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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2016-001666
Lower Court Case No. 2013-CP-08-2121

JUSTIN R. HILLERBY, #339543,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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CROSS-EXAMINATION

BY MR. BOSNAK:

Q. Detective Sharp, we talked the other day about this. Remember?

A. Yes, sir.

Q. And we talked about this being a high-profile case?

A. Yes, sir.

Q. And news media TV coverage?

A. Yes, sir.

Q. And it was a case that you and Ms. Williams were assigned to, Detective Sargent Williams, I believe; correct?

A. Yes, sir.

Q. Y'all were both assigned, and you two basically worked the case?

A. Correct, sir.

Q. Right.

And you told me the other day that Summerville Police Department does not believe in video recording confessions?

A. That is not our policy. Correct.

Q. That's not your policy.

And they don't believe in audio recording of confessions; correct?

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- 1 A. Again, that's our policy. Yes, sir.
- 2 Q. Okay. And I was asking you about your training.
- 3 A. Yes, sir.
- 4 Q. And you told me that you were trained in the
- 5 Reid investigation type of techniques?
- 6 A. Yes, sir.
- 7 Q. Which is a big company I believe out of Chicago,
- 8 Illinois, that trains military interrogators, police
- 9 officers, and private security. Would that be correct?
- 10 A. Yes, sir.
- 11 Q. Okay. Now, first of all, you said you thought
- 12 Mr. Hillerby had been drunk the night before and was
- 13 possibly under the influence. Would that be correct?
- 14 A. On the 15th?
- 15 Q. Yes, sir.
- 16 A. Yes, sir.
- 17 Q. Yeah. Let's start with the 15th.
- 18 A. Okay.
- 19 Q. And that's what you thought?
- 20 A. Yes, sir.
- 21 Q. Now, you didn't give him a Breathalyzer test,
- 22 did you?
- 23 A. No, sir.
- 24 Q. And you didn't ask him to do any field-sobriety
- 25 test, did you?

1 A. Nope. No, sir.

2 Q. Okay. That's just your opinion?

3 A. Yes, sir.

4 MR. BOSNAK: Okay. And if you would put that
5 first statement back on the board, please.

6 UNIDENTIFIED: Excuse me. For the 15th?

7 MR. BOSNAK: Yeah, for the 15th.

8 Q. [Mr. Bosnak] You said that you kept Mr.
9 Hillerby there approximately two hours?

10 A. Approximately, sir.

11 Q. Approximately two hours.

12 And this is all y'all talked about over a two-
13 hour period? Just this?

14 A. No. There was some more, sir. That was all
15 that he chose to -- elected to write.

16 Q. Okay. And you let him write this on this one?

17 A. Yes, sir.

18 Q. You let him write kind of a synopsis of what
19 went on that day; correct?

20 A. Yes, sir.

21 Q. Okay. Now, but there was a lot more said there,
22 wasn't it?

23 A. Yes, sir.

24 Q. And I think you told me the other day that you
25 had told Mr. Hillerby that if this was an accident, he

1 just needed to tell the truth; if he accidentally hit the
2 kid or hurt the kid, that nobody got in trouble for an
3 accident. Correct?

4 A. Yes, sir.

5 Q. And nobody would get in trouble so please come
6 forward, because you felt like he might have done
7 something but he just needed to tell the truth?

8 A. Yes, sir.

9 Q. And that's correct; right?

10 A. Uh-huh.

11 Q. And you and him got along pretty well, didn't
12 you?

13 A. I guess so.

14 Q. Well, I mean, you took three statements from
15 him?

16 A. Yes, sir.

17 Q. And the last statement he specifically asked for
18 you?

19 A. Yes, he did.

20 Q. And what you did was if he wanted a cigarette
21 break or something, you let him have it?

22 A. Uh-huh.

23 Q. When he was feeling dizzy and feeling bad, you
24 call EMS?

25 A. Yes, sir.

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1 Q. Asked him if he needed any medical care. You
2 wanted to take care of him.

3 A. Yes, sir.

4 Q. Wouldn't that be correct?

5 A. Yes, sir.

6 Q. Now, on September the 15th, you didn't even have
7 the autopsy back on the death of this child, did you?

8 A. Correct, sir.

9 Q. And, really, you didn't have anything to go by
10 at that time, did you?

11 A. Exactly right.

12 Q. You just knew that there were four people in the
13 house where this child died?

14 A. Yes, sir.

15 Q. And, really, all four of those people were
16 within the window of opportunity of maybe have done
17 something to that child; correct?

18 A. Correct, sir.

19 Q. And you interviewed all three of them? All four
20 of them. Excuse me.

21 A. I personally didn't, but they were all spoken
22 to, interviewed, yes, sir.

23 Q. The Summerville Police Department did?

24 A. Yes, sir.

25 Q. Do you know the length of their --

1 A. No, I --

2 Q. -- questioning?

3 A. -- do not.

4 Q. Just Mr. Hillerby's?

5 A. Yes, sir.

6 Q. Okay. Now, a lot -- a lot was left out of that,
7 though, that y'all talked about, wasn't it?

8 A. Yes, sir. I was going to go back and cover that
9 on a question and answer, but Mr. Hillerby was not feeling
10 well.

11 Q. Okay. But that wouldn't have taken very long to
12 do that at all, would it?

13 A. I'm not really sure what you mean.

14 Q. Well, I mean to write that out: maybe ten
15 minutes?

16 A. Fifteen. I don't know. I'll go with that.

17 Q. Okay. And, excuse me. I didn't mean to
18 interrupt you.

19 And it's not a lot of dialog there --

20 A. No.

21 Q. -- I mean, not a lot of talking?

22 A. Correct.

23 Q. Okay. Let's go to the 17th. Now, we get to the
24 17th, and you told him to come down there. Had you
25 already planned to arrest him on the 17th?

1 A. No, sir.

2 Q. Didn't plan to arrest him. Didn't have a
3 warrant typed up, or anything like that, for him?

4 A. Correct.

5 Q. Okay. And this time he adds in that he believed
6 he clipped his head on the hallway. Would that be
7 correct?

8 A. Yes, sir.

9 Q. I think that's the second paragraph on the first
10 page.

11 [Whereupon, the witness reviews documents]

12 Q. [Mr. Bosnak] Would that -- about middle ways
13 down.

14 A. On his written statement?

15 Q. Yes, sir. It says, I believe I clipped his head
16 in the hallway and maybe the crib, too.

17 A. Yes, sir. I got you. Yes, sir.

18 Q. And there's no follow-up question asking him
19 what doorframe he might have clipped the child; correct?

20 A. I don't believe that there was a written
21 question for that, no, sir.

22 Q. Well, you didn't ask him that. You didn't say,
23 well, which doorframe did you hit his head on.

24 A. I asked him.

25 Q. You did?

1 A. Uh-huh.

2 Q. Okay. What did he say?

3 A. He said it was his bedroom doorframe for VICTIM.

4 Q. Is that in this statement?

5 A. His written statement I do believe it is. Let
6 me double check.

7 [Whereupon, the witness reviews documents]

8 Q. [Mr. Bosnak] Well, there is says, what part of
9 Blaze's head got clipped in the hallway and what did it
10 strike. The side of his head against the doorframe --

11 A. Yes, sir.

12 Q. -- to his room. Okay.

13 A. Yes, sir.

14 Q. But did you ask him if it was the left side or
15 right side of the doorframe?

16 A. I do not remember. I think I was -- he -- when
17 he was talking, he was showing like he was carrying him
18 down the hallway and as he walked in the door.

19 Q. No follow-up was done to determine if there was
20 a dent on the doorframe, was it?

21 A. To go physically look at the doorframe?

22 Q. Yes.

23 A. When I found this info out, I didn't go back,
24 no, sir.

25 Q. Okay. And did anybody look to see if there was

1 any DNA evidence or anything, blood or anything, on this
2 doorframe? Correct?

3 A. I do not know, sir.

4 Q. Okay. But you didn't do it?

5 A. I did not.

6 Q. Okay. Did you tell anybody to go do it?

7 A. I think that they did that -- well, no, I didn't
8 tell anybody. But I would assume that they would do that
9 when they processed the scene on the 15th.

10 Q. Okay. You figured they would find that?

11 A. I would assume. I left the scene before crime
12 scene actually got there. I don't know.

13 Q. Okay. Now, did anybody check the crib where he
14 said he might have hit the child's head?

15 A. I did not.

16 Q. Now, he's arrested on the 17th. He's taken to
17 bonding court. And as you well know, Officer, when
18 somebody is charged with murder or homicide, a magistrate
19 cannot set bond; isn't that correct?

20 A. That's correct.

21 Q. Only a general sessions judge like Judge
22 Harrington can set bond on that?

23 A. Yes, sir.

24 Q. So he was denied bond?

25 A. Correct.

1 Q. And he was going to be sent from the Summerville
2 jail to the Berkeley County jail; correct?

3 A. Yes, sir.

4 Q. Okay. And he's being transported, and he
5 decides that he wants to come back and talk to you.

6 A. After he's bonded, yes.

7 Q. Right. After the bonding court.

8 He knows he's got to go to jail, knows he can't
9 get a bond. On the way up there, he decides he wants to
10 come back and talk to you?

11 A. Yes, sir.

12 Q. Correct?

13 And he tells the deputy sheriff, I believe it's
14 Olsen --

15 A. At the time, he was employed at Summerville
16 Police Department. He's now a Dorchester County sheriff.
17 It's Officer Darling.

18 Q. Oh. I'm sorry. Officer Darling. He was with
19 Summerville, now he's --

20 A. Yes, sir.

21 Q. -- with Dorchester.

22 A. Yes, sir.

23 Q. Okay. And he tells Officer Darling that he
24 wants to come back and talk to you?

25 A. That's what I was told, yes, sir.

1 Q. Okay. And the reason for that was he was saying
2 that people were looking at him unfavorably and didn't
3 think much of him because of this statement and things
4 that were being said about him; correct?

5 A. He indicated that he was being unfairly
6 portrayed in the media and he wanted to set the record
7 straight and talk to me.

8 Q. Okay. And the first statement, he gives no
9 incriminating evidence at all; correct?

10 A. On the 18th or the 15th?

11 Q. No. On the 15th.

12 A. Correct.

13 Q. No incriminating evidence at all. And it's a
14 narrative that he writes out.

15 The second statement on the 17th he writes out
16 two paragraphs and then the rest of it is out of a five-
17 page statement. The first two paragraphs are his writing
18 and then the rest of it is in the Q and A form, question
19 and answer form; correct?

20 A. Correct. Yes, sir.

21 Q. And in the second statement the only thing that
22 he talks about now -- well, he talks about the knee-shot,
23 about hitting the child with his leg or his knee, coming
24 out of the bedroom; right?

25 A. Yes, sir. The 17th, yes, sir.

1 Q. Yes, sir, the 17th. And knocking the child
2 down; right?

3 A. Yes, sir.

4 Q. And, also, I don't -- and you asked him the
5 time. And that's all he says on the 17th. And that he
6 might have hit the child's head on the doorframe and maybe
7 on the crib?

8 A. Correct. That's what he said.

9 Q. Those are the three things that he said he --

10 A. Yes, sir.

11 Q. -- did on the 17th. And two, maybe. Okay.

12 Now, he says that he's being unfairly portrayed
13 and he wants to change, and he calls you and you interview
14 him on the 18th. Now, this time he doesn't say anything
15 about hitting the child with his leg; correct?

16 A. On the 18th.

17 Q. Correct.

18 A. I'm sorry.

19 Q. I'm sorry. From the -- the last statement,
20 which would be the 18th.

21 A. Yes, sir.

22 Q. It doesn't say anything about hitting the child
23 with his leg; correct?

24 A. On the 18th he did not.

25 Q. Doesn't do anything there. Doesn't say anything

1 about the child spilling tea about eight o'clock in the --
2 after eight o'clock that night, and him putting him in
3 timeout. It doesn't say anything about that in here,
4 either, does it?

5 A. No, no timeout. No, sir.

6 Q. No timeout.

7 This time he says the child spills his drink
8 about 9:30 or 9:40, and he hits him openhanded a couple of
9 times in the head.

10 A. Yes, sir.

11 Q. And hits him hard enough to knock the child to
12 the floor.

13 A. Yes, sir.

14 Q. Okay. And then says he was intoxicated?

15 A. Yes, sir.

16 Q. And he said he hits him all over the head?

17 A. Yes, sir.

18 Q. And he hits him openhanded, not with a fist?

19 A. That's what he -- yes, openhanded.

20 Q. Okay. And talks about his tea. Says his tea,
21 cleaned up his tea, and went and got some more tea.

22 A. Yes, sir.

23 Q. Okay. And you don't really ask him -- do you
24 ask him what time -- what time all this took place?

25 A. I don't believe so. No, I did not.

1 Q. Okay. So we don't know when it takes place.

2 But he says after he hits him, he hits him with his open
3 hand and knocks the child down, that the child is groggy,
4 tired-looking, so he decided at that time to take him and
5 put him in bed; correct?

6 A. Yes, sir.

7 Q. Okay. And that's his new statement?

8 A. Yes, sir.

9 Q. And that's supposed to make him look better?

10 A. I assumed.

11 MR. BOSNAK: Okay. I'm just going to ask you a
12 few further questions.

13 Q. [Mr. Bosnak] Detective Sharp, y'all have the
14 solicitor here as lawyers representing Summerville today;
15 correct?

