in
15 Court?

16 A. Yes.

17 Q. And when you are testifying in Court about the
18 autopsies, does it aid you in being able to show the
19 photographs that have been taken?

20 A. Yes.

21 Q. I'm going to show you what's been marked as State's
22 Exhibits 86, 7, 8, 13, and 1 for identification. Do
23 you recognize these photographs?

24 A. Yes, I do.

25 Q. And were these taken during the autopsy of

1 Joshua Dial?

2 A. Yes.

3 Q. Do these photos accurately depict what you were
4 looking at while making your findings as to cause of
5 death relating to Joshua Dial?

6 A. . . .

7 Q. Go one by one. Starting with State's Exhibit 1,
8 would you tell the Court what that depicts?

9 A. This is the back of the head of Joshua Dial at
10 time of autopsy before any incisions were made.

11 Q. And what can you see on that photograph that is
12 of importance in the autopsy?

13 A. We see some settling of blood in some areas and
14 then some blanching at the back of the skull from the
15 head being on a hard surface.

16 Q. Okay, and do you see any signs of a bruise?

17 A. No, I do not.

18 Q. Is there something in that photo that could aid
19 you in showing that?

20 A. It just shows there are negative findings.

21 Q. And the blanching, what is that?

22 A. From the skin -- the pressure of the skin from
23 the hard surface, just from the body laying on a table.

24 Q. And how is that depicted? What does it look
25 like?

DR. ROSS IN CAMERA

1 A. It looks like paler skin as opposed to above and
2 below it, as I say, which is livemortis or settling
3 of blood after death to the dependent part of the
4 body.

5 Q. And State's Exhibit 13, what does that depict?

6 A. This shows underneath the chin of Joshua Dial at
7 autopsy. It shows a bruise at the angle of the left
8 jaw.

9 Q. Okay, and is there any question that that is a
10 bruise?

11 A. No, there is not.

12 Q. Now I show you State's Exhibit 86 for identifi-
13 cation. Do you recognize this photo?

14 A. Yes.

15 Q. And what does that photo depict?

16 A. This reveals the head from the scalp and reflected
17 back. It shows the various bruising underneath the
18 skin.

19 Q. And if you are trying to determine cause of
20 death and that perhaps it could have been from blunt
21 force trauma, is it important for you to examine this
22 fold of skin?

23 A. Yes.

24 Q. Why is that?

25 A. Just to see if there is a pattern of injury that

1 we could identify.

2 With blunt force injury, we can see or get an
3 idea of what could have been used, or if it's there
4 or not there.

5 Q. In this case, is it important for you to look at
6 that back flap of the child's head?

7 A. Yes.

8 Q. And what did it show?

9 A. No contusion, no bruising.

10 Q. No bruising -- is that a definitive answer as
11 to whether or not there was a bruise on the back of
12 the child's head?

13 A. Yes.

14 Q. And it is only through looking at that piece of
15 skin, the inside of that piece of skin, that you can
16 definitively say there was no bruising on the back
17 of the head?

18 A. Well, I can say from the outside also -- the
19 two together are conclusive.

20 Q. But if there were any question, the inside of
21 the head gives the definitive answer?

22 A. Yes.

23 Q. And State's Exhibit 8, can you say what that de-
24 picts?

25 A. That is the top of the brain showing a subarachnoid

1 hemorrhage, on both sides of the brain.

2 Q. And what is the arachnoid?

3 A. The arachnoid is a thin membrane, kind of like
4 seran wrap, that covers the surface of the brain, and
5 the bleeding is subarachnoid, so it is underneath the
6 arachnoid. On top of the brain surface, but under-
7 neath that membrane.

8 Q. And underneath that membrane that's like seran
9 wrap, is there -- the blood that is seen in that pic-
10 ture, is that definitely underneath that membrane?

11 A. Yes.

12 Q. How do you know that?

13 A. It is there.

14 Q. Did you clean off the top of that membrane?

15 A. Yes, yes.

16 Q. After you removed the top of the head?

17 A. Yes.

18 Q. So there is no doubt that that bleeding is a
19 separate area of bleeding from anything that would have
20 been on top of the arachnoid?

21 A. Yes.

22 Q. Is there something else that photo also shows?

23 A. It shows the surface of the blood is flat which
24 usually means it's swollen.

25 It is swollen so the surface hits the inside of

DR. ROSS IN CAMERA

1 the skull and flattens it out, as opposed to having
2 the usual folds in the brain.

3 Q. And is that important for you in determining the
4 cause of death?

5 A. Well, it helps identify the fact that there is
6 enough edema there to have swelling of the brain.

7 Q. And can you say in that bleeding and in that
8 swelling, is that -- can you say whether or not that
9 bleeding has been ongoing since the trauma you have
10 eventually said in your findings is the cause of
11 death?

12 That that bleeding has been ongoing or if that
13 bleed was started by the original trauma?

14 A. This bleed would be started by the original
15 trauma.

16 Q. And I'm going to show you what's marked as State's
17 Exhibit 7 for identification. What does that depict?

18 A. This is after the brain has been removed which
19 shows subdural space in the brain, and it shows hemor-
20 rhage on the right and left sides of the head.

21 Q. And what is the dura?

22 A. The dura is the very thick membrane that is right
23 underneath the skull.

24 Q. And can you see it in the picture?

25 A. Yes.

562

DR. ROSS IN CAMERA

1 Q. And can you point it out in the photo?

2 A. Yes.

3 Q. And that bleeding is under that dura?

4 A. Correct. It is under the dura and on top of
5 the retina.

6 Q. And what is important to you as a pathologist in
7 making your findings of that bleeding?

8 A. A subdural hemorrhage is venous bleeding from
9 the head, the brain being jostled around and pulling
10 on those veins going from the dura to the brain sur-
11 face, and it lacerates those vessel and causes the
12 hemmorhaging.

13 Q. How many areas do you observe blood?

14 A. Both sides of the skull.

15 Q. Not only is there blood, but you say there was
16 bleeding on both sides?

17 A. . . .

18 Q. There was bleeding on both sides?

19 A. Yes, yes.

20 Q. And that bleeding -- can you say if that bleed-
21 ing was caused from the original trauma that led to
22 the child's death?

23 A. Yes.

24 Q. And would it assist you in explaining this to
25 the jury to use the photo?

DR. ROSS IN CAMERA

1 A. Yes.

2 MS. WEISS: Your Honor, at this time I have no
3 further questions.

4 THE COURT: Thank you, Madam Attorney General.
5 Mr. Floyd, do you have any questions for Dr. Ross?

6 MR. ROSS: Not on this point, no.

7 THE COURT: All right. Thank you very much, Doc-
8 tor. You may step down.

9 (Witness excused from stand)

10 THE COURT: All right, and, again, your objec-
11 tions at this time, Mr. Floyd.

12 MR. FLOYD: Your Honor, for the same reason as
13 to the photographs that we previously objected to.

14 It is our position that they are intended to
15 arouse the sympathy and passion of the jury, and be-
16 cause of the prejudicial nature of the type of photo-
17 graphs, they far outweigh the probative value they
18 would have.

19 Dr. Ross is very skillful in testifying, and she
20 can explain in her own words. We don't need the in-
21 flammatory pictures to get Dr. Ross' points across.

22 THE COURT: All right. Thank you very much.

23 Anything you wish to put on the record, Madam
24 Attorney General?

25 MS. WEISS: Your Honor, Mr. Waters was the original

1 one arguing this point.

2 If I may, and I know it's kind of splitting it
3 up but if he could argue . .

4 THE COURT: Certainly.

5 MR. WATERS: Your Honor, I cited two cases on this
6 issue at the beginning of the proceeding. I don't know
7 if Your Honor has them up there.

8 State versus Jarrell, 64 Southeastern Second 362,
9 and State v. Martucci, 669 Southeastern Second 598.

10 Both of these cases were homicide by child abuse
11 cases, and in both the cases the Court of Appeals
12 held that photographs necessary to corroborate the
13 testimony rendered at trial, and corroborated that a
14 pathologist's testimony as to the extent of the injury
15 was admissible.

16 In fact, in Jarrell, the Court even cited with
17 approval the statement of the Trial Judge in that
18 particular case to the effect that while those photo-
19 graphs were graphic, the facts of the case were
20 graphic.

21 In that particular case, there were some alle-
22 gations of sexual abuse and things of that nature,
23 but here we have in place, very much at issue, the
24 fact of whether or not these injuries could have hap-
25 pened at an earlier time, whether or not they could

1 have come from a fall or something of that nature,
2 and there is peripheral testimony.

3 A big part of that or a big response to that is
4 the severity of the injuries, and I think, given that
5 is clearly an issue we have here, the photographs are
6 or would be admissible on that basis.

7 Ms. Weiss has gone through with you already that
8 we are not trying to -- I think we've gotten down to
9 what? Five photographs -- whatever the number is, so
10 we certainly are doing our best to reduce the number
11 down to the bare minimum so as to avoid having any un-
12 due pressure or effect to the jury.

13 Of course, the fact of the matter is that we are
14 in a homicide case, and this sort of testimony is
15 necessary and relevant.