16 A. Representing the State. Yes, sir.

17 Q. Right. Representing y'all; right? So y'all
18 have lawyers here.

19 Then we have Judge Harrington today on the
20 bench. And the Judge makes sure that we do everything
21 fairly; correct?

22 A. Yes, sir. I hope so.

23 Q. And we have this nice lady, with this thing up
24 to her mouth, which we call a court reporter. And she is
25 taking down every word that's being said here today --

1 A. Yes, sir.

2 Q. -- where nothing can be taken out of context, we
3 know exactly what's said; correct?

4 A. Yes, sir.

5 Q. Mr. Hillerby wasn't given any of those
6 privileges; was he?

7 A. When he said he wanted to talk to me, I let him
8 talk to me.

9 Q. I'm going to ask you again. Mr. Hillerby wasn't
10 afforded those safeguards, was he?

11 A. Mr. Hillerby was afforded the option of them and
12 he decided he wanted to still talk to me.

13 Q. So you would have brought a judge in while you
14 questioned him?

15 A. If he would have wanted to, I would have
16 attempted. But I know that you know and I know that you
17 can't do that, so I wouldn't have been able to talk to him
18 because he would have been invoking his rights then.

19 Q. But wasn't a judge -- you didn't bring a judge
20 in when you talked to him?

21 A. No, sir.

22 Q. And you said it's Summerville's Police
23 Department's policy not to record any of this?

24 A. Correct, sir.

25 Q. So we wouldn't have had a recording.

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1 A. Correct, sir.

2 Q. So we don't know what was said for two hours?

3 A. All you have is what he wrote and what I'm
4 speaking of and --

5 Q. Right.

6 A. -- what Sargent Williams said.

7 Q. That's all you want us to hear. We only know
8 what you want us to hear for the two hours.

9 A. No. I'm -- I would tell you if he said
10 something else.

11 Q. Well, you would? Well, you didn't write in here
12 about telling him that if it was an accident, nobody got
13 in trouble for an accident and just go ahead and tell the
14 truth and you would look out for him and make sure nobody
15 got in trouble. That's not in here.

16 A. If it's an accident, accidents unfortunately
17 happen. It's not -- doesn't rise to the level of a
18 homicide.

19 Q. It's not in here, though, is it?

20 A. No, sir.

21 Q. A lot of things are not in here.

22 A. Such as?

23 Q. Well, we don't know, because it was just you and
24 Detective Williams. We don't know. We don't know what
25 was said for over two hours.

1 A. Well, that's true. Not every word was written
2 down.

3 Q. Correct.

4 And the second statement was an hour and a half,
5 hour and forty minutes, and we don't know.

6 A. The 17th?

7 Q. Yes, sir.

8 A. Yes, sir.

9 Q. Now, I want to go back to my final question.
10 Mr. Hillerby wasn't given the safeguards that we are given
11 here today. Wouldn't that be correct?

12 MS. WILLIAMS: Your Honor, objection. Asked and
13 answered.

14 MR. BOSNAK: He hasn't answered it.

15 THE COURT: Counsel approach.

16 MR. BOSNAK: Yes, ma'am.

17 [Whereupon, an off-the-record bench conference
18 is held]

19 THE COURT: Sustained.

20 MR. BOSNAK: Thank you, Detective Sharp. No
21 more questions.

22 THE COURT: Ms. Williams?

23 MS. WILLIAMS: Just briefly, Your Honor.

24 - - -

25 - - -

REDIRECT EXAMINATION

BY MS. WILLIAMS:

Q. I represent the State of South Carolina, do I not?

A. Yes, ma'am.

Q. You're a witness in my case?

A. Yes, ma'am.

Q. You work for the State?

A. Yes, ma'am.

Q. Would you perjure yourself?

A. No.

Q. Are you telling the truth here today?

A. Yes, ma'am.

Q. These statements were written by this man right here, weren't they?

A. Yes, ma'am.

Q. He sat and wrote the statements?

A. Yes, ma'am.

Q. He was given his Miranda rights how many times?

A. At least three by me.

Q. And the last time, he requested the interview, did he not?

A. Yes, ma'am.

Q. Because he was being portrayed as the monster?

A. I assume so.

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1 Q. And in his mind, this statement was going to
2 make him look better?

3 A. I guess so. Yes, ma'am.

4 Q. Now, Mr. Bosnak asked you about the window of
5 opportunity, all these people in the house that could have
6 hurt this child. I'm going to refer you to page 3 of 4 on
7 the statement on the 18th. Do you ask him if the
8 roommates had anything to do with this incident?

9 A. Yes, ma'am, I did.

10 Q. What is his answer?

11 A. No.

12 Q. Somewhere in that statement do you ask him did
13 he tell Jen the truth about what happened?

14 A. Yes, ma'am, I did.

15 Q. And what did he say?

16 A. He said no.

17 Q. He tells you that he hits this child hard enough
18 for him to hit the floor? He smacks him so hard that he
19 hits the floor, his head hits the floor?

20 MR. BOSNAK: Your Honor --

21 A. Yes, ma'am.

22 MR. BOSNAK: -- this is leading.

23 THE COURT: Sustained as to leading.

24 MS. WILLIAMS: I will re-word my question, Your
25 Honor.

1 THE COURT: Thank you.

2 Q. [Ms. Williams] On page 2 of your -- well,
3 let me ask you the question first. Did you ask Mr.
4 Hillerby -- because Mr. Bosnak was asking you some
5 questions about the details of the statement. Did
6 you ask Mr. Hillerby questions about whether there
7 were visible injuries on this child?

8 A. Yes, ma'am.

9 Q. And what was the question that you asked him?

10 A. The question was: when you picked up JICIM to
11 move him, did you see any red marks or bruises on his
12 face.

13 Q. And what was his answer?

14 A. I didn't look.

15 Q. He didn't look.

16 A. Yes, ma'am.

17 Q. And does he also on -- does he also say anything
18 else about other areas of his body that he could have
19 hurt?

20 A. No. He just said that he struck him on the
21 head.

22 Q. What about -- would it refresh your memory to
23 look at page 4 of 5 on the 17th? the statement from the
24 17th?

25 [Whereupon, the witness reviews documents]

1 A. The second-to-last question on that page: did
2 you strike or cause any other forcible injury to ~~WICTM~~
3 that day other than the knee strike and the strikes to the
4 doorway and the crib. And his answer was: I grabbed his
5 shoulder and his neck, but no head strikes.

6 Q. [Ms. Williams] And, if you know, when did the
7 autopsy come out in this case?

8 A. I believe the autopsy was conducted on the 16th.
9 I'm not sure when the official written verdict was out.
10 I'm not sure.

11 Q. Would it refresh your memory to see that page
12 and when it was faxed out?

13 A. Please. Yes, ma'am.

14 MR. BOSNAK: Your Honor, this is beyond direct.
15 I'm going to object.

16 MS. WILLIAMS: It's just to refresh his memory.

17 MR. BOSNAK: No. This is all --

18 THE COURT: Counsel, approach.

19 [Whereupon, an off-the-record bench conference
20 is held]

21 THE COURT: Overruled.

22 Q. [Ms. Williams] Would it refresh your memory to
23 see --

24 A. Yes, ma'am.

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

1 THE COURT: You may.

2 Q. [Ms. Williams] When did that become public?

3 A. It looks like we received the fax on September
4 16th, 2008, 12:27.

5 Q. And what was the cause of death?

6 A. Probable cause of death is listed as blunt head
7 trauma.

8 Q. Okay. So on the 16th we know it's blood --
9 blunt-force trauma?

10 A. Yes, ma'am.

11 Q. And the 17th is when the defendant starts
12 telling you a different story about how the child's head
13 could be injured?

14 A. Yes, ma'am.

15 MS. WILLIAMS: Court's indulgence for just a
16 moment.

17 THE COURT: Yes, ma'am.

18 [Whereupon, Ms. Williams and Ms. Biagianti
19 confer]

20 MS. WILLIAMS: Nothing further. Please answer
21 any questions from the defense.

22 MR. BOSNAK: Just to clear up a few things.
23
24
25

RECROSS-EXAMINATION

BY MR. BOSNAK:

Q. I think my question was you didn't have the autopsy report the 15th when you first took the statement; isn't that correct?

A. Yes, I did not have it on the 15th.

Q. Right. Didn't have it on the 15th.

A. Correct.

Q. And I think my other statement was Mr. Hillerby didn't give any type of incriminating evidence about anything on the 15th, which would have been the first statement?

A. Correct. He did not.

MR. BOSNAK: Thank you.

THE COURT: Detective, you may step down.

THE WITNESS: Thank you.

THE COURT: Is he released from his subpoena?

MS. WILLIAMS: Yes, please, Your Honor.

THE COURT: May he remain in the courtroom?

MS. WILLIAMS: Yes, Your Honor, as far as the State.

THE COURT: Any objection?

MR. BOSNAK: No objection.

THE COURT: Detective Sharp, you are released from your subpoena. You may remain in the courtroom.

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1 Thank you. But you're free to go.

2 [Whereupon, the witness is excused and exits the
3 witness stand]

4 THE COURT: Call your next witness.

5 MS. WILLIAMS: Your Honor, may we approach very
6 briefly?

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

9 THE COURT: Ladies and gentlemen, this is an
10 appropriate time for us to go ahead and take our lunch
11 break.

12 Do not discuss this case amongst yourselves. Do
13 not read, watch, listen to any news accounts regarding
14 this case, should there be any.

15 Please be back in your jury room. We will begin
16 promptly at 1:30.

17 Please rise.

18 [Whereupon, the jury exits the courtroom at
19 12:48 p.m.]

20 THE COURT: Thank you. Be seated.

21 Anything -- any motions or any matters before we
22 break for lunch?

23 MS. WILLIAMS: Nothing from the State, Your
24 Honor.

25 MR. BOSNAK: Nothing from the defense.

1 THE COURT: All right. We are at ease until
2 1:30. Thank you.

3 [Whereupon, a recess is taken from 12:49 p.m. to
4 1:32 p.m.]

5 THE COURT: Thank you. Be seated.

6 Anything before we bring in the jury? From the
7 State?

8 MS. WILLIAMS: Nothing from the State, Your
9 Honor.

10 THE COURT: From the defendant?

11 MR. BOSNAK: Nothing from the defendant, Your
12 Honor.

13 THE COURT: Please bring in the jury.

14 [Whereupon, the jury enters the courtroom at
15 12:48 p.m.]

16 THE COURT: Thank you. Be seated.

17 Ms. Williams, call your next witness.

18 MS. WILLIAMS: The State would call Dr. Nicholas
19 Batalis.

20 [Whereupon, Dr. Batalis comes forward]

21 MS. WILLIAMS: Dr. Batalis, if you could just
22 walk this way and --

23 THE CLERK OF COURT: Raise your right hand.
24 Place your left hand on the Bible.

25 [Whereupon, Dr. Batalis is duly sworn by the

1 clerk of court as follows: do you solemnly swear or
2 affirm the testimony you will give the Court in the
3 trial of this case will be the truth, the whole truth,
4 and nothing but the truth, so help you God]

5 THE WITNESS: I do.

6 THE CLERK OF COURT: Please be seated.

7 [Whereupon, the witness takes the witness stand]

8 THE CLERK OF COURT: State your full name and
9 spell your last name for the record.

10 THE WITNESS: My name is Nicholas Ike Batalis.
11 That's B-A-T-A-L-I-S.

12 MS. WILLIAMS: Thank you, Doctor.

13 - - - - -

14 NICHOLAS BATALIS,

15 Having Been First Duly Sworn,
16 was Examined and Testified as Follows:

17 DIRECT EXAMINATION

18 BY MS. WILLIAMS:

19 Q. Where do you work?

20 A. I'm employed with the Medical University of
21 South Carolina in Charleston.

22 Q. And what is your occupation there?

23 A. I'm employed there as a forensic pathologist.

24 Q. And are you a licensed physician?

25 A. I am. I have a full unrestricted license in

1 South Carolina.

2 Q. And how long have you been licensed in your
3 profession?

4 A. I've had my license in South Carolina for
5 approximately four years.

6 Q. Okay. And do you specialize in pathology?

7 A. Yes. Pathology is my specialty, and then I --
8 and then a subspecialty is forensic pathology.

9 Q. And you are, as you said, presently practicing
10 at MUSC? The Medical University?

11 A. Yes.

12 Q. Sometimes goes by MUSC?

13 A. Yes.

14 Q. What does the study of pathology involve?

15 A. Pathology is a medical specialty that, simply
16 put, is the study of disease. So a general pathologist
17 may look at slides to determine if somebody has cancer or
18 not. They may also -- if you get clinical laboratory -- a
19 blood test drawn, a pathologist may help a family doctor
20 interpret those values.

21 Forensic pathology is then a subspecialty of
22 pathology that deals with the study of medical-legal
23 deaths, figuring out why people die and how they die.

24 Q. And are you -- does your work involve
25 specialized -- did you receive specialized training before

1 you were licensed?

2 A. Yes. So after graduating college, I then
3 attended medical school for four years in Indiana, then
4 came down to Charleston for my residence in anatomic and
5 clinical pathology. So my general pathology training for
6 four years. Then I went to the Dallas County Medical
7 Examiner's Office for a one-year specialized training in
8 forensic pathology, and then have been back at MUSC on
9 staff for almost two years now.