16 Like the Supreme Court, quoting the Trial Judge,
17 said, it is just comes with the facts in this kind of
18 case, and graphic images sometimes have to be dis-
19 played as long as they are done in a proper manner
20 and as long as they are to corroborate the testimony
21 of the pathologist.

22 THE COURT: Thank you, Mr. Waters.

23 As an initial matter too, I would -- I have tried
24 to and did look very closely at Jarrell and also at
25 Martucci, and also at Holder, which I cited, and I

1 did not realize that Holder was actually the Codefendant
2 of Martucci. Martucci was the boyfriend and Holder
3 was the mother of the child. I believe that's correct.

4 In that case, the Trial Judge, in Martucci and Holder,
5 were the same, being Judge Pyle. Judge John Hayes in
6 Jarrell.

7 But as an initial matter, I would note that ini-
8 tially there were fourteen photographs, 1 through 13,
9 and now 86. The State has withdrawn, although I'm going
10 to keep those for the record as part of the record --
11 the State has withdrawn those other numbers.

12 The State is only offering 1, 13, 7, 8 and 86,
13 and the Defense, as I understand it, has no objections
14 to State's Exhibits 1 and 13, which was a photograph
15 of the back of the child's head, number 1, and photo-
16 graph number 13 is the bruise on the jawline of the
17 child.

18 After listening very closely to Dr. Ross, and I
19 have heard her testify in the past, and she has testi-
20 fied very professionally.

21 Of course, she is a professional. However, her
22 testimony is that this will assist her in her testi-
23 mony before the jury in explaining various injuries
24 and harm to the child, and I am referring to 7, 8 and
25 86.

1 That these corroborate her autopsy findings and
2 corroborate the extent of the injuries; that they were
3 bilateral per 86, and confirms there was no underlying
4 bruise that could not have been seen on the back of
5 the head until such time as the pathologist went inside
6 and did note that there was no hemorrhaging inside there
7 as indicated. That was her testimony, and it was con-
8 clusive.

9 It appears that that would be of assistance to
10 jury.

11 The State has a responsibility for proving its case
12 beyond a reasonable doubt and proving the elements of
13 the case, which is proving the child was abused and
14 the abuse was the cause of the death, and that the abuse
15 manifests an extreme indifference to human life.

16 All of these are required for a charge of homi-
17 cide by child abuse. The photographs would be neces-
18 sary to depict the severity of the bruises and the
19 trauma, and which may be inconsistent with accidental
20 injury.

21 So they are relevant and necessary, and they are
22 not introduced to inflame the jury or to elicit sym-
23 pathy of or prejudice the jury, or to cause a decis-
24 ion based on emotion.

25 I further find that they are graphic, and I looked

1 up the definition of the word graphic, and I don't
2 see any objection to graphic testimony.

3 Quite frankly, graphic means vivid or realistic,
4 and unfortunately those are the facts in these types of
5 cases. Graphic photograph does not necessarily indi-
6 cate the perpetrator of the injuries.

7 It may indicate the force of the violence which
8 was used or the manner in which the injury was in-
9 flicted, but not necessarily, and it normally does
10 not

11 So I would take it from a forensic pathological
12 point of view.

13 So in light of Holder, Martucci and Jarrell, in
14 my discretion, and realizing the State has withdrawn
15 nine of fourteen, Exhibits 1, 13, 8, 7 and 86 are
16 admissible, and 8, 7 and 86 are admissible subject
17 to Defense objections.

18 Anything further on that?

19 MS. WEISS: No, Your Honor.

20 THE COURT: Mr. Floyd?

21 MR. FLOYD: No, Your Honor.

22 THE COURT: Bring us the jury, please.

23 (Jury returned to Courtroom)

24 THE COURT: All right. Welcome back, ladies and
25 gentlemen.

1 I apologize for the delay, and I assure you it
2 was entirely my bad, so to speak. We were back and
3 ready to proceed, but there was one issue I wanted to
4 address prior to our afternoon session.

5 With that being said, please continue to give the
6 parties your complete and undivided attention.

7 Madam Attorney General, you may call your next
8 witness.

9 MS. WEISS: The State calls Dr. Janice Ross.

10 CLERK: Swear the witness?

11 THE COURT: Yes, please.

12 JANICE ROSS, being duly
13 sworn, testified as follows:

14 CLERK: Again, if you will state your name and
15 spell your last name for the record, please.

16 WITNESS: Janice Edwards Ross. R O S S.

17 DIRECT EXAMINATION

18 BY MS. WEISS:

19 Q. Dr. Ross, what is your current position?

20 A. I'm a forensic pathologist and a hospital path-
21 ologist at Newberry, South Carolina.

22 Q. As the forensic pathologist and hospital patholo-
23 gist at Newberry, South Carolina, do you also provide
24 services for Lexington County?

25 A. Yes, we do. As a forensic pathologist, we do

DR. ROSS ON DIRECT

1 autopsies for coroners for several counties in the
2 State, including Lexington.

3 Q. Would you please explain to the jury what a foren-
4 sic pathologist is?

5 A. As a pathologist, we learn to identify diseases
6 through looking at tissue under the microscope and use
7 of the laboratory, blood work, etcetera.

8 We also learn how to do an autopsy in a specific
9 manner.

10 The word forensic means legal, so we use our
11 pathology knowledge on legal matters such as homicides,
12 accidents and suicides.

13 We learn how to do a specific forensic autopsy
14 and identify patterns of injury, documenting evidence
15 for Courts of Law.

16 Q. Would you please explain to the jury your educa-
17 tional experience?

18 A. Yes, I have a Bachelor's Degree from the Univer-
19 sity of South Carolina. My M.D. is from Upstate Med-
20 ical Center in Syracuse, New York, where I also did
21 training and residency in pathology.

22 I am board certified in three areas of pathology.

23 Q. And what are those?

24 A. Anatomic, clinical and forensic pathology.

25 Q. And do you receive continuing training on your

1 three year and board certification?

2 A. Yes.

3 Q. And does that include forensic pathology?

4 A. It does.

5 MS. WEISS: Your Honor, at this time I would like
6 to introduce Dr. Janice Edwards Ross as an expert in
7 forensic pathology.

8 THE COURT: All right. Mr. Floyd?

9 MR. FLOYD: No questions, Your Honor.

10 THE COURT: All right. Again, ladies and gentle-
11 men, as you recall, a person cannot ordinarily give
12 opinion testimony. Usually a person must testify as to
13 what they saw, what they sensed by smell or some other
14 senses.

15 There is an exception for those persons that have
16 training, experience, education and become qualified
17 in some art, science, craft or profession.

18 They are permitted to give opinions in certain
19 areas if the Court qualifies them.

20 This witness, Dr. Janice Ross, will be qualified
21 in the area of forensic pathology and may give opinion
22 testimony in that area.

23 That does not mean that you must accept the opin-
24 ions, but it is evidence that you, the jury, can use
25 in any way you see fit.

1 Thank you. You may continue.

2 MS. WEISS: Thank you, Your Honor.

3 BY MS. WEISS:

4 Q. Dr. Ross, did you have the opportunity to view the
5 body of Joshua Dial?

6 A. Yes.

7 Q. And on what date was that?

8 A. January 21st, 2010.

9 Q. What time was that?

10 A. We started at eight thirty in the morning.

11 Q. And when you start with an autopsy, how does the
12 body come to you?

13 A. The body is received in a body bag. In Lexington
14 County they have this little plastic lock on the body
15 bag so that no one can open it.

16 It has to be opened -- that has to be cut, and
17 we document the lock number and the body bag and do
18 photographs.

19 Q. And did you document the lock number in this
20 case?

21 A. Yes.

22 Q. So this body bag was locked, and you were the
23 one who broke that seal?

24 A. Yes.

25 Q. Do you have records that show the age of Joshua

DR. ROSS ON DIRECT

1 Dial?

2 A. Yes, he was said to be five months old.

3 Q. Please walk us through what you do as you start
4 an autopsy.

5 A. As I said, we photograph the body front and back
6 in a clothed position, a clothed body. Then we take
7 the clothing off, if there is any, and document it,
8 and we take photographs of the front and back of the
9 body again and look thoroughly over the external sur-
10 face of the body for any evidence of injury or any
11 evidence of natural disease.

12 We then proceed to autopsy, which is a specific
13 way of just looking at each organ of the body to, again,
14 identify any types of injuries or any natural disease.

15 Q. And do you do bone scan?

16 A. On babies, yes, in certain cases. In this case
17 we took x-rays before we did the autopsy.

18 Q. And was there evidence of any breaks, healing
19 fractures, or any injuries to the bone?

20 A. No.

21 Q. As you did the external scan of the body of Joshua
22 Dial, did you notate all puncture wounds or marks?

23 A. Yes.

24 Q. And can you say from the neck down on Joshua Dial
25 was there any injury that you noted that occurred

1 prior to resuscitative efforts or hospital efforts?

2 A. No.

3 Q. So just for the record, there were several pricks
4 and marks but only from -- from your expert testimony
5 they were from health care intervention once the baby
6 was taken to them?

7 A. Yes. There were puncture wounds for intravenous
8 lines, etcetera. Yes.

9 Q. And to what -- do you start with examining the
10 lower part of the body or the head of the child?

11 A. All of the above. We usually start from the
12 head down.

13 Q. Okay. First of all, when you were examining the
14 body, did you find any bacterial endocarditis?

15 A. Well, that would be looking at the heart, and
16 when I looked at the heart there was no evidence of
17 that.

18 You take tissue, little pieces of each tissue,
19 and look at them under a microscope, and there was no
20 evidence of that.