10 Q. And does your work involve performing and
11 participating in autopsies on a regular basis?

12 A. Yes. That's the primary duty of the job.

13 Q. How many autopsies would you say you've
14 performed?

15 A. More than 700.

16 Q. Are you a member of any specialized medical or
17 scientific groups or associations?

18 A. Yes. I'm a member of the two largest forensic
19 groups, the National Association of Medical Examiners and
20 the American Academy of Forensic Scientists, along with
21 several general pathology organizations.

22 Q. And are special examinations required for
23 certification to be a specialist in an area of medicine?

24 A. There are. To be -- as a board certified
25 forensic pathologist, there are a couple of different

1 steps to go through. First, after completing the
2 generalized residency training, you then have to take a
3 two-day test by the American Board of Pathology, who is
4 the single certifying organization to check everybody's
5 records.

6 After that, and then following the -- your
7 forensic training, there's again another full-day test
8 which you take and then pass, and then the American Board
9 of Pathology then certifies us as board certified in
10 forensic pathology, as well.

11 MS. WILLIAMS: Your Honor, at this time the
12 State would move to have Dr. Batalis qualified as an
13 expert in the field of forensic pathology.

14 MR. BOSNAK: Without objection.

15 THE COURT: This witness will be qualified as an
16 expert in that area.

17 MS. WILLIAMS: I guess they've already been
18 given that instruction.

19 THE COURT: Yes, ma'am, they have.

20 Q. [Ms. Williams] During September of 2008, were
21 you working at the Medical University?

22 A. Yes, I was.

23 Q. And did you participate in an autopsy of a
24 victim named ~~UTCTM~~ [REDACTED]?

25 A. Yes, I did, on September 16th of 2008.

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1 Q. Okay. How old was this victim?

2 A. At the time of the exam, he was just under two
3 years of age.

4 Q. Okay. And how -- what was your role in the
5 autopsy?

6 A. I was the attending physician on the autopsy, so
7 I was the primary person involved involving the
8 dissections and dictation of the autopsy.

9 Q. How long would you say an autopsy -- or this
10 autopsy took to complete?

11 A. This autopsy took approximately three hours.

12 Q. And was it performed at the Medical University?

13 A. Yes, it was.

14 Q. Did you prepare a final report in this case? a
15 forensic autopsy report?

16 A. I did.

17 Q. And was there a correction, at some point, to
18 the date of death on that report?

19 A. Yes. The initial report incorrectly listed the
20 date of death as 9/14 of 2008. And that was amended,
21 after the report was issued, to 9/15/2008.

22 Q. Okay. But, actually, are you able to give a
23 specific time to when this child died?

24 A. Based on the scene findings and the autopsy
25 findings, we can give a window but I couldn't testify to

1 an exact time of death.

2 Q. And how big would you say the window is in this
3 case?

4 A. Based on the -- from the time that he was found,
5 the changes described at the scene by the first
6 responders, and then what we saw at autopsy the following
7 day, I would say probably the closest I could get it down
8 is to say that he died within hours of when he was found.

9 Q. Okay. So when you say hours, it could be four
10 hours, three hours, five hours?

11 A. Yeah. You know, it could be, like you said, two
12 or three up to, you know, maybe ten or twelve hours, based
13 on just the way the body was found.

14 Q. So it could be as late as twelve hours before he
15 was found?

16 A. Approximately, yes.

17 Q. Okay. And that's just based on -- purely on the
18 medical records?

19 A. Yes.

20 Q. Okay. And based on this autopsy, and to a
21 reasonable degree of medical certainty, have you formed an
22 expert opinion as to the cause of death?

23 A. Yes, I have.

24 Q. And what is that?

25 A. He died of blunt head trauma.

1 Q. And what about the manner of death?

2 A. The manner of death was a homicide.

3 Q. So is it fair to say that that would be non
4 accidental?

5 A. Yes. Homicide, simply put, is death at the
6 hands of another, the death of a human caused by another,
7 so it is a non-accidental manner of death.

8 Q. And not to beat a dead horse but -- so what
9 you're saying was a twelve-hour window, it would not be
10 unreasonable for this child -- for us to assume that this
11 child could have died at ten o'clock the night before if
12 he was found at ten o'clock in the morning?

13 A. Yes.

14 Q. And can you give us, at first, just an overview
15 of what the injuries were to this victim?

16 A. The injuries on the decedent were entirely
17 focused on the head and neck region. As far as the --
18 kind of starting from the outside in, injuries we saw
19 on the face: he had scattered around the face and the
20 scalp -- there were twelve different bruises essentially
21 covering most of the face. There were two bruises on the
22 back of the scalp. And a couple of scrapes on the face,
23 as well.

24 Also, kind of working our way down, there were
25 two cuts on the inner -- there were cuts on the inner

1 portion of his upper lip, and also the inner portion of
2 the lower lip, that were consistent with his teeth being
3 jammed into the inner lip.

4 When we further did the dissection underneath
5 the scalp, so still on the outside of the skull but
6 underneath the scalp, we saw at least nine different areas
7 of hemorrhage that would be consistent with an impact site
8 where he would have been struck in those spots.

9 Q. So when you say nine points of impact, what
10 would cause a point of impact?

11 A. So these are all separate bruises, that we see
12 on the inside of the scalp, that would have been caused by
13 a significant force. And can't say what caused it but it
14 was, again, some sort of blunt-force trauma. So when we
15 say blunt-force trauma it's you're not being hit with a
16 sharp object like a knife. So it could be a book, it
17 could be a fist, and the -- or, alternatively, the child
18 could have been pushed against something that the head
19 could have struck against a doorway, a desk, many
20 different ways.

21 Q. And would these points of trauma -- or points of
22 impact, rather, been visible before the autopsy?

23 A. Two of them were. We did have two bruises on
24 the back of the head that would have been visible. The
25 remainder of them you could not see until we actually

1 reflected the scalp back, which is not uncommon in
2 children of this age whatsoever.

3 Q. Did these injuries cause bleeding outside the
4 scalp?

5 A. None of the scalp injuries or the ones on the
6 outside of the face caused any bleeding. There were no
7 cuts or lacerations to the skin. But the wounds on the
8 inner lips, there were cuts on the lips that could have
9 caused bleeding.

10 Q. Okay. So would it surprise you that there would
11 not be a lot of blood at the crime scene?

12 A. No. Not at all.

13 Q. Are these what is referred to as closed-head
14 trauma or closed-head injuries?

15 A. Yes. Closed-head injury just means that all the
16 injuries are maintained within the head; that is, there is
17 no skull fractures or open injuries.

18 Q. And was his head fractured at all?

19 A. No, there were no fractures of the skull.

20 Q. Let's talk a little bit about these points of
21 impact. When you have a point of impact like the ones you
22 saw underneath this child's scalp, is that something where
23 a child could be like playing and fall down and get that
24 kind of injury?

25 A. No, for two different reasons. One, to cause

1 enough of an impact to cause the bleeding or bruising
2 underneath the scalp, it's going to be more than just kind
3 of your normal -- excuse me -- more than your normal wear
4 and tear, just kind of bumping into things. Now, if the
5 child had fallen from a -- you know, several feet, a
6 decent height, you could get the bruising underneath
7 there.

8 The other thing that would go against just kind
9 of bumping around is that the -- again, just the number of
10 different impact sites. So, again, fourteen roughly on
11 the face and then nine that we saw on the scalp
12 underneath. So that would not be consistent with an
13 accidental injury, either.

14 Q. And would you, in your medical opinion, say that
15 all of these points of impact are about the same age?

16 A. Yes. They all had gross characteristics,
17 looking at them, all the same color, all appeared to be of
18 the same age.

19 Q. What about -- would the points of impact under
20 the scalp be about the same age as the bruising on the
21 face?

22 A. You're looking at two different things. I mean,
23 what we can say is the ones on the face were all inflicted
24 at the same time. The ones on the scalp for sure had the
25 same appearance. And loosely the two, the scalp wounds

1 and the face wounds, were likely at the same time. But
2 you can't really compare one to one individually.

3 Q. Okay. I am going to show you -- how long do
4 bruises stay on an individuals face would you say?

5 A. Bruises could last, you know, up until a week or
6 so. Even longer in some individuals.

7 Q. Like bruises like this.

8 A. These bruises were kind of a bright red-purple
9 color, which would be a fresh bruise. So no longer than a
10 day or so to all have this fresh purple appearance to
11 them.

12 MS. WILLIAMS: The Court's indulgence for just a
13 second.

14 THE COURT: Yes, ma'am.

15 [Whereupon, Ms. Williams and the court reporter
16 confer]

17 MS. WILLIAMS: I'm going to show counsel, Your
18 Honor, first what's been previously admitted as State's
19 Exhibit 1.

20 [Whereupon, Ms. Williams proffers documents to
21 Mr. Bosnak]

22 [Whereupon, Mr. Bosnak reviews documents]

23 MS. WILLIAMS: May I approach?

24 THE COURT: You may.

25 Q. [Ms. Williams] Doctor, this is a photograph of

1 this victim three days before the 15th, so four days
2 before your autopsy. Do you see any of the bruising, that
3 you saw at autopsy, on his face?

4 A. No, not at all.

5 Q. Or his neck?

6 A. No.

7 MS. WILLIAMS: Just -- could you just put that
8 up very quickly? State's Exhibit 1.

9 Q. [Ms. Williams] So you would have expected the
10 bruising that you saw at autopsy to have been visible
11 three days before?

12 A. If the injuries were present at that point, yes.

13 Q. Okay. Would you consider the injuries to be
14 fresh?

15 A. Yes.

16 Q. What type of force -- and you might have already
17 sort of addressed this a little bit. But what type of
18 force would it take to inflict these kinds of injuries?
19 And I'm talking about the head injury. And we're going to
20 talk a little bit more about the brain injury. But just
21 in general.

22 A. You know, the injuries on the -- as far as just
23 outside of the head that's on the face and the scalp,
24 again, would be significant injury, more than your normal
25 wear and tear. You're not going to get those type of

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1 injuries from just, you know, bumping into something. It
2 would be something more severe than that.

3 Q. If the child was standing up and hit with
4 someone's hand hard enough for him to fall back and hit
5 the floor on the back of his head, would that be an
6 explanation for at least two of the injuries?

7 A. Yes. You could get injuries from where the
8 individual was hit to begin with. And then when they
9 struck the floor or another object on the way down, you
10 could definitely get an injury from that, as well.

11 Q. Would these kinds of injuries be painful?

12 A. Yes.

13 Q. Could a child get these kind of injuries from
14 falling into a pool?

15 A. No. Not at all.

16 Q. Doctor, I'm going to have you demonstrate --

17 MS. WILLIAMS: Your Honor, I have already shown
18 counsel a demonstrative aid that we plan to use with
19 the doctor. And if we could just get the easel.

20 Q. [Ms. Williams] And while we're setting that up,
21 I can show you some of these photographs.

22 MS. WILLIAMS: I'm going to show counsel what's
23 been previously marked as State's 14 through 18.

24 [Whereupon, Ms. Williams proffers documents to
25 Mr. Bosnak]

1 [Whereupon, Mr. Bosnak reviews documents]

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

3 THE COURT: You may.

4 Q. [Ms. Williams] Doctor, I would like you to just
5 look at all of these pictures collectively, and then I'm
6 going to ask you if you recognize them and ask if you took
7 them.

8 [Whereupon, the witness reviews documents]

9 A. Yes. These are all photographs I took during
10 the course of the autopsy examination.

11 Q. [Ms. Williams] Okay. And do each of these
12 pictures accurately depict what you saw at the autopsy?

13 A. Yes. These show all of the injuries, that we
14 saw in the head and neck area, on the surface of the skin.

15 MS. WILLIAMS: Your Honor, at this time we would
16 offer State's 14 through 18 into evidence.

17 MR. BOSNAK: Without objection, Your Honor.

18 THE COURT: Without objection? State's 14
19 through 18 into evidence without objection.

20 [Whereupon, State's Exhibit Number 14 is
21 admitted into evidence by the Court]

22 [Whereupon, State's Exhibit Number 15 is
23 admitted into evidence by the Court]

24 [Whereupon, State's Exhibit Number 16 is
25 admitted into evidence by the Court]

1 [Whereupon, State's Exhibit Number 17 is
2 admitted into evidence by the Court]

3 [Whereupon, State's Exhibit Number 18 is
4 admitted into evidence by the Court]

5 MS. WILLIAMS: May we publish, Your Honor?

6 THE COURT: You may publish.

7 Q. [Ms. Williams] Now, looking at this picture,
8 can you tell us what -- where the injuries are?

9 MS. WILLIAMS: I'm going to give you a laser
10 pointer. May I --

11 THE WITNESS: I believe there's one up here.

12 MS. WILLIAMS: -- approach?

13 THE COURT: You may approach. You have
14 continuing permission.

15 Q. [Ms. Williams] You can usually --

16 MS. WILLIAMS: Blanket permission.

17 THE COURT: Yes.

18 MS. WILLIAMS: If you could just use the pointer
19 to kind of show where the injuries are on this child's
20 face.

21 A. Sure. So this -- in this photograph we're
22 looking at obviously the right side of the child's face.
23 And on this there are approximately six different distinct
24 injuries. Starting with up here just above the right eye,
25 there is a circular contusion or bruise above the eye;

1 then there are a series of three separate bruises along
2 the side of the face; another bruise down here at the
3 angle of the jaw on the right side. And then I believe
4 one of the other photographs will show this, but there is
5 also a bruise within the ear -- within the ear cavity.

6 Q. [Ms. Williams] And let's talk about that bruise
7 in the ear. Are those types of injuries every accidental?

8 A. Occasionally they would be accidental, but it's
9 definitely a red flag when you see -- it's not a typical
10 place that you would see a bruise in an accidental injury.
11 Usually when people bang their heads, they fall down, they
12 hit the outside of the scalp. You don't hit the inner
13 surface of the ear because it's well protected by the
14 outside of the ear.

15 Q. So what kinds of things can cause that kind of
16 bruising inside a child's ear?

17 A. If he was struck directly in the ear at the --
18 struck directly there. Also, we see these sometimes where
19 a child has been pinched and kind of squeezed. That could
20 cause the bruising in the ear. Those would be the two
21 most likely causes.

22 Q. Let's go to State's 15. Okay. Is this just --
23 tell us what this is.

24 A. Yeah. So this is a close-up again. We're
25 looking at the right hear. This would be the top of his

1 ear. His face would be down, in this picture. And what
2 we're seeing here is this dark purple area or bruise that,
3 again, is kind of deep in the inner surface of the ear.

4 Q. And, generally, would these bruises have been
5 visible at the time that they were inflicted?

6 A. No. Bruises aren't going to be instantaneously
7 visible. If you sprain your ankle or bump into your own
8 arm, often it takes, you know, a couple of hours for the
9 bruise to fully to develop. It would not be
10 instantaneous.

11 Q. Okay. Let's move on to State's 16.

12 MS. WILLIAMS: If I'm blocking anyone, please
13 let the judge know. I feel like I'm right in the
14 middle.

15 THE WITNESS: 16?

16 MS. WILLIAMS: Yeah.

17 Q. [Ms. Williams] Okay. Tell us about this
18 photograph.

19 A. We're looking now at the child's face. Here
20 I've taken my hand to pull back the top part of the lip to
21 show you the inner surface of the lip. So this would be
22 directly -- during life, this would be directly in contact
23 with the teeth. What we see here are two cuts or
24 lacerations into the inner surface of the lip.

25 Q. So what causes -- what could cause his teeth to

1 go through his lip?

2 A. Again, it would be a significant injury, not
3 just something you would bump down. There's a couple of
4 different scenarios: one, that the child was struck
5 directly into the mouth. That could drive the lip into
6 the teeth. Alternatively, if it was struck on the bottom
7 of the chin, that could drive the bottom teeth or top
8 teeth also up into the lip.

9 Q. And do we have an abrasion on the chin, or a
10 bruise of some kind?

11 A. We do. In this picture you can see this down
12 here. There's a circular bruise right on the bottom of
13 the chin.

14 Q. Let's move to State's 16 -- or 17. Excuse me.
15 Let's talk about the injuries on this picture.

16 A. Okay. This picture, we are now looking at the
17 left side of his face so the corollary to the first
18 photograph we looked at, and the -- a couple of things we
19 can see. One thing we have is the bruise on the chin,
20 which we saw in the last picture, at the bottom of his
21 chin. We also have a little scrape mark or abrasion on
22 the left side of his chin here. And then what you can see
23 beginning above the eye, extending down along the side of
24 the nose, down the cheek, and up around the outside of the
25 eye, is one large bruise. It appears to be confluent, so

1 it could have been inflicted in one blow. There's a
2 little area of difference here, so that also theoretically
3 it could have been one blow here and then another separate
4 contusion. But they appear to be blending together.

5 Q. And what about the ear on this side of the face?
6 This isn't the best photograph. But tell us about the
7 injury to that.

8 A. So in the ear here, similar to what -- similar
9 to what we saw in the right ear, there are two bruises
10 deep inside the ear cavity down here.

11 Q. And that would be from the same type of --

12 A. Yes. It would be the same type of force as the
13 other area there: direct impact, or some sort of maybe
14 pinching injury.

15 Q. Okay. Let's go to State's 18. Okay. Tell us a
16 little bit about this picture.

17 A. So this picture, I guess much like the photo two
18 photos ago, I've now -- we've now taken the bottom lip and
19 pulled it away to show the inner surface. And what there
20 are, there are four separate cuts or lacerations into the
21 lip down here, again, that really pair up very closely in
22 approximation with the teeth. So, again, these injuries
23 would be the same as before, consistent with maybe a blow
24 to the bottom of the chin or a direct blow to the mouth.

25 Q. So the bottom teeth went through the front lip,

1 or the top lip, and the top teeth went through the bottom
2 lip?

3 A. I think it was actually -- it looks more like
4 the bottom teeth correspond with the laceration on the
5 bottom lip and the top teeth appear to go more with the
6 lacerations on the top lip.

7 Q. Okay. And is this still a different view of the
8 injuries around the eyes of the child?

9 A. Yes. We're not seeing any new injuries here.
10 This, again, is part of that same large contusion or
11 bruise that we saw on the left side of the face.

12 Q. Okay. Thank you.

13 Now, these injuries, as disturbing as they are,
14 were not fatal?

15 A. No.

16 Q. Let's talk about the injuries to this child's
17 brain. If you could just give us an overview and then we
18 could, you know, talk specifically about what the brain
19 injury was to this child.

20 A. So, you know, certainly the bruises that we saw
21 you could get from, again, contact. People don't die from
22 a bruise to the face. But what these are indicative of is
23 that there was significant trauma and force. So when we
24 went deeper down and went inside the skull, the first
25 thing we saw was a collection of blood. Your brain -- so

1 you have your skull first and then you have a sac that
2 goes around your brain called the dura, and that -- so you
3 have a space, then, between that dura that kind of
4 protects your brain and your brain itself. And so he had
5 about ten or fifteen milliliters of subdural hemorrhage,
6 so fresh liquid blood that was around the brain,
7 indication of significant amount of trauma.

8 He also had another form of hemorrhage, what we
9 call subarachnoid hemorrhage. An arachnoid is another
10 membrane, but it sits directly on the top of your brain.
11 So the subdural hemorrhage you can wipe away.
12 Subarachnoid is kind of pulled right up close to -- right
13 up close to the brain, almost like a tee-shirt on your
14 body.

15 And we had patchy areas of the subarachnoid
16 hemorrhage scattered around the brain. Again, this is
17 from tearing of the small blood vessels of that lining of
18 the arachnoid. And, again, is a -- it indicates very,
19 very severe trauma. The subdural and the subarachnoid
20 hemorrhage, while the injuries like she mentioned on the
21 face and scalp are bad injuries, these are indicators of
22 possible fatal injury. And so that was the injuries
23 around his brain.

24 Also, which is routine in these cases, we remove
25 the eyes to examine the eyes, and the nerves that connect

1 to the eyes, for hemorrhages there. And he also did have
2 several hemorrhages around the nerves feeding both eyes,
3 and then also had hemorrhages within the retina or within
4 the eyeballs on both sides. And, again, these retinal
5 hemorrhages or peri-optic nerve hemorrhages -- which is
6 the ones around the eye nerves -- are indications of,
7 again, severe head trauma.

8 MS. WILLIAMS: And I'm going to do what I said I
9 was going to do before. Instead of this easel -- for
10 you to show the jury where all of these injuries were
11 under his scalp.

12 [Off the record momentarily]

13 MS. WILLIAMS: Doctor -- I mean, Judge, would it
14 be okay for the witness to come out of the witness seat
15 and --

16 THE COURT: He may step down.

17 MR. BOSNAK: Your Honor, could we move to see
18 the pictures?

19 THE COURT: You may.

20 MS. WILLIAMS: This is a pen. And if you need
21 to use your report, that is fine.

22 Q. [Ms. Williams] If you could just -- we have two
23 pictures for you. If you could show the jury -- this one
24 might be easier, too, if you want to use them both.

25 A. I believe the pictures we just showed show

1 all the injuries that we would see on this diagram better
2 than --

3 THE COURT: Doctor, I'm going to need you to
4 speak up, because you are in between the demonstrative
5 aid and my court reporter. I'm going to need you to
6 speak very loudly.

7 THE WITNESS: Okay.

8 THE COURT: Thank you.

9 A. All right. So this is a diagram of the scalp,
10 which is part of the autopsy. We make an incision and
11 pull the scalp forward so that we can then make an
12 incision into the skull to examine the brain.

13 So this top-left picture would be looking at the
14 decedent's face, if you're looking straight at him, with
15 the back of the scalp pulled forward. And what we saw
16 here, we had a large area of hemorrhage in this area, a
17 separate area here. So approximately four different
18 hemorrhages on the right side of the scalp. Again, these
19 are pulled forward, so these would be kind of underneath
20 your head. Kind of the top of your forehead towards the
21 back of the head is where these injuries would be.

22 There are also similar areas of bleeding in the
23 scalp on the left side. They were a little bit smaller.
24 So there were approximately four of those. And that would
25 correspond to injuries kind of on the top of your scalp

1 here and moving back towards the mid portion of the head.

2 And then there was one last area of hemorrhage
3 in the scalp that was back here, which would be kind
4 of the back, what we call the occipital area. So the
5 back-right side of the head there was a separate area.

6 So in all, again, there's at least nine areas of
7 distinct hemorrhages that tell us that these were from
8 separate impacts, as opposed to maybe all being caused by
9 one.

10 MS. WILLIAMS: Okay. Thank you so much. If you
11 would just return to the chair.

12 [Whereupon, the witness re-takes the witness
13 stand]

14 Q. [Ms. Williams] So what actually causes a person
15 to die from this kind of brain injury? What is this kind
16 of brain injury called?

17 A. So that the mechanisms of why he died is what we
18 call diffuse brain injury or diffuse axonal injury. And
19 the easiest way to think of this is almost like a
20 concussion. If you bang your head, you're kind of dizzy
21 for a while and disoriented. That's at the very low end
22 of this diffuse brain injury or diffuse axonal injury.

23 The indicators that we know, we had this --
24 again, he had the severe head trauma that resulted in the
25 subdural hemorrhage, subarachnoid hemorrhage, and then the

1 hemorrhage around the eyes. So it causes kind of a shock
2 effect or a concussive effect on the brain, injures those
3 cells so they can't send their messages like they normally
4 would, which then caused the decedent -- causes the
5 individual to die.

6 Q. When you say messages, do you mean like messages
7 to breathe, messages to pump blood, messages to make the
8 body work?

9 A. Yeah. All your brain's commands to your organs
10 and body to do what it's supposed to do.

11 Q. And when you say a concussion is on the lower
12 end of the diffuse brain injury, would you consider this
13 to be severe?

14 A. Yes. This would be the most severe type. It
15 doesn't always result in death, but in this case it
16 certainly did.

17 Q. Considering all of these injuries, would VICTIM
18 [REDACTED] have been symptomatic immediately after impact?

19 A. Yes. Individuals with this diffuse axonal
20 injury, this diffuse brain injury, are symptomatic
21 immediately.

22 Q. So would the wobbly, not being able to hold his
23 head up, not being able to walk, would those be symptoms?

24 A. Those would be. Sometimes people will describe
25 somebody as at first being kind of sleepy. And just kind

1 of groggy-appearing is another description we'll hear
2 sometimes.

3 MS. WILLIAMS: Court's indulgence.

4 THE COURT: Yes, ma'am.

5 [Whereupon, Ms. Williams and Ms. Biagianti
6 confer]

7 MS. WILLIAMS: Doctor, I don't have anymore
8 questions for you. Please answer any questions the
9 defense might have.

10 THE COURT: Mr. Bosnak.

11 MR. BOSNAK: Thank you.

12 CROSS-EXAMINATION

13 BY MR. BOSNAK:

14 Q. Doctor, there were more marks on the child than
15 just on the face; isn't that correct??

16 A. Yes, there were.

17 Q. I'm going to show you some --

18 MR. BOSNAK: Let me get them marked first.

19 [Whereupon, Defendant's Exhibit Numbers 1
20 through 10 are marked by the court reporter]

21 MS. WILLIAMS: If we could just see it before --

22 THE COURT: Yes, ma'am.

23 Q. [Mr. Bosnak] While she's marking those --

24 THE COURT: She can't mark and --

25 MR. BOSNAK: Okay. I'm sorry.

1 THE COURT: -- record.

2 Q. [Mr. Bosnak] Doctor, if you would please look
3 at these pictures marked Defense 1 through 9 [sic],
4 Defendant's 1 through 9 [sic], and tell me if you
5 recognize those pictures.

6 [Whereupon, the witness reviews documents]

7 A. Yes. These are all photographs I took during
8 the autopsy.

9 Q. [Mr. Bosnak] And that's a fair and accurate
10 representation of the way the child looked during the
11 autopsy or before the autopsy?