21 Q. Any evidence of a bleeding issue in the child?

22 A. No.

23 Q. Or bleeding problem like coagulopathy problems?

24 A. Coagulation problems? No.

25 Q. And what would you look for relative to that?

DR. ROSS ON DIRECT

1 A. Well, you would obviously have a history, but you
2 would also see a lot of bruising anywhere that there
3 was any kind of injury.

4 There would be an IV line, there would be exces-
5 sive bleeding in that area.

6 Q. Did you see any evidence of that?

7 A. No.

8 Q. Did you see any evidence of any trauma or other-
9 wise that could have caused the death of Joshua Dial
10 from his neck down?

11 A. No.

12 Q. At this time, I would move on to focus on the
13 head in the autopsy.

14 I show you what has been marked as State's Exhi-
15 bits 1 and 13 for identification. Do you recognize
16 these photos?

17 A. Yes, I do.

18 Q. And are these . . .

19 A. These are of Joshua Dial from the autopsy.

20 Q. And starting with . . .

21 MS. WEISS: Your Honor, at this time I would move
22 to enter State's Exhibits 1 and 13 into evidence.

23 THE COURT: Mr. Floyd.

24 MR. FLOYD: Without objection.

25 THE COURT: State's Exhibits 1 and 13 are in

1 evidence without objection.

2 (Autopsy photos admitted without objection as
3 State's Exhibits 1 and 13)

4 BY MS. WEISS:

5 Q. Starting with Exhibit 13, I'm going to hold it
6 up for your testimony.

7 What is this picture?

8 A. It depicts the chin with the head thrown back
9 somewhat. You can see the chin and underneath, and
10 the neck, and there is a bruise right here on the left,
11 right at the angle of the left jaw.

12 Q. Okay, are you talking about that right there?

13 A. Yes.

14 Q. And do you have an estimate of approximately what
15 size that bruise is?

16 A. It's about half an inch in diameter.

17 Q. And do you have any idea what caused that bruise?

18 A. No.

19 Q. State's Exhibit 1, can you show what your findings
20 are related to that photograph?

21 A. It just shows the head of Joshua Dial and the
22 upper shoulders, upper back, and it shows really no
23 injury, no bruising.

24 Q. Okay, on this photo there appear to be some dark
25 areas and a light area here. Can you explain what

1 that is?

2 A. The dark areas -- it's called lybermortis. After
3 death, the blood settles to the lower part of the body
4 by gravity, and it will settle and make the skin look
5 red, icky red, except for those areas that are actually
6 touching surface, like the back of the head is touch-
7 ing the table, or the bottom of the body. That is
8 blanched where the blood settled in that area.

9 So there is blanching where there is pressure to
10 the -- from just the head being on the table.

11 Q. Is there any bruising at all on the back of this
12 child's head?

13 A. No, there is not.

14 Q. I now show you what's been marked as State's Ex-
15 hibit 86 for identification. Do you recognize this
16 photograph?

17 A. Yes.

18 Q. What does this photograph depict?

19 A. This shows the body of Joshua Dial, the head,
20 after the scalp has been reflected.

21 Q. Can you describe what that means to the jury?

22 A. The -- in order for us to identify the brain on
23 the autopsy, we have to make an incision in the back
24 of the scalp and then we just reflect the skin for-
25 ward and backward to look underneath the skin, to

DR. ROSS ON DIRECT

1 further identify any kind of bruising that might not
2 be visualized externally.

3 Q. And could there possibly be bruising that is
4 starting on the inside of the head that hasn't deve-
5 loped or shown up on the head?

6 A. There are times when you can't see it from the
7 outside, but you would see it on the inside, yes.

8 Q. And does this photo help you to answer whether
9 there was any bruising on Joshua Dial?

10 A. Yes, it does.

11 MS. WEISS: Your Honor, at this time I would like
12 to move Exhibit 86 into evidence.

13 MR. FLOYD: Subject to our earlier objection.

14 THE COURT: State's Exhibit 86 is in evidence sub-
15 ject to previous objection.

16 (State's 86 admitted over objection in evidence,
17 being an autopsy photograph)

18 BY MS. WEISS:

19 Q. Dr. Ross, could you please step down and show
20 the jury what you're talking about as far as the bruis-
21 ing?

22 A. . .

23 THE COURT: Yes, please, Doctor, and keep your
24 voice up.

25 A. The back of the head is here, and the front is

DR. ROSS ON DIRECT

1 here. You can see underneath the skin in the back that
2 there is no red, dark areas. Likewise on the front,
3 and I'll go through this again.

4 This is the back of the scalp here with no bruises
5 and the front with no bruises.

6 Q. We had mentioned about the bruise on the chin.
7 Does that skin show all the way down to underneath the
8 chin?

9 A. No.

10 Q. And normally would you pull that skin back?

11 A. We don't necessarily go up that high.

12 Q. Okay.

13 A. Because we don't want to interfere with the visual
14 -- the seeing the body in the coffin.

15 Q. Looking at this, Dr. Ross -- I'm sorry, Dr.
16 Ross.

17 Looking at this photo, is there any question as
18 to whether or not there was any bruising on the back
19 of Joshua Dial's head?

20 A. I don't have any question that there is no
21 bruising there.

22 Q. If you could just stay there. Actually, maybe
23 you'd better sit back down.

24 After you removed the skin and looked at the skin
25 on the head, and you determine there is no bruising,

1 what do you do next?

2 A. We cut the top of the skull off with a saw. We
3 take that off, and then we can visualize the brain
4 directly.

5 Q. And prior to doing that on Joshua Dial's body,
6 did you have any conclusion as to what caused the
7 death of Joshua Dial?

8 A. I did not.

9 Q. Once you were able to take off the top of the
10 head and look, were you able to then start forming
11 your conclusions?

12 A. Yes.

13 Q. Can you explain to the jury why -- what was sig-
14 nificant when you took off the top of the head?

15 A. We saw immediately that there was subdural hemor-
16 rhage and subarachnoid hemorrhage.

17 We also saw that the brain had been -- was swol-
18 len so much that the brain was flat and had a flat
19 surface as opposed to the usual kind of hill and val-
20 ley type of formations.

21 Q. I show you State's Exhibits 7 and 8 for identifi-
22 cation. Do you recognize these two photos?

23 A. Yes, I do.

24 Q. And what do they depict?

25 A. Number 8 depicts subarachnoid hemorrhage on both

DR. ROSS ON DIRECT

1 sides of the brain, and Number 7 shows subdural hemor-
2 rhage on both sides of the brain.

3 MS. WEISS: Your Honor, at this time I would move
4 State's Exhibits 7 and 8 into evidence.

5 MR. FLOYD: Subject to my objection.

6 THE COURT: All right, 7 and 8 are in evidence
7 subject to previous objection.

8 (Autopsy photographs admitted into evidence over
9 objection as State's Exhibits 7 and 8)

10 BY MS. WEISS:

11 Q. Dr. Ross, if you could step down and show these to
12 the jury?

13 A. Yes.

14 Q. Okay.

15 A. The first thing you do is remove the top of the
16 head.

17 Q. In this photo is that the top of the head as you
18 removed it?

19 A. That's the top of the head and it's like a cap.
20 We're looking at the side of this cap.

21 Q. Show that to the jury and show them what was im-
22 portant to you as that was being done.

23 A. You can see the skull and right underneath it is
24 this thick membrane called the dura, and then this
25 surface of the dura mater that is underneath the dura

1 and on top of the brain, and there is blood -- blood
2 clots on both sides.

3 So we have bone, the dura mater, and blood.

4 Q. From that, what are you able to determine?

5 A. The subdural hemorrhages -- by head trauma and by
6 -- the brain is pushed around inside the skull in the
7 space there.

8 It pulls and tugs on the blood vessels that con-
9 nect with the brain to the dura, and it breaks them
10 and causes bleeding in that space.

11 Q. From looking at this, does it -- how does this
12 rate on the amount of bleeding and injury to the sub-
13 dura?

14 A. Well, it is a significant amount for a child, be-
15 cause the child or baby -- the skull has just so much
16 space in it, and a child's brain fills that space.

17 So any extra volume is going to put a lot of pres-
18 sure on the brain, as opposed to someone my age and
19 the brain shrinks a little bit.

20 That doesn't mean you are getting stupid or any-
21 thing, but it shrinks a little bit and you have more
22 space there.

23 So alcoholics who have stumbled and fall get sub-
24 dural hemorrhages and they can have a lot more
25 hemorrhage than a child can have because they have

1 more space. The brain can make more space available
2 in that adult.

3 Q. Can you tell whether the injuries that were occur-
4 ring here or the hemorrhages happened as the cause of
5 a single trauma?

6 A. It looks like, yes, it did. It is all about the
7 same age. The blood clot was only on the dura for
8 hours to a couple of days. After that, it starts to
9 joining or becomes attached to the dura.

10 Q. And with a subdural hematoma like that, does it
11 eventually stop itself from bleeding?

12 A. Yes, because of the space.

13 Q. Let me show you State's Exhibit 8. Can you tell
14 the jury, please, what you found to be significant in
15 this photograph?