12 A. Yes.

13 MR. BOSNAK: Your Honor, at this time I would
14 ask that Defendant's Exhibits 1 through 10 be put into
15 evidence.

16 THE COURT: 1 through 9, or 1 through 10?

17 MR. BOSNAK: 1 through 10.

18 THE COURT: 1 through 10.

19 MS. WILLIAMS: Without objection.

20 Q. [Mr. Bosnak] I'm going to hold on to these a
21 minute. I'm going to ask you a question about --

22 THE COURT: Defendant's 1 through 10 into
23 evidence without objection.

24 [Whereupon, Defendant's Exhibit Numbers 1
25 through 10 are admitted into evidence by the Court]

1 MR. BOSNAK: I'm going to hold on to these a
2 minute and come back with these.

3 THE WITNESS: Sure.

4 Q. [Mr. Bosnak] Doctor, our skull and facial bones
5 are fairly strong bones, are they not?

6 A. Yes, they are. All bones are strong, but --

7 Q. But especially our skull because we have such
8 vital organs, our brain, to protect our brain; would that
9 be correct?

10 A. Yeah. I mean, the skull is definitely strong.
11 There are areas of it that are weaker than others but it's
12 a strong bone, for sure.

13 Q. Right. And a child's bones and skull would not
14 be probably as strong as mine or your skull, would it?

15 A. A child's bones tend to be a little bit more
16 flexible. As a person gets older, things get firmed up,
17 get more calcified and become more firm, in general,
18 whereas children's bones tend to be a little bit more
19 flexible because they really haven't fully developed,
20 fully calcified, at that point.

21 Q. But it would still take a lot of force from a
22 blow to do this to this child, would it not?

23 A. Certainly.

24 Q. Now, do you have any estimation or within a
25 medical certainty of which one of -- which of these

1 bruises or strikes to the face, in what order they were
2 done? Can you tell that?

3 A. No. I can't testify as to which order that the
4 bruises were inflicted, nor which of the ones that we saw
5 were the fatal blow. Sometimes it is one where -- one
6 last blow, or sometimes it's a commutative effect from the
7 multiple injuries.

8 Q. Now, I guess if you wanted to get hit -- none of
9 us want to get hit.

10 A. I don't want to.

11 Q. I don't, either.

12 But probably in this area, around this area in
13 here, not the nose but maybe in the mouth in here, that
14 wouldn't be -- you would really have to get real -- hit
15 real hard in this area to kill you, wouldn't it?

16 A. Yeah. As far as -- there would be two different
17 mechanisms of death. You could get hit in the face and
18 have part of your nose break and get shoved back. But as
19 far as relating to these types of injuries, it would be
20 more trauma to the skull itself; so that kind of the top
21 of the head, as opposed to injuries on the face.

22 Q. So I think what you're telling us -- and I'm not
23 trying to put words in your mouth, but I'm just trying to
24 understand -- the blows to the head is what you're saying
25 killed the child -- the skull -- correct?

1 A. Ultimately, the injury -- the injuries to the
2 skull ultimately would have led to the brain injuries.
3 However, as I mentioned earlier, an injury to the face if
4 the child was struck in the face, fell backwards and hit
5 their head on the ground, hit it on another object. So it
6 would still be -- the death would still be as the result
7 of the injury to the face.

8 Q. I understand. And what I'm trying to get at: I
9 understand if you hit me right here and I fell back and
10 hit my skull on the corner here, this probably wouldn't
11 have killed me. But the blow in me hitting my head on the
12 table or the floor would have caused my death; correct?
13 Is that what you're saying?

14 A. Yes.

15 Q. So in other words, you could hit the child, the
16 child could fall and hit its head on the table or the
17 floor, possibly, and that would have been the injury from
18 the blow, the secondary blow that was the more severe
19 injury; correct?

20 A. It's all -- once the injury is started, it's
21 all -- you say secondary, but it's still all the result of
22 the same blow.

23 Q. I understand. But --

24 A. So it would still be due to that initial blow.
25 But most likely the trauma would be after hitting that

1 secondary object.

2 Q. I understand.

3 It very well could be that the child could have
4 been hit in the face first and would have cried; correct?

5 A. That's certainly reasonable.

6 Q. Just like if we got hit in the face and it hurt,
7 I'll holler or something. So the child could have been
8 hit in the face and could have cried, or when it fell it
9 could have cried; correct?

10 A. Yes, sir.

11 Q. Now, I think you said there were thirteen facial
12 blows; is that correct?

13 A. I had fourteen injuries, twelve of which were
14 bruises, and then there were two scrapes. So fourteen,
15 all together, on the face.

16 Q. In the face.

17 And then how many on the skull?

18 A. At least nine.

19 Q. Okay. So twenty-three? Twenty-three total?

20 A. Twenty-three total. Keeping in mind that we saw
21 two bruises on the back of the scalp, on the outside of
22 the scalp, that could have corresponded to some of the
23 ones that we saw on the inside. Because when we pulled
24 back the scalp, I showed two injuries. There were two
25 bruises on the outside of the scalp. Then when we

1 reflected back the scalp, it could have been the same
2 ones. So there may have been twenty-one.

3 Q. So the child was hit quite a bit; correct?

4 A. Yes.

5 Q. And can you ascertain within a medical certainty
6 what the child was hit with?

7 A. No. When I say blunt-force injuries, again,
8 we've been talking these last couple of minutes about
9 being struck with the fist. The child could have been
10 struck with any blunt object. So, again, something
11 without a sharp edge: a remote, a fist, a knee.
12 Alternatively, the child could have been pushed into
13 something where the head hit the blunt object which,
14 again, could be a desk, a chair, anything.

15 Q. So it wouldn't necessarily have to be a fist?

16 A. No.

17 Q. Do you think a person could hit a child with an
18 open hand on top of the head and do that type of injury to
19 them with an open hand?

20 A. No. The -- with the open hands you would get
21 enough dispersal of the force that you would not get the
22 bruises we saw on the inside of the scalp.

23 Q. So you would have to have some kind of fairly
24 hard object to put force, a lot of force, in one
25 particular area; correct?

1 A. Right, to get those distinct areas of bruising.

2 Q. To get the distinct areas.

3 The child was hit in the mouth, and I think you
4 showed us a picture of the -- right here in the upper lip
5 it looked like the teeth had went up in the child's upper
6 lip and also in the bottom lip, too?

7 A. Yeah.

8 Q. In your expert opinion, was that caused by one
9 blow, two blows, three blows? What would you think?

10 A. It could have been any of those.

11 Q. Okay. And it also could have been caused by
12 hitting the child in the chin --

13 A. Right. So it --

14 Q. -- correct?

15 A. We saw that bruise on the chin. It could have
16 been from that all in -- so it could have all been one
17 injury with the bruise on the chin and the injuries to the
18 mouth, or those could have been three separate ones. He
19 could have been hit separately in the lower lip and then
20 in the upper lip. I can't say.

21 Q. Did anybody swab the child's mouth to check for
22 possible DNA, or any kind of tissue or anything, or blood
23 from somebody other than the child? Did y'all do that?

24 A. No. That's not standard procedure. We did not
25 do that.

1 Q. Okay. But very possibly you could have found
2 somebody -- if somebody had hit that child in the mouth
3 and cut their hand and had a piece of skin or their DNA,
4 it possibly could have shown something; right?

5 A. There were no pieces of skin on the mouth. You
6 know, we did examine that. So that wouldn't be -- if an
7 assailant had left behind -- if he had cut his hand, sure,
8 there could have been a little bit of DNA in there.

9 Q. Let me ask you: if somebody was to have hit
10 this child with their fist twenty-three times -- and let's
11 say the child fell a couple of times. Let's just say
12 eighteen or nineteen times, he hit the child eighteen or
13 nineteen times, in cases -- would it do damage to the
14 person's hand if they were just using a closed fist?

15 A. It may; it may not. That's going to depend on
16 the individual, their -- the way their bone structure is,
17 the way the integrity of their skin is, and also the
18 object that they're striking. So it's --

19 Q. But it could have bruised their hand?

20 A. Could have.

21 Q. And it could have bruised their hand badly,
22 couldn't it?

23 A. Could have.

24 Q. And there could be cuts in the hand, especially
25 from hitting the child in the mouth, couldn't it?

1 A. [No response]

2 Q. If that happened.

3 A. Yeah, if it happened. If the assailant's hand
4 did strike the mouth and struck the teeth, you could
5 definitely cut your fingers on the teeth.

6 Q. I want to go back and ask you what is State's
7 Exhibit Number 1. What is that?

8 A. This is a picture of the kind of back left side
9 of the decedent. So kind of over the left back there.

10 Q. Okay. And is that bruising?

11 A. Initially I had thought so. I believe in
12 several of these photographs there's areas that resembled
13 bruising. It had a kind of a reddish-orange appearance,
14 similar to appearance on some of the things that we saw on
15 the face. So initially during the exam, I thought that
16 could have been other areas of bruising. At the
17 completion of the autopsy, on the back side of the body,
18 as not to disfigure it too much, we do incisions down the
19 backs of the arms, the back and the legs, to open up and
20 look for deeper areas of bruising. And so when we cut
21 through these injuries on the back, there was no fresh
22 blood in there, so there was no -- there was no bruise
23 there.

24 Q. So you don't believe that was a bruise?

25 A. No.

1 MR. BOSNAK: Your Honor, can I pass these to the
2 jury as we go through them instead of putting them up
3 on the board?

4 THE COURT: You can do it that way, Mr. Bosnak,
5 but if you do that then you have to stop talking while
6 all thirteen of the jurors look at the pictures.

7 MR. BOSNAK: Okay, Your Honor. Let me go
8 through them and then maybe that -- a quicker way and
9 less cumbersome.

10 Q. [Mr. Bosnak] How about this on -- what is this?

11 A. This is a picture of the back -- it's tough to
12 tell it's -- we're up pretty high-power. The back of a
13 leg. It could be the right leg or the left leg. And has
14 similar kind of reddish-brown discoloration on the leg.
15 And some of them have a whitish area. I think this is the
16 back of the knee here that has a whitish cleared-out area
17 consistent with some scarring.

18 Q. Okay. And this next picture, tell me about
19 this.

20 A. So this is a picture of the buttocks. And,
21 again, there are some red discolorations on here that were
22 initially concerning for bruising. But as we cut through
23 here at the end of the case, there was no hemorrhage into
24 the -- into the fat.

25 Q. And the side?

1 A. Yeah. So this photograph is a picture of the
2 kind of upper-right portion of the body: the back of the
3 right arm and the right side of the back. And there are,
4 again, several different areas of these red-brown
5 discolorations on the side of the back and the back of the
6 arm.

7 Q. Okay. Could any of these marks be old bruises?

8 A. No.

9 Q. Okay.

10 A. No. We did not -- again, not to disfigure the
11 body, we did not cut through every single mark on the
12 extremities. But in the course of doing those incisions
13 down the back side, we saw a representative sample to say
14 that none of them were bruises.

15 Q. Okay. How about on the arm there?

16 A. Again, similar here with the red discoloration
17 on the arm. And some of these, again, have a central area
18 of white, or we call pallor, associated with some scarring.

19 Q. Do you know where that scarring came from? Do
20 you have any idea?

21 A. I don't.

22 Q. Okay. And this picture with the leg?

23 A. So this is an overall picture of the body prior
24 to autopsy. It shows some of the injuries that -- excuse
25 me -- some of the marks on the skin that we've already

1 seen, and then additional ones on the front part of the
2 right leg; again, the red discolorations with some areas
3 of scarring associated with them.

4 Q. Okay. And these are just basically the same
5 pictures, maybe a little different; correct?

6 A. Yeah. Those are just closeups of different body
7 parts that we see on these photos.

8 MR. BOSNAK: All right. Your Honor, I would
9 like to publish these to the jury --

10 THE COURT: You may.

11 MR. BOSNAK: -- at this time.

12 THE COURT: If you'll hand them to the bailiff.

13 [Whereupon, Mr. Bosnak proffers documents to the
14 bailiff]

15 THE COURT: Thank you.

16 MR. BOSNAK: I'll just sit down. I'm finished
17 with the doctor.

18 THE COURT: All right.

19 MR. BOSNAK: Thank you so much for answering my
20 questions.

21 [Whereupon, the jury reviews documents]

22 THE COURT: Ms. Williams?

23 MS. WILLIAMS: Thank you, Your Honor.

24 - - -

25 - - -

REDIRECT EXAMINATION

BY MS. WILLIAMS:

Q. So all of the pictures that he just showed you, that he showed the jury, is not bruising?

A. No.

Q. And you're positive?

A. Yes. All the ones that we sectioned through, which, as I said, were many of them on the back -- on the back and on the backs of the arms and legs, sectioned through those and none of those were bruising.

Q. And it's horrible to think about, but explain to them how you're so sure of this. What do you do to determine if there's bruising under the skin?

A. After we've complete the autopsy, we turn the body face down and then essentially make an incision from the top of the shoulder to the bottom of the wrist on both arms, down to the muscle, pull back the skin, to look for any deep bruising into the muscle or, in this case, to help us tell whether those surface lesions were, in fact, bruises or just a skin condition or another mark.

We then do the same thing on the back where we reflect the skin of the back to look at, again, the deep tissue and the skin there, and then make incisions from the buttocks down to the heels and again pull back the soft tissue on the legs to look for any areas of injuries

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1 there.

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

3 THE COURT: You may.

4 Q. [Ms. Williams] So these photographs, although
5 they might look to the lay person like Mr. Bosnak like
6 bruising, or to Mr. Hillerby like bruising now -- in your
7 medical opinion, your expert medical opinion, that's not
8 bruising?