16 A. This is the surface of the brain, and what you
17 can't see because it's clear like seran wrap is what
18 is called the arachnoid, and it covers the very sur-
19 face of the brain.

20 And the brain is covered by the arachnoid membrane
21 but the bleeding is underneath there. It's called
22 subarachnoid hemorrhage.

23 We have wiped off the surface so this blood is
24 underneath that membrane.

25 Q. And is that a separate bleed from the subdural

1 hematoma?

2 A. Yes, but it is really caused by the same type of
3 force.

4 Q. And do you believe this bleed along with the sub-
5 dural bleed occurred at the same time?

6 A. Yes.

7 Q. Can you explain how arachnoid bleeding occurs,
8 how it happens?

9 A. Similarly, it can be caused by a variety of
10 things, broken arteries, for instance, but it can be
11 caused from the brain being hit against the inside
12 of the skull, breaking the blood vessels.

13 Q. Do you always see archnoid bleeding when you
14 see subdural bleeding?

15 A. Not always.

16 Q. After you were able to visualize both of those
17 bleeds, what did you do?

18 A. We took photographs and took sections of all the
19 organs, looked at all of the organs.

20 Q. Were there any injuries to any of the organs?

21 A. No.

22 Q. Based on -- was there anything else during the
23 autopsy that you base your findings on?

24 A. . .

25 Q. Other than what you have already explained to

1 the jury?

2 A. No.

3 Q. And were you able to come up with an expert opin-
4 ion or an opinion as to the manner of death involving
5 Joshua Dial?

6 A. Yes.

7 Q. And what was the cause of death?

8 A. Homicide.

9 Q. What were the causes of death?

10 A. The cause of death was the subdural hemorrhages
11 and edema due to blunt force injury to the head.

12 Q. And how did the subdural hemorrhage and the cere-
13 bral edema and subarachnoid hemorrhages -- how did
14 they cause the death of Joshua Dial?

15 A. It caused, as I said, a lot of swelling around
16 the brain, a lot of -- all that volume puts pressure
17 on the base of the brain where centers for breathing
18 and for heart rate are, so that it causes eventually
19 the brain to stop telling the lungs and the heart to
20 work.

21 Q. And what did you find to be the cause of all of
22 that hemorrhaging?

23 A. Close head injury and blunt force injury to the
24 head.

25 Q. What does that mean?

DR. ROSS ON DIRECT

1 A. That there was injury to -- there was blunt force
2 injury to the head. The head was hit by something or
3 the head hit a surface.

4 Q. And in order to cause -- would you say this was
5 severe bleeding?

6 A. Yes.

7 Q. And in order to cause severe bleeding that would
8 result in death, is there a certain amount of force
9 that has to go with that?

10 A. A significant force, yes.

11 Q. Would you say that an adult carrying a baby who
12 falls to the floor could cause enough force to cause
13 that type of injury and bleeding to the brain?

14 A. Not unless it was really very forceful.

15 Q. A normal trip and fall?

16 A. Not likely.

17 Q. And what about a trip and fall, say, into --
18 where you would land on this table or the baby would
19 land on the table, head would hit the table?

20 A. Not likely, unless again it is -- if you fell in
21 position. You know, if it just landed on that, no.

22 Q. And if someone fell maybe from a second story
23 balcony onto the concrete ground?

24 A. That . . .

25 Q. That kind of force?

DR. ROSS ON DIRECT

1 A. Yes.

2 Q. That's more the force that you are describing?

3 A. Yes.

4 Q. And is there any question in your mind about the
5 manner of death in this case?

6 A. No.

7 Q. And what was that finding?

8 A. Homicide.

9 Q. Thank you.

10 MS. WEISS: No further questions, Your Honor.

11 THE COURT: Thank you very much. Mr. Floyd?

12 MR. FLOYD: Thank you, Your Honor.

13 CROSS EXAMINATION

14 BY MR. FLOYD:

15 Q. Dr. Ross, I am going to ask if you can identify
16 a document?

17 A. Yes, this is what we put out from -- what we
18 have typed up following autopsy to give the coroner
19 an idea of how to word the death certificate.

20 Q. And is that something verified by you or your
21 office?

22 A. Yes.

23 Q. Your signature on it?

24 A. This particular one we put together at the time
25 of the autopsy but I subsequently changed that, the

1 same day.

2 Q. Isn't that the one that is changed?

3 A. It was changed because I took away describe how
4 injury occurred. I took away those words.

5 REPORTER: Defendant 2 for ID, Your Honor.

6 THE COURT: All right.

7 BY MR. FLOYD:

8 Q. This bears your signature, does it not?

9 A. Yes, it does.

10 Q. And where it says describe how injury occurred,

11 . . .

12 MS. WEISS: Your Honor, objection. If he intends
13 to publish that to the jury, he has to enter it in
14 evidence.

15 Q. Where it says describe how injury occurred,
16 would you agree with me it says head hit object?

17 A. Yes, and that is why it was subsequently changed.

18 Q. That was your initial finding, was it not?

19 A. It was our initial thought. When I thought
20 about it again, I realized I didn't want to -- the
21 head could have been hit by something or could have
22 hit an object.

23 So I removed that in order to open up possibili-
24 ties because the investigation was still going on.

25 Q. Did you have a conversation with the Sheriff's

DR. ROSS ON CROSS

1 Department about it?

2 A. I think I talked to the Coroner about it after I
3 went to change it.

4 Q. So at their request you changed it?

5 A. No, not that I recall.

6 Q. Did you change it the same day?

7 A. I believe so, yes.

8 Q. And who did you talk to between the time you gave
9 a finding until the time you changed it?

10 A. I changed it myself, and then I called the Coroner
11 to ask them to submit the second death certificate
12 and not the first.

13 When we -- we had those typed up while we were
14 doing the autopsy, and I got back to the office and
15 went through my notes and decided to change it at that
16 time.

17 Q. And you just remember that is what you did?

18 A. Correct.

19 Q. So you first put head hit object?

20 A. Yes.

21 Q. And then you changed it to say -- so you don't
22 put any description about how it happened?

23 A. Correct.

24 Q. Does that mean you don't know how?

25 A. That means that -- yeah. Well, yes, it could be

1 head hitting something or something hitting the head.

2 Q. I got you, so that would be the change?

3 A. Correct.

4 Q. Initially you had head hit object?

5 A. Right.

6 Q. But you on second thought said either head hit
7 object or something hit head?

8 A. Correct.

9 Q. But you didn't write that in the description?

10 A. Correct.

11 MR. FLOYD: I'd like to have this marked also.

12 REPORTER: Defense Number 3, Judge.

13 THE COURT: All right.

14 BY MR. FLOYD:

15 Q. It was a subdural hemorrhage?

16 A. Correct.

17 Q. With some swelling of the brain?

18 A. Yes.

19 Q. And that is in effect what you would call the
20 cause of death? Would that be correct?

21 A. Correct.

22 Q. Would you then describe that as a blunt force in-
23 jury to the head?

24 A. Yes.

25 Q. Which you said happened with head hit object or

DR. ROSS ON CROSS

1 object hit head?

2 A. Correct.

3 Q. Does that pretty much explain it?

4 A. Yes.

5 Q. Now, the pictures that you gave us, can you say
6 there was one injury or more than one injury?

7 A. No, what we very often see, because the brain has
8 gone back and forth and there are blood vessels all
9 over, and there are multiple blood vessels that are
10 broken. It is very likely or most often from one in-
11 cident.

12 Q. But you can't rule out that in fact there may
13 have been more than one incident?

14 A. Correct.

15 Q. Now, you mentioned something about bleeding after
16 the incident?

17 A. Not after clinically the baby became brain dead,
18 but there is only so much space in the head that al-
19 lows bleeding, and after you get to a point that there
20 is so much tension, you don't have any more bleeding.

21 Plus, the clotting factors and all start kicking
22 in.

23 Q. Well, were you aware that this child was diag-
24 nosed with coagulopathy?

25 A. I didn't see evidence of that in the chart. There

DR. ROSS ON CROSS

1 was a question mark of coagulopathy, but his value
2 were normal or within normal range, his clotting
3 values.

4 Q. Can you tell the jury what coagulopathy is?

5 A. It's a problem with blood clotting. Hemophilia
6 is coagulopathy, for instance, and sometimes in injur-
7 ies you use up all your clotting factors so that you
8 may bleed from anything and everything wherever you
9 have some kind of injury.

10 Q. And that would mean that your blood clotting
11 mechanisms would not be efficient?

12 A. Correct.

13 Q. And in that situation you could continue to
14 bleed from an injury?

15 A. You could.

16 Q. For a long period of time?

17 A. You could.

18 Q. Now, are there tests that hospitals give to
19 make a diagnosis of coagulopathy?

20 A. Yes, that was what I was referring to, called
21 PTT, and those measurements were normal.

22 Q. The hospital would not have made that diagnosis
23 without doing those type of tests, would they?

24 A. No, they would not.

25 Q. So if they made a diagnosis of coagulopathy,

DR. ROSS ON CROSS

1 at the time they did it would you agree that if
2 coagulopathy existed at that time that there would
3 have been a tendency for additional bleeding?