9 A. No, they're not.

10 Q. What causes that kind of discoloration after a
11 person dies?

12 A. One thing that causes it is as the body is
13 placed into a cooler, which this body -- we received the
14 body about twenty-four hours before we performed the
15 autopsy. Bodies in coolers will -- the blood takes on
16 kind of a bright red appearance, and so often we'll see
17 that somebody who may have had a darker purple color
18 before, they'll turn kind of a bright red appearance.

19 The area -- there were areas, as I said -- in
20 some of those pictures there was kind of a reddish area
21 around, and then that scaring underneath. That would be
22 consistent -- we were told at one point that the child may
23 have had a skin condition. So if there was any irritation
24 of the skin condition, that certainly could have caused
25 these lesions.

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1 Q. And the mother testified that he had eczema. So
2 if he had eczema, would that be an explanation for what
3 you're talking about?

4 A. Yeah. The red areas could have been flare-ups
5 of the eczema, whereas, again, that -- those white areas
6 where it was kind of cleared out in the middle, those
7 would have been areas of scarring. So maybe itching at it,
8 previously, enough to cause areas of scarring.

9 Q. And as far as how he got all of these injuries,
10 the hypotheticals are endless, aren't they?

11 A. Yes. With that many, as I mentioned before, he
12 could have been struck against something, something could
13 have struck him. So with no distinct pattern, I can't
14 testify as to exactly the -- any object used or the number
15 of --

16 Q. An open hand hitting him to the floor and him
17 hitting the floor, or coffee table, or just -- there's no
18 way to tell, is there?

19 A. Right. Well, the open hand, we wouldn't expect
20 that in itself to cause any of the bruising. But falling
21 backwards and hitting the table or the -- as you
22 mentioned.

23 Q. And was there a pretty large hematoma in the
24 back of the head?

25 A. There was one on the back-right side of the

1 scalp. There was an area of bruising there.

2 Q. You don't know if this baby cried after he was
3 hit, do you?

4 A. I don't.

5 Q. And you don't know at what point the symptoms of
6 brain injury came on?

7 A. As far as the sequence of the injuries, I don't
8 know. Again, I do know that after whatever the
9 termination or the final blow, the symptoms would have set
10 in immediately. But, again, that's not -- we don't know
11 where that -- I can't say where that would have come --

12 Q. Exactly.

13 A. -- in the sequence.

14 Q. But he would have been symptomatic -- you just
15 testified -- fairly soon after the impact started, in
16 terms of the brain injury?

17 A. Yeah, the severe impact and if he was -- again,
18 if he was struck in the face first and some of the ones
19 that weren't causing the severe injury down deep, there
20 could have been some time to respond. But once the trauma
21 accumulated enough to cause the injuries to the brain, we
22 would have not -- we wouldn't expect him to actually be
23 crying and fussy due to the brain injury.

24 Q. Doctor, what is purge?

25 A. So purge fluids -- there's fluids that will come

1 out of individuals' mouths or nose, the digestive tract,
2 after death. Part of this is just due to drainage. In
3 this case the decedent was found face down on the
4 mattress, so there could have been drainage to come out of
5 the mouth just from the saliva and the fluids in your
6 mouth.

7 Purge fluid also comes about -- as the body
8 starts to break down or decompose a little bit, you'll
9 have gas bubbles that are released and some fluid from
10 tissues being broken down will come up through the nose
11 and mouth.

12 Q. I'm going to show you what's been previously
13 marked as State's Exhibit 12 and 13. Did you review any
14 of these photographs as part of your report, or look at
15 any of them?

16 A. Yes, I did.

17 Q. And when you see the -- tell us what that is.

18 A. There are two pictures of the decedent lying on
19 the back in a crib. There's a close-up photo showing some
20 of the same injuries on the side of the face, that we've
21 described I think in pretty good detail, and --

22 Q. Let me -- let me put those up for you, Doctor,
23 so that we --

24 A. Sure.

25 MS. WILLIAMS: If you would put 12 up first.

1 Q. [Ms. Williams] And if you could just describe,
2 or with a pointer, just that little bit of blood -- where
3 do you think, based on if he was found on his stomach,
4 that blood came from?

5 A. Sure.

6 So there was -- the way the blood had settled in
7 the body, there was areas of clearing out on the stomach
8 and then the side of the face. So what that tells us is
9 that when he died, he would have been face down with the
10 side of the face down towards the mattress. So what this
11 most likely represents is that he was face down and some
12 of the bloody fluid came out of the mouth. Again, he had
13 some injuries, the tears of his lips, of the upper and
14 lower lips, so that -- some of that could be blood
15 draining out from that. Again, it could have been mixed
16 with some saliva and some purge fluid that were also
17 draining out.

18 Q. So the person that killed him may not have seen
19 this blood when he put him in the crib?

20 A. No. It would depend on -- again, the most blood
21 that would be coming out would be from the lip injuries.
22 So if they were struck and then put down immediately,
23 there may not have been time for the face to become
24 bloody.

25 Q. And certainly the purge fluids, the blood in the

1 purge, would not have been present at the time that he was
2 laid down in the crib?

3 A. Correct. And, again, we have a fairly large
4 area here, several inches. But when fluid was just -- if
5 you mix saliva with even one or two drops of blood, it's
6 going to make the whole fluid look bloody. So this, you
7 know, in fact, is not all blood but a mix of the fluid.

8 MS. WILLIAMS: Okay. And if you could put 13
9 up.

10 Q. [Ms. Williams] And is that -- the dried blood
11 that's on his face, is that from any of the injuries on
12 his face or would you -- what is your medical opinion
13 about where that came from?

14 A. The fluid around the mouth?

15 Q. Yeah. There seems to be like dried blood on his
16 face. Is that from the injuries?

17 A. That would be the -- most likely it's the same
18 fluid that we saw on the mattress. So a mixture of blood,
19 probably from the injuries to the lips, in addition to the
20 fluid that was draining from the body.

21 Q. Would it be consistent with him just laying
22 there and it coming out and then it just got on his face?

23 A. That could happen, as well.

24 MS. WILLIAMS: I have no further questions.

25 THE COURT: Mr. Bosnak.

1 MR. BOSNAK: Just a few more questions.

2 RECROSS-EXAMINATION

3 BY MR. BOSNAK:

4 Q. I don't know the word you used, but we were
5 talking about the child being hit and then I guess
6 eventually being hit in one part of the head and going
7 unconscious; correct? Now I forgot the word you used.
8 It's a certain period.

9 A. It's a diffuse brain injury or diffuse axonal
10 injury.

11 Q. Right. Eventually that took place, but we don't
12 know how long it would take for that to take place. It
13 would depend on the injuries; correct?

14 A. Right. So it could be from one blow that was
15 severe enough to cause it by itself, or it could have been
16 from the accumulation of -- if you have one severe head
17 blow and you continually -- the commutative effect of a
18 head injury is going to also be to that.

19 MR. BOSNAK: Okay. Now, if you could go back to
20 State's Exhibit -- the one with the child in the crib,
21 blood. Let me see the pictures up here.

22 Q. [Mr. Bosnak] This one. Doctor, if you would
23 look at that very carefully. What is that? State's
24 Exhibit what?

25 A. Number 12.

1 MR. BOSNAK: 12. If you could put that back up.

2 Q. [Mr. Bosnak] Doctor, when the baby finally
3 loses consciousness, would the child still be able to move
4 and things like that?

5 A. Not once he had lost conscious [phonetic], no.

6 Q. Well, how would the blood get on the pajamas
7 like it is? If you've got a puddle of blood coming from
8 his mouth and nose that we see, how would that blood get
9 on those pajamas down around the leg part? Do you have
10 any idea?

11 A. Could you point out to the area you're referring
12 to, please?

13 Q. I think it's -- we're talking about here are
14 smears of blood, and here are smears of blood.

15 A. Okay. I couldn't tell from the pattern of the
16 pajamas.

17 I'm not sure how it got there. Like I said,
18 I can say that the decedent would have been face down
19 when he died. So at some point the body was moved onto
20 its back. So possibly whoever moved the body over, if
21 their hand would have moved it down there, that could have
22 been --

23 Q. It possibly could have been that way.

24 And one thing you said about the time of death:
25 the time of death could have been from nine o'clock in the

1 morning until nine o'clock -- I mean, nine o'clock at
2 night to nine o'clock the next morning? Is that what you
3 said? The time of death?

4 A. Approximately, yes.

5 Q. Maybe twelve hours?

6 A. Yes.

7 MR. BOSNAK: Okay. Thank you, sir.

8 MS. WILLIAMS: Nothing further for the doctor,
9 Your Honor.

10 THE COURT: Is he released from his subpoena?

11 MR. BOSNAK: Yes, Your Honor.

12 MS. WILLIAMS: As far as the State is concerned.

13 THE COURT: Doctor, you are released from your
14 subpoena. You are free to leave, but you are also free
15 to remain with us. Thank you.

16 THE WITNESS: All right. Thank you.

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

19 THE COURT: Call your next witness.

20 MS. WILLIAMS: Dr. Mia Amaya.

21 [Whereupon, Dr Amaya comes forward]

22 MS. WILLIAMS: Doctor, if you would just walk
23 this way and up to the chair. Right up there. Yeah.

24 THE CLERK OF COURT: Right here. Raise your
25 right hand. Place your left hand on the Bible.

1 [Whereupon, Dr. Amaya is duly sworn by the clerk,
2 of court as follows: do you solemnly swear or affirm
3 the testimony you will give the Court in the trial of
4 this case will be the truth, the whole truth, and
5 nothing but the truth, so help you God]

6 THE WITNESS: I do.

7 THE CLERK OF COURT: Please be seated.

8 [Whereupon, the witness takes the witness stand]

9 THE CLERK OF COURT: State your full name and
10 spell your last name for the record.

11 THE WITNESS: My name is Michelle Amaya.
12 A-M-A-Y-A.

13 MS. WILLIAMS: I think I introduced you as Mia.
14 Do you sometimes go by Mia?

15 THE WITNESS: Yes. Mia is my nickname. It's my
16 initials.

17 - - - - -
18 MICHELLE AMAYA, M.D.,

19 Having Been First Duly Sworn,
20 was Examined and Testified as Follows:

21 DIRECT EXAMINATION

22 BY MS. WILLIAMS:

23 Q. Where do you work, Dr. Amaya?

24 A. I work at the Medical University of South
25 Carolina in Charleston.

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1 Q. And are you a licensed physician?

2 A. Yes, ma'am.

3 Q. In what state?

4 A. In South Carolina.

5 Q. How long have you been licensed in your
6 profession?

7 A. In pediatrics?

8 Q. Yes.

9 A. Since 1993.

10 Q. And is that your specialty?

11 A. I have -- I'm double boarded. I have board
12 certification in general pediatrics, as well as in
13 child-abuse pediatrics.

14 Q. And where do you practice, generally? Do you
15 practice just at MUSC, or do you have other
16 responsibilities?

17 A. Everything I do is under the auspices of the
18 Medical University of South Carolina. They are the ones
19 who employ me. But we have a number of clinics that we
20 cover in collaboration with some of the area centers. So
21 a lot of our duties are in the emergency room at Medical
22 University, on the floor in the general wards, and ICU.

23 But we also go out to some outpatient clinics to
24 cover, and two of them are children advocacy centers that
25 serve families in the area of Charleston, Dorchester, and

1 Berkeley Counties. So there's one in Charleston called
2 the Dee Norton Lowcountry Children's Center, and there's
3 another one in Summerville called Dorchester Children's
4 Center.

5 Q. And those deal with children that are subject of
6 what types of abuses?

7 A. Children and families will come there when
8 they're concerned that their child may have been abused,
9 neglected. Any kind: physical abuse, sexual abuse,
10 neglect.

11 Q. Can you tell us a little bit about your
12 educational background?

13 A. Certainly.

14 Well, I attended college. And after the four
15 years of college I went to the College of William and Mary
16 in Virginia and I had a BS in Chemistry there. Subsequent
17 to that, I went to medical school for four years, and that
18 was at University of North Carolina at Chapel Hill. I
19 then did a three-year residency in pediatrics where I
20 could be a pediatric specialist. And that was also at the
21 University of North Carolina in Chapel Hill.

22 After I finished that, my husband and I were
23 both interested in pursuing fellowships, which is
24 additional medical training. We were kind of addicted to
25 medical training. And so we moved down to Birmingham,

1 Alabama, and I worked for a year there as a clinical
2 instructor and then I decided that I would do their
3 fellowship there. So while -- I did a two-year fellowship
4 in general academic pediatrics; and I obtained a masters
5 in public health, at the same time, in maternal and child
6 health.

7 When I finished that, that fellowship, then I
8 took on my first official position as an assistant
9 professor, pediatrics.

10 Q. What about your training in terms of general
11 internal medicine and pediatrics? What kind of training?

12 A. In general pediatrics? General pediatrics
13 really that was -- I count the four years of medical
14 school, because there is a lot of background stuff that
15 you have to do to learn things to practice. So really the
16 specific pediatric training starts in residency. So you
17 have to apply and specifically get into a place where they
18 teach you about pediatrics, which means children zero to
19 eighteen pretty much. So I did three years of training
20 where you take lots of call and you pretty much live in
21 the hospital for three years. And then after I finished
22 that, then I did the two years of fellowship, which was
23 also in pediatrics. So that was clinical work, as well as
24 some administrative learning and teach -- learning how to
25 teach, research, et cetera.