4 A. There could be, but you'd have bleeding every-
5 where. You would -- like a needle stick from an intra-
6 venous line.

7 You would have excessive hemorrhage from that,
8 for instance.

9 Q. Now, were you aware or do you know whether any
10 type of blood pressure chemical or treatment was per-
11 formed?

12 A. I don't know.

13 Q. What is Dopomine?

14 A. Dopomine is used very often to prevent the brain
15 swelling or decrease brain swelling. It pulls out
16 water from the body, like a diuretic.

17 Q. And does it increase the blood pressure?

18 A. I'm not sure.

19 Q. How about Epinephrine?

20 A. It could, but I'm not -- I don't give medica-
21 tions.

22 Q. All right. You don't know whether those type of
23 treatments were provided?

24 A. I do not know.

25 Q. Now, you did an examination of the entire body?

1 A. Yes.

2 Q. And you found no evidence whatsoever of old in-
3 jury, did you?

4 A. No, I did not.

5 Q. No skeletal fractures, nothing like that? No in-
6 ternal injuries to the organs?

7 A. Correct.

8 Q. I would like to ask you one thing. I notice
9 that the right lung was a hundred fourteen grams and
10 the left one was eighty grams?

11 A. Yes.

12 Q. Were you aware that a tube positioning error had
13 been made, causing the left lung to collapse?

14 A. I did not know that.

15 Q. Was it still collapsed at that point?

16 A. It wasn't collapsed. The right lung is larger
17 than the left lung normally.

18 Q. But that is a significant difference there, isn't
19 it?

20 A. Not necessarily. It also depends on if the baby
21 was on the right side or the left side.

22 Q. Now, if there is an injury to the brain and it
23 causes some bleeding, does that mean there has been
24 some disruption in the integrity of the capillaries,
25 the vessels and the arteries in the brain?

DR. ROSS ON CROSS

1 A. Yes.

2 Q. And is the disruption of that integrity of those
3 vessels what causes bleeding into the brain area; is
4 that correct?

5 A. Underneath the membrane, yes.

6 Q. Now, you could have an injury which would cause
7 some bleeding, and if the body were acting efficiently
8 it might shut the bleeding off immediately, is that
9 correct?

10 A. Yes.

11 Q. But if there was coagulopathy present, that
12 bleeding may continue unabated?

13 A. If there is coagulopathy, yes.

14 Q. And that could be bleeding over a long period of
15 time?

16 A. Yes, depending on how much space there is. There
17 is finite space.

18 Q. Well, did you weigh the amount of blood?

19 A. No.

20 Q. Now, isn't it true that you could have a trauma
21 to the head which could cause brain injury but without
22 showing evidence of trauma to the exterior of the
23 skull?

24 A. Yes.

25 Q. Now, as to this particular case, do you have any

1 way of telling us in a twenty-four to forty-eight
2 hour range as to when whatever insult or insults oc-
3 curred?

4 A. No. The clinical history would give an idea of
5 when the symptoms started, for instance.

6 Q. But actually there can be some period of time
7 between the insult and the onset of symptoms also,
8 can't there?

9 A. With an incident like this, I wouldn't think it
10 would take very long in minutes to start having the
11 symptoms.

12 Q. But those symptoms may be mild at first, isn't
13 that correct?

14 A. Well, there could be lethargy going into uncon-
15 sciousness. It may occur over minutes to an hour.

16 Q. Thank you, Doctor. No further questions.

17 THE COURT: Any Redirect?

18 MS. WEISS: Briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MS. WEISS:

21 Q. Dr. Ross, as a forensic pathologist, you don't
22 deal with living patients?

23 A. No.

24 Q. And you don't deal with the medications or dosages
25 and all that?

DR. ROSS ON REDIRECT

1 A. Correct.

2 Q. But in your experience and your training, and
3 looking at the record, there is nothing to show that
4 Joshua Dial had any coagulopathy or bleeding problems
5 at the time these injuries occurred?

6 A. Correct.

7 Q. And can you also state that as the body gets
8 more and more severely ill, eventually clotting be-
9 comes an issue?

10 A. It can.

11 Q. But what you're looking at and what you're re-
12 ferring to is when Joshua Dial received these injur-
13 ies there was no evidence of coagulopathy?

14 A. Correct.

15 Q. Thank you.

16 THE COURT: Mr. Floyd?

17 RE-CROSS EXAMINATION

18 BY MR. FLOYD:

19 Q. And at the time Joshua Dial got to you, he could
20 no longer bleed?

21 A. No.

22 Q. And so coagulopathy was not an issue at that
23 point?

24 A. Correct.

25 Q. But now coagulopathy would have been important

1 to a treating physician, would it not?

2 A. Yes.

3 Q. And if they tested for coagulopathy and found
4 it, would you agree that the diagnosis made then was
5 correct?

6 A. Yes.

7 Q. Thank you. No further questions.

8 THE COURT: Thank you very much, Doctor. You
9 may step down.

10 MS. WEISS: Your Honor, may Dr. Ross be excused?

11 THE COURT: Any objection?

12 MR. FLOYD: No objection, Your Honor.

13 THE COURT: You may be excused.

14 (Witness excused)

15 THE COURT: All right. I think we'll take about
16 a fifteen minute recess, ladies and gentlemen. If
17 you would please leave your notes face down on your
18 chair.

19 Do not discuss the case during this brief recess.

20 Thank you very much.

21 (Jury excused from Courtroom)

22 THE COURT: How many more witnesses have you got
23 today, Madam Attorney General?

24 MR. WALKER: Your Honor, we had potentially four or
25 five short ones.

1 THE COURT: Well, I have another matter I need to
2 deal with, so I am going to take a recess, and then
3 we'll go to about five o'clock.

4 MR. WALKER: Your Honor, if I may . .

5 THE COURT: Certainly.

6 MR. WALKER: I just want to put this on the re-
7 cord to complete the record with regard to Defense
8 Counsel objections to the photographs.

9 Not only did we hear this but it has already been
10 discuss -- we have deliberately chosen not to put
11 the photos on the Elmo or some type of overhead pro-
12 jector to be broadcast in the Courtroom.

13 That was a deliberate election on the part of
14 the State.

15 THE COURT: All right, thank you very much.

16 Anything further, Mr. Floyd?

17 MR. FLOYD: No, sir.

18 THE COURT: Then we'll take about fifteen min-
19 utes.

20 (Court stood in recess for brief period after which the
21 matter was resumed)

22 THE COURT: Anything before we bring in the
23 jury?

24 MR. WATERS: No, sir.

25 THE COURT: From the Defense?

1 MR. FLOYD: No, sir.

2 THE COURT: Bring our jury, please.

3 (Jury returned to Courtroom)

4 THE COURT: All right, the jury is back so we will
5 continue with the trial.

6 Mr. Waters, you may call your next witness.

7 MR. WATERS: Thank you, Judge. We would call
8 Investigator Prestigiacomò.

9 THE COURT: Come around and be sworn, please.

10 EDDIE PRESTIGIACOMÒ, being
11 duly sworn, testified as follows:

12 CLERK: Please have a seat, sir. When you are
13 seated, state your name, spelling your last name for
14 the record.

15 WITNESS: Eddie Prestigiacomò, P R E S T I G I
16 A C O M O.

17 DIRECT EXAMINATION

18 BY MR. WATERS:

19 Q. I think I've butchered your name more than I've
20 done some of these medical terms. I apologize for
21 that.

22 A. It's okay.

23 Q. Does everyone call you Presti?

24 A. Presti or Eddie is fine.

25 Q. And please tell me what your position is and

MR. PRESTIGIACOMO ON DIRECT

1 where you are employed?

2 A. I'm a major crimes detective with the Lexington
3 County Sheriff's Department.

4 Q. How long have you been doing that?

5 A. In major crimes, roughly five years.

6 Q. Would you quickly run down your other law en-
7 forcement experience for us?

8 A. Absolutely. I started, getting out of the mili-
9 tary, in '89, and worked at NYPD until '93; then in
10 Lexington for several years; and then Lexington County
11 in '96.

12 Q. And you've been with Lexington County ever since?

13 A. Yes.

14 Q. Did you have any involvement in this particular
15 case, in the investigation into the death of Joshua
16 Dial?

17 A. I did.

18 Q. And as part of that, did you go to the hospital
19 where Joshua was?

20 A. Yes.

21 Q. Which hospital was it that you went to?

22 A. Palmetto-Richland.

23 Q. All right, and did you also . .

24 A. I'm sorry. Lexington Medical Center.

25 Q. Lexington Medical?

1 A. Yes. I apologize.

2 Q. And do you recall about what time you got there?

3 A. I got to the hospital roughly at nine P.M. on
4 January 19th.

5 Q. And at any point did you leave the hospital?

6 A. Yes, I did.

7 Q. And for what purpose did you leave?

8 A. I was dispatched to pick up Misti Rice, the mother
9 of Joshua.

10 Q. And where did you go to do that?

11 A. I went to Heartbreakers, a strip club, on Bush
12 River Road.

13 Q. Is that in Lexington County or Richland County?

14 A. Richland County.

15 Q. And what did you do when you got there?

16 A. When I arrived at the club, I initially had ap-
17 proached several of the bouncers with Misti Rice's
18 name, to try to get her from the club.

19 They advised me that they needed a stage name.

20 I made a phone call to Detective Terry Govan who got
21 her stage name of Misti.

22 I spoke with the manager, and thereafter she
23 came out, and I drove her to Lexington Medical Cen-
24 ter.

25 Q. Okay. You said her stage name was Misti or . . .

MR. PRESTIGIACOMO ON DIRECT

1 A. Breezy.

2 Q. And when you first arrived at the hospital before
3 you went and got Misti, Joshua was already there, is
4 that correct?

5 A. Yes.

6 Q. And after that you left and went to pick up
7 Misti from work. Is that true?

8 A. Yes.

9 Q. All right, I have nothing further at this time.

10 THE COURT: Thank you. Mr. Floyd?

11 MR. FLOYD: No questions, Your Honor.

12 THE COURT: Thank you, Detective Prestigiacomo.

13 You may step down.

14 (Witness excused from stand)

15 THE COURT: Call your next witness.

16 MR. WATERS: Your Honor, we'd call David Day.

17 DAVID DAY, being duly

18 sworn, testified as follows:

19 MR. WATERS: I apologize. May Investigator
20 Prestigiacomo be excused.

21 THE COURT: Mr. Floyd?

22 MR. FLOYD: No objection.

23 THE COURT: You may be excused.

24 (Witness excused)

25 CLERK: Please have a seat, and when you are

MR. DAY ON DIRECT

1 the local people until it could be basically turned
2 back over to the locals.

3 Q. Okay. Back on January 19, 2010, were you em-
4 ployed with the Lexington County Sheriff's Office at
5 that time?

6 A. Yes, I was.

7 Q. All right, and did you respond to the home on Oakey
8 Springs Road?

9 A. I did.

10 Q. Is Oakey Springs Road in Lexington County?

11 A. Correct.

12 Q. And what was your job there?

13 A. I was crime scene investigator. I was called
14 there to document, which basically means photograph,
15 generate a report, and to collect any items of eviden-
16 tiary value to assist the other detectives.

17 Q. Okay, and what did you do when you first got
18 there?

19 A. When I first got there, I spoke to the Sergeant
20 on the scene, Sergeant Howard, and got very vague in-
21 formation. There was not a lot of information that
22 was known.

23 I kind of did a lot of waiting at first, and I
24 found out later on that a search warrant needed to be
25 obtained. I was pretty much waiting for that until

MR. PRESTIGIACOMO ON DIRECT

1 A. Breezy.

2 Q. And when you first arrived at the hospital before
3 you went and got Misti, Joshua was already there, is
4 that correct?

5 A. Yes.

6 Q. And after that you left and went to pick up
7 Misti from work. Is that true?

8 A. Yes.

9 Q. All right, I have nothing further at this time.

10 THE COURT: Thank you. Mr. Floyd?

11 MR. FLOYD: No questions, Your Honor.

12 THE COURT: Thank you, Detective Prestigiacomo.

13 You may step down.

14 (Witness excused from stand)

15 THE COURT: Call your next witness.

16 MR. WATERS: Your Honor, we'd call David Day.

17 DAVID DAY, being duly
18 sworn, testified as follows:

19 MR. WATERS: I apologize. May Investigator
20 Prestigiacomo be excused.

21 THE COURT: Mr. Floyd?

22 MR. FLOYD: No objection.

23 THE COURT: You may be excused.

24 (Witness excused)

25 CLERK: Please have a seat, and when you are

1 seated state your name, spelling your last name.

2 Speak up loud and clear.

3 WITNESS: My name is David Day, D A Y.

4 DIRECT EXAMINATION

5 BY MR. WATERS:

6 Q. Would you tell us what your current position is?

7 A. I am currently a crime scene investigator for the
8 Lexington County Sheriff's Department.

9 Q. All right, and otherwise known as CSI?

10 A. Correct.

11 Q. And tell us briefly your law enforcement exper-
12 ience, if you would?

13 A. I have approximately eighteen years of law en-
14 forcement, and all but two of it has been with the
15 Lexington County Sheriff's Office.

16 Q. Where were those two?

17 A. The two years were not with the County. I
18 asked for and was granted a two years leave of ab-
19 sence to participate in an international peacekeeping
20 mission in Kosovo.

21 The country was in civil war and they were left
22 without a police agency. The State Department or the
23 U.N. asked for law enforcement from around the world
24 to come in and help.

25 So I went over there to help police and train

MR. DAY ON DIRECT

1 the local people until it could be basically turned
2 back over to the locals.

3 Q. Okay. Back on January 19, 2010, were you em-
4 ployed with the Lexington County Sheriff's Office at
5 that time?

6 A. Yes, I was.

7 Q. All right, and did you respond to the home on Oakey
8 Springs Road?

9 A. I did.

10 Q. Is Oakey Springs Road in Lexington County?

11 A. Correct.

12 Q. And what was your job there?

13 A. I was crime scene investigator. I was called
14 there to document, which basically means photograph,
15 generate a report, and to collect any items of eviden-
16 tiary value to assist the other detectives.

17 Q. Okay, and what did you do when you first got
18 there?

19 A. When I first got there, I spoke to the Sergeant
20 on the scene, Sergeant Howard, and got very vague in-
21 formation. There was not a lot of information that
22 was known.

23 I kind of did a lot of waiting at first, and I
24 found out later on that a search warrant needed to be
25 obtained. I was pretty much waiting for that until

1 we got the search warrant.

2 Q. And once that was obtained for that residence,
3 what did you do?

4 A. I began by photographing -- well, first of all,
5 like I said, I spoke with anyone I could get ahold
6 of to find out what kind of information, you know,
7 to look for inside, you know, before I went inside.

8 And the only information I had was, of course,
9 a small child had been transported, not breathing,
10 unresponsive.

11 I received information that the child was still
12 alive but in an unknown condition, and the father of
13 the child was holding the child and had fallen onto
14 a table.

15 That was pretty much all the information that I
16 got.

17 The search warrant was obtained, and I began
18 photographing, and you always start from the outside
19 and work our way in.

20 I started photographing, starting from the mail-
21 box, and I walked all the way around the house photo-
22 graphing all sides.

23 Then I proceeded inside of the residence and I
24 strictly photographed every room and tried to get
25 every angle.

MR. DAY ON DIRECT

1 While I am there, I am taking mental notes from
2 what I was told by the Sergeant and the Detective
3 of things they were looking for, and things of value,
4 to make sure I photographed it very carefully.

5 Then once I am through photographing, I began
6 searching, looking for anything else of value.

7 Q. Okay.

8 A. And . . .

9 Q. I show you what's been marked as State's 66 and
10 see if you recognize that?

11 A. It is a photograph of the front of the residence.

12 MR. WATERS: Your Honor, we would move State's
13 Exhibit 66 in evidence at this time.

14 THE COURT: Mr. Floyd.

15 MR. FLOYD: No objection.

16 THE COURT: State's 66 in evidence without ob-
17 jection.

18 (Photograph in evidence without objection, State's
19 Exhibit 66)

20 BY MR. WATERS:

21 Q. All right, I want to show you what's been marked
22 as State's 75. Do you recognize that?

23 A. It is a table that was found in the living room
24 next to -- between the recliner and the sofa.

25 Q. Okay. Did you -- in taking that picture, did

MR. DAY ON DIRECT

1 you tamper with or move that table in any fashion?

2 A. No.

3 Q. That is how it was found by you when you came
4 in?

5 A. Yes.

6 Q. And that includes with the legs there underneath
7 the newspaper and trash and that sort of thing?

8 A. That is correct.

9 MR. WATERS: Your Honor, at this time I would move
10 State's 75 in evidence without objection.

11 THE COURT: Mr. Floyd.

12 MR. FLOYD: No objection.

13 THE COURT: In evidence without objection.

14 (Photograph in evidence without objection,
15 State's Exhibit 75)

16 BY MR. WATERS:

17 Q. I see there is a number one on there. Can you
18 tell me what that is?

19 A. That is for my benefit. When I'm taking some-
20 thing of evidence I always put -- if it is something
21 physical, I use a number. If it is something non --
22 like I'm going to photograph a footprint I will use
23 a letter.

24 It helps me when I go to write my report to know
25 what item one was, the table, and where it was located

MR. DAY ON DIRECT

1 at, to write my report and for Court.

2 Q. Can I ask you to step down over here?

3 A. Yes, sir.

4 THE COURT: Keep your voice up, please.

5 WITNESS: Yes, sir.

6 BY MR. WATERS:

7 Q. Come around here, please. Do you recognize
8 that?

9 A. Yes, sir. That's my writing and my name on the
10 evidence cards.

11 Q. What is item one?

12 A. The table.

13 Q. That's the table shown on the screen right now?

14 A. Yes.

15 Q. On State's 75?

16 A. Correct.

17 Q. Let me take this out.

18 MR. FLOYD: Your Honor, we would move State's 83
19 in evidence at this time, I believe without objection,
20 the table.

21 MR. FLOYD: No objection.

22 THE COURT: All right, without objection.

23 (Table entered in evidence without objection as
24 State's Exhibit 83)

25 Q. And this is the table that is in the photograph,

MR. DAY ON DIRECT

1 is that correct?