1 Q. How long have you been working at MUSC? Did I
2 ask you that?

3 A. I was recruited here from Birmingham in 19 --
4 I'm sorry -- 2008, and so I got -- I've been here about a
5 year, a little -- almost a year and a half.

6 Q. And what is the practice of forensic pediatrics?

7 A. Forensic pediatrics is -- it's when you see
8 children, specifically where there's concern where there
9 may be some kind of abuse that has happened, whether an
10 injury may have been inflicted purposefully. What I tell
11 families and what I tell students pretty much is what our
12 job does is we're injury specialists. What we try to do
13 is to collect info so that we can differentiate injuries
14 that have occurred that were inflicted on purpose versus
15 injuries or neglect situations that may have happened not
16 on purpose.

17 So forensics just means pertaining to the court.
18 So what we try to do is collect the information so that
19 it's good enough for medical practice and serving the
20 families, but also that it'll be collected in a way
21 that'll be useful to present in a court situation, if
22 needed.

23 Q. And are you a member of any specialized medical
24 or scientific group or association?

25 A. Yes.

1 Q. You said you were double board certified --

2 A. Right. The American Board of Pediatrics,
3 they're -- they do our licensure, our certification for
4 specialty. But I'm a member of some professional
5 organizations.

6 Q. How many pediatric child abuse cases -- that's a
7 little redundant. How many child abuse cases would you
8 say you've worked on?

9 A. I guess I would say -- if I take sort of the
10 average of all the patients I've seen over the years, if I
11 tried to say like -- I would say about -- I'm trying to be
12 very conservative. So like fifteen cases a week, where
13 there's going to be some days where I see fifteen patients
14 a day just for general pediatrics. So I'm going to say
15 I've seen over 10,000 children, in general, for any kind
16 of medical problem. And then for child abuse assessments,
17 I would say easily 2,000 but probably closer to three.
18 But just to be on the safe side, let's just say 2,000.

19 MS. WILLIAMS: Okay. Your Honor, at this time
20 we would move to have Dr. Amaya qualified as an expert
21 in the field of forensic pediatrics.

22 MR. BOSNAK: Without objection.

23 THE COURT: Dr. Amaya will be qualified as an
24 expert in the area of forensic pediatrics.

25 MS. WILLIAMS: Thank you, Your Honor.

1 Q. [Ms. Williams] Did you review the records on
2 the victim in this case, VICTIM [REDACTED]?

3 A. Yes, I did.

4 Q. How old was he at the time of his death?

5 A. Twenty-two months.

6 Q. And what types of records did you review?

7 A. I had a couple of the autopsy, with the
8 photographs from the autopsy. I had records from the
9 primary car physician at Sweetgrass Pediatrics. I also
10 had statements when various people during the
11 investigation were questioned and interviewed. And I had
12 statements from the mother, the mother's before, I think
13 primarily.

14 Q. Okay. And when you looked -- did you look at
15 the autopsy photos?

16 A. Yes, ma'am.

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

18 THE COURT: You may.

19 Q. [Ms. Williams] Do you remember the photographs
20 of the back of the child where the child was almost --
21 where they peeled the skin back to see if the bruising was
22 actually underneath the skin?

23 A. Yes, ma'am.

24 Q. We just had a specialist testify that although
25 bruising on the outside looked like bruising, they turned

1 the skin over to determine if that was bruising. Can you
2 explain your understanding of why a pathologist, someone
3 who does an autopsy, can tell if it's bruising rather than
4 us just looking at a picture and saying that looks like a
5 bruise?

6 A. Yes. In fact, I depend heavily on the
7 pathologist for this myself because most of my practice,
8 everything that I do, is related to living children. And
9 while I do collect information and interpret things
10 related to children who have been deceased, we rely on the
11 pathologist to tell us that. So, for example, as the
12 pathologist may have testified, if a child has been dead
13 for some time, the position that they are in will cause a
14 lot of the blood to settle. And when the blood settled it
15 can look a lot like bruises, because what is a bruise
16 anyway? A bruise is bleeding into the skin. And so if
17 blood is settling in the skin because of death, then it
18 needs -- you need help to differentiate what is that from
19 a death situation versus a bruise, which would be an
20 injury.

21 So, yes. The pathologist, what they can do is
22 they can do little cuts into the skin and look and peel
23 back and see if there's any bruises that are present
24 versus if it's just blood coloration that's settled.

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

1 THE COURT: You may.

2 Q. [Ms. Williams] The pathologist testified that
3 although these pictures looked like bruising, he cut in
4 and determined that there was not bruising because of the
5 procedure that you just described. If you would just look
6 at those pictures.

7 [Whereupon, the witness reviews documents]

8 A. Okay.

9 Q. [Ms. Williams] And if he testified that he cut
10 into and, you know, what we just talked about, sort of
11 dissecting the skin and did not see bleeding under the
12 skin, would you agree that those are not bruises?

13 A. Yes.

14 Q. Did you look at some of the pediatric -- just
15 switching gears just for a second -- some of the pediatric
16 records of this child before the time of his death?

17 A. Yes, I did.

18 Q. And did that cover from birth until pretty much
19 twenty-two months?

20 A. Yes, ma'am. The first records that Sweetgrass
21 Pediatrics had was from age four days. So it was from
22 four days old until the last visit was August 20th, 2008,
23 and that was with an allergist.

24 Q. And did you see anything in his records that
25 would make him predisposed to any of the things that

1 caused his death? I mean, any illness or condition or
2 anything that would have contributed to his death?

3 A. No. He did have a couple of minor medical
4 problems but --

5 Q. And what were they?

6 A. He had reactive airway disease. When you're
7 under two years old, pediatricians will often call asthma-
8 like illness reactive airway disease because they tend to
9 wheeze but it may be with colds. And if they don't keep
10 doing it after they're two years -- they usually make the
11 diagnosis after age two, if they keep wheezing. So he had
12 a tendency to wheeze and would take medicine for --
13 wheezing medicine for that.

14 And the other thing is he had change -- skin
15 changes typical of eczema. And you can see them in the
16 photographs, as well, especially behind his knees, on his
17 ankle. I think there was a little bit here on his elbow.

18 So he had some eczema and a little bit of
19 reactive airway disease.

20 Q. Okay. And reactive airway disease, is it fair
21 to say that's mild asthma?

22 A. It's like the precursor to asthma. But, yes,
23 it's very much like a mild asthma.

24 Q. Okay. And you don't think that that in any way
25 would have contributed to his death?

1 A. No, ma'am. Especially because of the history
2 that went with it, that he had been well during the day
3 and he wasn't -- I mean, certainly it is possible to die
4 of asthma, but that is not going to be a trauma, trauma
5 being an injury kind of thing. You won't see injury marks
6 from that. You can have pneumonia and difficulty
7 breathing. He didn't have any signs of that on his
8 autopsy.

9 Q. What injuries did VICTIM [REDACTED] have, at the time
10 of his death, that you noted?

11 A. The key ones that I focused on were the ones up
12 on his scalp, face, neck. He had some significant
13 bruising, as well, on his ear so -- in the outer portions
14 of the ear, as well as on the concha or the part that
15 leads into the ear canal --

16 THE WITNESS: Can you hear me okay?

17 A. -- and that was on both ears.

18 He also had what looked to be like significant
19 bruising under his left eye, with like a black eye but was
20 fresh. And it wasn't black yet, it was just really red.

21 Q. [Ms. Williams] What about did you note any
22 injuries to the scalp or any brain injury?

23 A. Yes. And that was especially well-shown by the
24 pathologist when they dissected the scalp. And a lot of
25 times when you look at someone who's had a head injury,

1 you might -- as a physician I might examine and examine
2 and I can't find any bruising or soft spot on a child but
3 then after they die, the pathologist can make a skin flap
4 and peel forward, and then when you peel it forward you
5 can see all the bleeding and bruising in the scalp.

6 And this child had numerous spots, more than
7 ten, I think, that were on the outside -- on the scalp
8 part. Then you could see a couple of places also on the
9 skull, especially on the top back of the skull.

10 Q. And would you classify these injuries as
11 accidental or non accidental?

12 A. Well, it's easier to classify that when -- with
13 history, but also when the pathologist went on and opened
14 up the skull cap, opened up the bone and looked into the
15 brain. And the brain injury is what really makes it
16 easier to differentiate the accidental versus non
17 accidental.

18 What happened with the brain is that the child
19 had really easily visible collection of subdural blood. I
20 don't know if the pathologist explained what subdural
21 blood is, but there was a lot of subdural blood. And then
22 there was also multiple patchy areas in a little bit -- a
23 slightly deeper layer called the subarachnoid layer, and
24 there was blood there.

25 And those are signs of shearing injury. You can

1 get injured by direct-contact forces. Like, for example,
2 if I, you know, slipped in my chair and fell and I hit my
3 head on this podium, that would be a contact injury where
4 I just banged my head. But if I like sat in this chair
5 and maybe one of the people here came, and they weren't
6 really fond of me and they flipped me around and around
7 and around in the chair in a circle, I might not really
8 get very injured, but I won't feel very good. But that is
9 a different kind of force. That's called an angular force
10 or a rotational force.

11 And subdural blood and subarachnoid blood are
12 both markers of angular acceleration or angular forces,
13 meaning that, yes, he had clear evidence of contact forces
14 because he had all those blood spots we talked about. But
15 he also had evidence of non-contact forces, which is this
16 rotational force that was applied to him.

17 So his head had to spin around in some way, and
18 in a very forceful way, in order for those blood vessels
19 to rupture and bleed to cause the subarachnoid patches, as
20 well as those subdural patches.

21 So because of that, and because of -- and so
22 then the next thing you have to do is you've got to pour
23 over the story that was given to see, you know, what if he
24 had been in a motor-vehicle accident or what if he had
25 been -- you know, if there had been something that

1 explained it, then you would match it up and say, okay, do
2 those forces fit the findings that you have.

3 And there was nothing in this case that would
4 match up to explain -- there was no accidental injury that
5 was described. In fact, there were specific statements I
6 believe that the child was at the pool during the day,
7 prior to his demise, and nobody -- in the statements that
8 were given to me, anyway, there was no statement that
9 anyone observed him have an injury of any kind. So -- and
10 supposedly he had no present injuries except for maybe a
11 small bruise on his face that his mother had reported in
12 her statement.

13 So none of the brain injuries could have been
14 explained by that, so that leads you to worry about -- it
15 definitely makes you worry about inflicted injury.

16 Q. And if the child was grabbed by the neck and
17 shoulders and shaken really hard, would that explain some
18 of that rotational injury that you're talking about?

19 A. Yes. That is one way that you could sustain
20 those injuries, because the neck -- what you're looking
21 for is does the -- can the brain slip back and forth
22 within the skull. And if someone is shaken very
23 forcefully, then the neck serves as a pivot point and the
24 head will go back and forth. And it also kind of -- it
25 doesn't just go straight back and forth, it goes kind of

1 side to side, too. And all of that counts as angular
2 acceleration that can be really, really bad for brain.

3 Q. Did his injuries appear to be about the same
4 age?

5 A. Everything that I saw looked very fresh. So it
6 looked new and fresh.

7 Q. And do you have an opinion as to how this child
8 would have acted after the brain injury was inflicted?

9 A. Yes. When -- remember we were talking about
10 subdural and subarachnoids being markers of angular
11 acceleration. When that happens, what happens directly to
12 the brain is -- the brain is composed of lots of little
13 cells. There's lots of different kinds of cells, but one
14 of the really important cells is the axons and those are
15 ones that transfer information. They have kind of a long
16 stalk. Well, the axon can be injured, the brain cell can
17 be injured, and when you have that it's called axonal
18 injury.

19 So if it's injured -- if they're -- if diseased
20 or messed up because of a trauma, or, in other words,
21 injury, that's called traumatic axonal injury. And when
22 that happens, if it's even moderate, moderate to severe,
23 you lose consciousness or you are very lethargic, sleepy.
24 If it's very severe, you go on to have problems with
25 breathing. You can have irregular breathing or stop

1 breathing completely. And some people will have seizures
2 from it.

3 So his degree of injury was obviously so severe
4 that he died. And with that severe -- and with -- and we
5 know that because of all the blood that was found by the
6 pathologist.

7 And severe traumatic axonal injury is
8 immediately evident with unconsciousness.

9 Q. And so is it possible that after the blows were
10 inflicted that he couldn't have spoken or yelled or really
11 even walked or kept his head up? Are those symptoms of
12 brain injury?

13 A. Yes, ma'am. Especially if -- he may have --
14 it's difficult to say how many blows he had. We know he
15 had a number of impact parts on his head. I don't think
16 looking at that and looking at the location and how
17 diffuse they are, it couldn't have occurred from a single
18 blow. But I don't know if it was two or ten blows from
19 looking at it.

20 But as the blows -- there was one -- at one
21 point where there was a blow that was severe enough that
22 caused the brain injury and caused enough angular
23 acceleration of the brain within the skull to cause
24 injury, and then he wasn't able to do anything.

25 Q. And as part of your process in evaluating all

1 the records, did you look at some of the statements by the
2 defendant, Justin Hillerby?