2 A. That's correct.

3 Q. All right, and these are the legs that were
4 there, is that correct?

5 A. That's correct.

6 Q. I guess it's self evident, but is this the part
7 that was underneath all the trash?

8 A. Correct.

9 Q. All right, and that's the top of the table that
10 was leaning against the couch?

11 A. Correct.

12 Q. Okay, and then two of these legs or at least one
13 of them was in the bottom portion, is that correct?

14 A. Yes.

15 Q. And how do these legs work? How did they get
16 in there?

17 A. It looks like it slides in. I don't see any
18 screws or . . .

19 Q. Okay. It's got slides in there?

20 A. Yes.

21 Q. Are they light or what?

22 A. Very light plastic.

23 Q. And it kind of pops in these little holes on the
24 bottom of the board, is that correct?

25 A. Correct.

MR. DAY ON DIRECT

1 Q. Okay, you can take your seat again, if you
2 would.

3 A. Sure.

4 Q. All right. Let me show you what's been marked
5 as State's 77 and see if you know what that is?

6 A. A photograph of the kitchen.

7 Q. Okay, and is there a single reason you took that
8 photograph?

9 A. Just showing the condition of the kitchen. A
10 baby jar on the floor, because there was a question
11 that he was feeding the child, and showing the condi-
12 tion of the trash.

13 Q. And where was this in relation to that picture
14 up there that shows the table?

15 A. It's a different room. You come out of the
16 kitchen into this room, into the living room.

17 MR. WATERS: Your Honor, at this time I would
18 move State's 77 in evidence.

19 MR. FLOYD: No objection.

20 THE COURT: State's 77 in evidence without objec-
21 tion.

22 (Photograph admitted without objection as State's
23 Exhibit 77)

24 BY MR. WATERS:

25 Q. I'm going to show you what's been marked as

MR. DAY ON DIRECT

1 State's 69 and see if you recognize it?

2 A. It's a picture shot from the living room into
3 the kitchen, and I guess that would be -- with the
4 dining area -- it looks like it may have been the
5 dining room looking into the kitchen.

6 Q. And this fairly and accurately depicts what you
7 saw that evening?

8 A. Ys.

9 MR. WATERS: I would offer State's 69.

10 MR. FLOYD: No objection.

11 THE COURT: State's 69 is in evidence without
12 objection.

13 (Photograph admitted in evidence without objection
14 as State's 69)

15 BY MR. WATERS:

16 Q. All right. Let me show you State's 70 and see
17 if you recognize what that is?

18 A. A picture of the living room again, just at a
19 different angle. It is looking like coming from what
20 I would consider the master bedroom.

21 The kitchen will be kind of to your left, look-
22 ing into the living room.

23 Q. And does that reflect the table that we just
24 viewed?

25 A. Yes.

MR. DAY ON DIRECT

1 Q. And is it in the same position it was when you
2 found it?

3 A. It was.

4 Q. Did you tamper with it or move it in any way?

5 A. I did not.

6 Q. All the trash and stuff around it, that is how
7 it was found. Is that correct?

8 A. Correct.

9 MR. WATERS: Your Honor, I'd offer State's 70, I
10 believe without objection.

11 THE COURT: Mr. Floyd?

12 MR. FLOYD: No objection.

13 THE COURT: State's 70 in evidence without objec-
14 tion.

15 (Photograph admitted in evidence without objec-
16 tion as State's Exhibit 70)

17 BY MR. WATERS:

18 Q. All right, I'm going to show you State's 74.

19 See if you can tell us what that is?

20 A. It is just a close-up, a closer photograph, of
21 the table, item number one.

22 Q. And is that the condition you found it in with-
23 out tampering with it?

24 A. Correct.

25 MR. WATERS: Your Honor, I'd offer State's 74 in

MR. DAY ON DIRECT

1 evidence, I believe without objection.

2 THE COURT: Mr. Floyd?

3 MR. FLOYD: No objection.

4 THE COURT: State's 74 in evidence without objec-
5 tion.

6 (Photograph admitted in evidence without ob-
7 jection as State's Exhibit 74)

8 BY MR. WATERS:

9 Q. All right, I'm going to show you State's 72 and
10 see if you recognize that?

11 A. The same thing, just a different distance shot
12 of the living room, showing the table.

13 Q. And what is beside it right here?

14 A. It's a steam cleaner that looks to be a carpet
15 cleaner. It's laying over and touching the recliner
16 that is extending out.

17 Q. Is that the condition in which you found it?

18 A. It is.

19 MR. WATERS: Move 72 into evidence, Your Honor.

20 THE COURT: Mr. Floyd?

21 MR. FLOYD: No objection.

22 THE COURT: State's 72 in evidence without objec-
23 tion.

24 (Photograph admitted in evidence without objec-
25 tion as State's Exhibit 72)

MR. DAY ON DIRECT

1 BY MR. WATERS:

2 Q. Okay, I think we've got one more. I show you
3 State's 73 and ask if you can tell us what that is?

4 A. It is of a carpet cleaner. I stood it up since
5 there was a question that the father of the child
6 had tripped and fallen. My job is to corroborate whe-
7 ther or not this has happened, and with the limited
8 information I wasn't even a hundred percent sure it
9 happened in the living room.

10 But since I'd heard there was a table involved,
11 and this was the only table I saw, my job was to try
12 to figure out did he trip and fall.

13 Well, seeing the carpet cleaner lying to the
14 side, I -- as carefully as I could without moving it,
15 I sat it up and then walked around to see if that in
16 fact could have -- if he could have tripped over it,
17 to see if that was in fact in the walkway.

18 I did have limited information on what had hap-
19 pened, so I just stood it up and photographed it and
20 tried to photograph different angles, to see whether
21 or not -- could this have been the culprit.

22 Q. So this does reflect a change you made by stand-
23 ing it up in the way you described?

24 A. Correct.

25 Q. Okay.

MR. DAY ON DIRECT

1 MR. WATERS: Your Honor, I'd offer State's 73,
2 I believe without objection.

3 THE COURT: Any objection?

4 MR. FLOYD: No objection.

5 THE COURT: Admitted in evidence without objec-
6 tion.

7 (Photograph entered in evidence without objection
8 as State's Exhibit 73.)

9 BY MR. WATERS:

10 Q. Did you collect anything else while you were
11 there?

12 A. I did. I collected several -- known to me be-
13 cause I'm not a chemist -- different kinds of pills
14 that I found laying in the living room floor.

15 I found one in what I would again consider the
16 master bedroom in a little cup and different prescrip-
17 tion pills.

18 I collected a pillow from the bed or off the
19 bed in the bedroom that had a reddish stain on it which
20 I did treat with a reagent which tested positive for
21 blood.

22 Q. And is there a reason why you collected the pills?

23 A. The pills were collected because I did know, ac-
24 cording to some detectives on the scene, that the
25 father, Lexie, was acting strange or that he might

MR. DAY ON DIRECT

1 have been on something.

2 There was a question of whether or not he had
3 been taking anything, so those tablets or pills were
4 collected in case something were found later on in
5 his blood and we would have something to compare it
6 to.

7 Q. And that's the blood that came back with just the
8 Phenergan in it?

9 A. Correct.

10 Q. All right, so is it fair to say that when you
11 were doing this, that based on the information you had
12 you were just kind of getting anything that you had
13 thought might be of value, just to be safe?

14 Is that fair to say?

15 A. Correct.

16 Q. Okay.

17 MR. WATERS: Your Honor, I believe that's it.

18 THE COURT: Thank you, Mr. Day, Mr. Waters.

19 Mr. Floyd?

20 MR. FLOYD: Yes, Your Honor. Just a few ques-
21 tions.

22 CROSS EXAMINATION

23 BY MR. FLOYD:

24 Q. Agent Day, your job is to document the scene,
25 is that correct?

1 A. Correct.

2 Q. And there was some mention about a pillow with
3 blood on it, but that wasn't analyzed, was it?

4 A. No, sir.

5 Q. It was just a small, reddish brown and tested
6 positive for blood?

7 A. Correct, and I don't know if it's human blood or
8 not because . . .

9 Q. Could it have been animal blood?

10 A. It could have been.

11 Q. Now, I want to ask you a few questions about
12 these pictures.

13 First of all, how large -- when you walk in the
14 front door, is that the room where the table was?

15 A. It was. When you walk in, come in the front
16 door, immediately to your left is the living room,
17 and if you walk straight ahead -- again not living
18 there, but it looks like to me what would be a din-
19 ing room.

20 It's kind of in between.

21 Q. Okay. The living room and the dining room, are
22 they connected?

23 A. Yes.

24 Q. And it's an open area, not like a doorway?

25 A. Correct. It's open. You can make your way to

MR. DAY ON CROSS

1 the kitchen by going straight around or through the
2 living room into the kitchen.

3 Q. Now, is there a separate dining room or a kit-
4 chen dining room?

5 A. I believe it was -- it is separated by only a
6 short wall.

7 Q. Now, let me try to get some perspective here.
8 This is Number 77, and is that a picture of the kit-
9 chen?

10 A. Yes.

11 Q. And the item that is in the center of the floor
12 there, is that a baby bottle? Not a baby bottle, but
13 baby food?

14 A. It is a baby food jar.

15 Q. A baby food jar?

16 A. Yes.

17 Q. That the food was taken out of, is that cor-
18 rect?

19 A. Correct.

20 Q. And the thing in the middle of the floor with the
21 red thing, that's the baby food jar with the spoon
22 sticking out of it. Is that correct?

23 A. Yes.

24 Q. And it's kind of out there by itself, isn't it?

25 A. Yes.

MR. DAY ON CROSS

1 Q. Now, down there is some trash, is that correct?

2 A. Yes.

3 Q. And is that a continuation of the trash that was
4 photographed in the living room or was that a separ-
5 ate bag of trash?

6 A. I didn't see any bag along with it. It is just
7 like it was just dumped in the room, but I didn't see
8 a bag along with it.

9 Q. Now, how much distance is it from the table here
10 to the kitchen?

11 A. . . .

12 Q. Five feet or so?

13 A. A very short distance.

14 Q. Tell me when I'm too close.

15 A. You're too close. From the table to the kitchen
16 I would say about -- maybe a little further back.

17 Q. All right, about like this?

18 A. It's also -- you've got to come out the room
19 and turn left, and it is not straight ahead.

20 Q. Not straight ahead?

21 A. No.

22 Q. Let's see if we can -- do you have a picture
23 that kind of shows the entrance to the kitchen?

24 A. . . .

25 (Brief pause)

MR. DAY ON CROSS

1 BY MR. FLOYD:

2 Q. Is there one that would show us kind of what you
3 are talking about, the angle . .

4 A. I guess this would be as close as I could try
5 to explain. As I can recall, coming out of the kitchen
6 -- that one is immediately to your left -- so if you
7 walk straight out of the kitchen, you would walk
8 straight this way.

9 To get to the table, you would have to walk out
10 the kitchen and then kind of turn to get to the table,
11 like that.

12 Q. Now, that would mean that the steam cleaner here
13 would be directly across from the entrance to the
14 dining room?

15 A. Yes.

16 Q. Now, how far would the entrance to the dining
17 room be from the turned over steam cleaner?

18 A. Maybe three, four feet.

19 Q. And how far from the entrance to the dining room
20 would the can of -- the jar or bottle -- jar of baby
21 food be?

22 A. I'm sorry. Can you repeat that?

23 Q. How far from the entrance to the dining room
24 would that jar of baby food be?

25 A. The same, two or three feet. That is only

1 approximate.

2 Q. But these are not large rooms, are they?

3 A. No.

4 Q. So it is conceivable that if he tripped over
5 the steam cleaner with the jar of baby food, it could
6 go about from me to where it laid?

7 A. In which direction? Coming from which direc-
8 tion?

9 The direction of the steam cleaner he is fall-
10 ing over, in conjunction with the baby food jar -- I
11 don't see that.

12 Q. But you see where it was laying but that doesn't
13 mean that's the direction he tripped?

14 A. No, but it -- which way are -- which way is it are
15 you saying in your scenario that he would have to come
16 out and trip over -- the jar of baby food seems to
17 almost be in the center of the kitchen floor.

18 Q. Okay.

19 A. I guess I'm just a little . . .

20 Q. Well, let's focus on the baby. You've got a
21 jar of baby food and the baby, and you trip over the
22 cleaner this way to go into the table there.

23 A. It would have to be coming out of the bedroom.
24 Tell me which room are you coming from, because from
25 where the baby food jar is found and the way the

MR. DAY ON CROSS

1 vacuum cleaner or the steam cleaner was, I don't see
2 how it could have landed where it did.

3 Q. Let me finish my scenario. Assume this is the
4 . .

5 A. Okay.

6 Q. Assume this is the table and this is the steam
7 cleaner where you saw it, and it's laying this way.
8 There's the kitchen over there, is that right?

9 A. The kitchen would be to your left if you're
10 standing -- the kitchen is over there.

11 Q. Okay, you trip and there is nothing to prevent
12 that going that way as you are grabbing for your baby,
13 and his head is straight down to the table?

14 A. That is correct jar-wise, but from that -- I
15 don't think the table -- can I see the picture of the
16 table and the steam cleaner again?

17 Q. There are some others too that . .

18 A. I guess if you are holding the jar in your left
19 hand and trip over the steam cleaner, in theory he
20 could possibly have thrown it off to the left, and
21 then you are saying he falls onto the table?

22 It's conceivable, but to me the way the table
23 is laying against the chair, I would think the table
24 would have fallen straight down, unless it was moved
25 after the fact.

1 But the table just looks strange the way it is
2 laid up on its side.

3 Q. Yeah, well, we don't know whether or not the
4 table might have been moved.

5 Q. That's right, I don't, but just looking at what
6 I saw -- that's the main reason I lifted up the
7 steam cleaner.

8 I wanted to see if it was in the doorway, which
9 it was not. There was plenty of room coming out of
10 the bedroom.

11 It was not like in the middle of the walkway.
12 I mean, there is plenty of room.

13 I can see how the jar could fall over there.
14 The table was very suspect. I didn't understand the
15 way the table was laying.

16 Q. Well, I understand what you're saying, but we
17 don't know whether or not it had been moved in some way.

18 No question though but it was in the room on
19 the floor?

20 A. Absolutely.

21 Q. That's all the questions I have.

22 THE COURT: Thank you, Mr. Floyd.

23 Mr. Waters?

24 MR. WATERS: Very briefly, Your Honor.

25 REDIRECT EXAMINATION

MR. DAY ON CROSS

1 BY MR. WATERS:

2 Q. You were asked about whether or not we don't know
3 if anything had been moved.

4 Is it true that all law enforcement are trained
5 not to disturb anything about the scene that they are
6 on, is that correct?

7 A. And we are even asked to make sure nobody else
8 moves anything.

9 Q. Okay, and you said -- you were asked about the
10 items that were in the trash, and you said it looked
11 like somebody just dumped it out on top of there, is
12 that correct?

13 A. Yes.

14 Q. On top of where the table was, right?

15 A. It -- well, it just looked like somebody dumped
16 trash out in the living room.

17 Q. And some of that trash is lying on top of the
18 legs, is that correct?

19 A. Yes, exactly.

20 Q. And this table was found -- you might be able to
21 see it better on the screen -- it was just leaned up
22 against the ..

23 A. The recliner.

24 Q. Is that correct?

25 A. The recliner, yes.

MR. DAY ON REDIRECT

1 Q. That table is a flimsy cardboard table with
2 these little light plastic legs that kind of go in
3 this area right here?

4 A. Correct.

5 Q. Nothing further.

6 THE COURT: Recross?

7 MR. FLOYD: Just one.

8 RECROSS EXAMINATION

9 BY MR. FLOYD:

10 Q. And what you don't know is whether or not some-
11 one else other than law enforcement moved the table?

12 A. Yes, sir. I wasn't there.

13 Q. For example, trying to clear a pathway for the
14 EMS people?

15 A. They were gone so I was not able to ask them,
16 but I do know we hold training classes for EMS.

17 We as crime scene will hold training every so
18 many months for EMS and tell them what we need from
19 them.

20 The priority is taking care of the patient, I
21 mean, regardless, but, secondarily, please don't
22 touch anything and watch where you step, and, you know,
23 basically the same thing that officers are taught about
24 not to mess up the crime scene.

25 Q. Okay, I understand, but, I mean, could have tried to

MR. DAY ON RECROSS

1 clear a pathway for EMS?

2 A. Absolutely, yes, sir.

3 Q. And also some of the items here we see in the
4 floor may have in fact been on the table before it
5 broke, is that correct?

6 A. Yes, sir.

7 Q. Either the top layer or the other layer?

8 A. Yes.

9 Q. Thank you. No further questions.

10 THE COURT: Thank you, Officer Day. You may
11 step down.

12 MR. WATERS: May Officer Day be excused?

13 MR. FLOYD: No objection.

14 THE COURT: All right. You may leave.

15 (Witness excused)

16 THE COURT: All right, ladies and gentlemen, we
17 are going to take our evening recess, and I would
18 again remind you during this recess that you are not
19 to discuss this case with anyone, your fellow jurors,
20 family, friends or anyone.

21 If anyone tries to talk to you about the case,
22 let me know.

23 Do not read, listen to any news reports about
24 the case.

25 Please recall my instructions that you not use

1 your computer, cellular phone or any other electronic
2 devices with electronic capability to obtain or to
3 disclose information about the case.

4 That is prohibited but not limited to the follow-
5 ing: Information about a party, a witness, an at-
6 torney or court officer; news accounts of the case;
7 information collected through your research on any
8 topic or testimony offered by any witness; information
9 collected through any research or other topic you
10 might think would assist you in deciding the case.
11 Don't do any investigation on the internet, and re-
12 member to keep an open mind. Do not begin your de-
13 liberations until you are instructed to do so by the
14 Court.

15 Leave your notes upside down on your chairs.
16 You are now excused until nine thirty in the morning.
17 Please be back promptly at nine thirty in the morning.

18 Hope you all have a pleasant evening.

19 Thank you very much.

20 (Jury excused for the evening)

21 THE COURT: Madam Clerk, would you secure the
22 jurors' notes? Thank you.

23 Anything further from the State?

24 MS. WEISS: No, Your Honor.

25 THE COURT: The Defense?