3 A. Yes, ma'am.

4 Q. I'm going to read you from one of his statements
5 on the 18th, just to see if that's consistent with the
6 symptoms that you're describing: the last time his head
7 hit the floor, I went and cleaned up the mess, and when I
8 came back he was still laying there with his eyes open. I
9 put him on the futon and made a glass of tea. I looked at
10 him, and he looked like he was falling asleep.

11 Would that be consistent with a symptom of brain
12 injury?

13 A. Yes. That's altered mental conscious, altered
14 level of consciousness with lethargy. So that --

15 Q. And those --

16 A. -- would make you worry about that.

17 Q. And then in another statement he says: he kept
18 nodding off. He looked like a zombie. He moved slowly.

19 Does that sound like he's describing brain
20 injury?

21 A. Yes. And in one of the statements what struck
22 me the most -- because, you know, how do you know. Was he
23 just tired. Wasn't this like ten o'clock at night. But
24 there was a description that the child was specifically
25 running towards the defendant and then there was a

1 statement that he was -- very quickly after that there was
2 some description of an impact and that he was tired and
3 moaning and like a zombie at that point. So because you
4 knew that he was awake and running and then almost
5 immediately not, that was a problem.

6 Q. And if people saw the child acting normally,
7 just like he would have normally acted, does that seem
8 possible that he would have been acting normally after the
9 brain injury was inflicted?

10 A. No. Now, the skull and scalp injury he may have
11 acted normally. But once the brain was injured, he could
12 not act normally.

13 MS. WILLIAMS: Court's indulgence for just a
14 second.

15 THE COURT: Yes, ma'am.

16 [Whereupon, Ms. Williams and Ms. Biagianti
17 confer]

18 MS. WILLIAMS: I have no further questions,
19 Doctor. Please answer any questions the defense might
20 have.

21 THE COURT: Mr. Bosnak?
22
23
24
25

CROSS-EXAMINATION

BY MR. BOSNAK:

Q. Doctor, if somebody was to grab a child by the shoulders, by the neck, and shake them very violently to cause brain injury, wouldn't there be marks and stuff on their shoulders, more than likely?

A. Maybe. And it's -- when you look at records of people who have studied these injuries, it actually only occurs in a very small minority of the patients where there will be bruising.

Q. But there could be bruising?

A. There could be bruising, but it's not expected.

Q. Not expect -- you mean somebody could grab you very hard here in the shoulders, and shake you like that, and there would be no bruising?

A. Uh-huh. A baby, in particular. So a young child, in particular.

Q. Okay. Now, talking about falling: children fall all the time at two years old; correct?

A. Yes, sir.

Q. Playing, they fall. Usually they don't fall on their heads, do they?

A. They usually do fall on their heads.

Q. They don't roll, hit on their shoulders, the same way we do?

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1 A. They may, but they also can just bonk themselves
2 in the head. They can fall directly on their forehead, or
3 they can fall on their head. Sometimes they'll guard with
4 their arms.

5 Q. Well, don't we, most us, have a mechanism that
6 when we fall, even when we fall when we don't expect it,
7 our hands go out or we roll to our shoulders? Because if
8 we didn't, we would suffer all kind of head injuries,
9 wouldn't we, if we fell on our heads every time we
10 slipped?

11 A. That's true. We do have a guarding mechanism.
12 Children are a little bit different because they're -- the
13 amount of -- the mass of their head and the brain is so
14 much out of proportion to us. Like for us, I think the
15 mass of our -- in our head is like three to five percent,
16 compared to our body. But -- and for a child, it's more
17 like ten to fifteen percent. So their heads are really
18 giant compared to their bodies, compared to us. So
19 they're more top heavy. So even though they do have
20 guarding, you know, they hit their heads a lot. Young
21 children hit their heads a lot.

22 Q. Okay. And also, though, when a child -- if a
23 child was to fall into a table or fall onto the floor,
24 that could cause bruising, couldn't it?

25 A. Yes, sir.

1 MR. BOSNAK: Thank you. No further questions.

2 MS. WILLIAMS: We have no further questions for
3 the doctor.

4 THE COURT: Is the doctor released from her
5 subpoena?

6 MS. WILLIAMS: Yes, as far as the State.

7 THE COURT: Any objection?

8 MR. BOSNAK: No, Your Honor.

9 THE COURT: Dr. Amaya, you are released from
10 your subpoena. You are free to remain with us. You
11 are also excused. Thank you.

12 THE WITNESS: Okay. Thank you so much.

13 [Whereupon, the witness is excused and exits the
14 witness stand]

15 THE COURT: Call your next witness.

16 MS. WILLIAMS: Your Honor, at this time the
17 State rests.

18 THE COURT: Ladies and gentlemen, that signifies
19 to the Court that there is a matter of law that I must
20 take up outside of your presence.

21 Do not begin your deliberations. Do not discuss
22 this case amongst yourselves.

23 Please rise for the jury.

24 [Whereupon, the jury exits the courtroom at
25 3:02 p.m.]

1 THE COURT: Thank you. Be seated.

2 Anything before we take our afternoon break?

3 MS. WILLIAMS: No, Your Honor. Nothing from the
4 State.

5 MR. BOSNAK: I think we're going to make a
6 motion, just whenever you want us to make it.

7 THE COURT: All right. You'll make your motion
8 and then we'll -- depending on my ruling, we'll go
9 forward into your case.

10 MR. BOSNAK: Your Honor, we just make a directed
11 verdict motion at this time.

12 THE COURT: All right. I'll be happy -- I'll be
13 happy to hear it. I'll hear arguments from both sides.
14 We're going to take our afternoon break.

15 MR. BOSNAK: Thank you, Your Honor.

16 THE COURT: 3:15. Thank you.

17 MR. BOSNAK: Thank you.

18 [Whereupon, a recess is taken from 3:02 p.m. to
19 3:14 p.m.]

20 - - - - -

21 MOTION FOR A DIRECTED VERDICT

22 THE COURT: All right. Mr. Bosnak, I'll be
23 happy to hear you regarding your motion.

24 MR. BOSNAK: Directed verdict, Your Honor. Just
25 that the State has failed to meet their burden of

1 proof.

2 THE COURT: All right. Ms. Williams, are you
3 arguing --

4 MS. WILLIAMS: Yes.

5 THE COURT: -- this motion?

6 MS. WILLIAMS: Yes, Your Honor.

7 THE COURT: Ms. Williams, if you will please
8 articulate for me the testimony that correlates to the
9 elements that the State has to prove.

10 MS. WILLIAMS: Yes, Your Honor.

11 Homicide by child abuse is we have to prove that
12 the defendant caused the death of this child, that the
13 child was under the age of eleven, and that he caused
14 the death in Berkeley County, and that the death
15 occurred under circumstances manifesting in extreme
16 indifference to human life.

17 There has been evidence that the death occurred
18 at [REDACTED]. That is in Berkeley County.
19 That was testified to by Leonard S

20 There has been evidence, by the defendant's own
21 statements, that he struck the child repeatedly. He
22 was the last person with the child.

23 This child died of those injuries, and I think
24 the type of injuries and the amount of injuries go to
25 the extreme indifference to the value of human life.

1 Directed verdict evidence, the weight of the
2 evidence required, is not concerned with the weight but
3 whether there is existence or non existence of
4 evidence, not it's weight. And that's State v.
5 Williams, 303 S.C. 274. And I think clearly there is
6 evidence that Mr. Hillerby killed this child, did it
7 while committing child abuse. The kid was under
8 eleven, and he did it with extreme indifference to the
9 value of human life, based on the facts just presented.

10 THE COURT: Mr. Bosnak.

11 MR. BOSNAK: Your Honor, I just renew my motion.
12 I know you have to judge this motion in the light most
13 favorable to the nonmoving party. So I just --
14 whatever your ruling would be at this time.

15 THE COURT: All right. Thank you, Mr. Bosnak.

16 In ruling on a motion for a directed verdict,
17 under Rule 19 the Court is concerned with the existence
18 or non existence of the evidence and not as to its
19 weight.

20 Based upon the testimony the Court has heard
21 thus far, and viewing it in the light most favorable to
22 the State, which is the nonmoving party on this motion,
23 I deny the defendant's motion for directed verdict. I
24 do feel that the State has met its burden and deny your
25 motion at this time.

1 MR. BOSNAK: Thank you, Your Honor.

2 THE COURT: Mr. Bosnak, are you prepared to go
3 forward?

4 MR. BOSNAK: Yes, Your Honor.

5 THE COURT: All right. How many witnesses do
6 you have?

7 MR. BOSNAK: I just have two here today. I
8 didn't know how long we would be, but I have two.

9 THE COURT: All right. Mr. Hillerby, please
10 rise.

11 [Whereupon, Mr. Hillerby complies]

12 THE COURT: Mr. Hillerby, we have reached the
13 stage of the trial where you are going to be able to
14 present your defense. The State has rested, and I have
15 denied the motion for directed verdict.

16 Do you recall all of the rights that I indicated
17 that you had yesterday regarding your decision whether
18 or not to testify?

19 MR. HILLERBY: Yes, ma'am.

20 THE COURT: Do you need for me to go over those
21 any more?

22 MR. HILLERBY: No, I do not.

23 THE COURT: Have you had an opportunity -- it is
24 now 3:30. I instructed you about 4:30 yesterday
25 evening. Have you had ample opportunity, sufficient

1 time, to meet with Mr. Bosnak to discuss your decision
2 to testify?

3 MR. HILLERBY: Yes, ma'am.

4 THE COURT: And have you reached a decision?

5 MR. HILLERBY: Yes, ma'am, I have.

6 THE COURT: And what is that decision?

7 MR. HILLERBY: I would like to testify.

8 THE COURT: You will be testifying; is that
9 correct, Mr. Hillerby?

10 MR. HILLERBY: Yes, ma'am.

11 THE COURT: All right. Thank you.

12 All right. Anything before I bring in the jury?

13 MR. BOSNAK: Nothing from the defense.

14 THE COURT: Anything from the State?

15 MS. WILLIAMS: Nothing from the State, Your
16 Honor.

17 THE COURT: All right. Let's bring in the jury.

18 [Whereupon, the jury enters the courtroom at
19 3:19 p.m.]

20 THE COURT: Thank you. Please be seated.

21 Mr. Bosnak, please call your first witness.

22 MR. BOSNAK: Roy Shoup.

23 [Whereupon, Mr. Shoup comes forward]

24 THE CLERK OF COURT: Raise your right hand.

25 Place your left hand on the Bible.

1 [Whereupon, Mr. Shoup is duly sworn by the clerk
2 of court as follows: do you solemnly swear or affirm
3 the testimony you will give the Court in the trial of
4 this case will be the truth, the whole truth, and
5 nothing but the truth, so help you God]

6 THE WITNESS: Yes, I do.

7 THE CLERK OF COURT: Please be seated.

8 [Whereupon, the witness takes the witness stand]

9 THE CLERK OF COURT: State your full name, and
10 spell your last name for the record.

11 THE WITNESS: My name is Roy Shoup. S-H-O-U-P.

12 THE COURT: Mr. Bosnak, your witness.

13 MR. BOSNAK: Roy, how are you today?

14 THE WITNESS: I'm good, sir. How about
15 yourself?

16 MR. BOSNAK: I'm fine.

17 - - - - -

18 ROY SHOUP,

19 Having Been First Duly Sworn,
20 was Examined and Testified as Follows:

21 DIRECT EXAMINATION

22 BY MR. BOSNAK:

23 Q. Tell us a little bit about yourself. How old
24 are you?

25 A. I am twenty-eight years old.

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1 Q. And where are you employed?

2 A. Right now I work for two different companies,
3 real estate companies. I fix houses.

4 Q. And you were working earlier today?

5 A. Yes, I was.

6 Q. Okay. Thank you for being here.

7 Roy, are you single?

8 A. Yes, I am.

9 Q. Do you have any children?

10 A. No, sir.

11 Q. All right. Now, do you know the defendant,
12 Justin Hillerby?

13 A. Yes, I do.

14 Q. And how do you know him?

15 A. We've been friends for over ten years now.

16 Q. Over ten years.

17 And do you recall September the 14th, 2008?

18 A. Yes, I do.

19 Q. And could you tell me what you were doing that
20 day?

21 A. We were at the pool swimming.

22 Q. Okay. Well, what time did you and Justin
23 Hillerby meet that morning?

24 A. It was after 9:00-ish.

25 Q. Did he come by and get you? Or how did you

1 meet?

2 A. That much I really couldn't recall.

3 Q. Okay. Go ahead.

4 A. I don't know how we met up that day, but we did
5 spend the whole day at the pool. And, you know, just a
6 typical Sunday, hang around talking and that kind of
7 thing.

8 Q. Who all was with you at the pool that day?

9 A. We had a couple of friends there. It was my
10 friend Craig; Justin was there; Jen was there; my friend
11 Beth came later on that day.

12 Q. Was ~~VICTIM~~ there?

13 A. Yes, ~~VICTIM~~ was there.

14 Q. And was Serena?

15 A. Yes. Both of the children were there.

16 Q. Let me ask you: how was Mr. Hillerby's mood
17 that day?

18 A. His mood seemed fine. He -- like I said, it was
19 just a regular Sunday afternoon, I mean, not a care in the
20 world.

21 Q. Did he seem angry to you?

22 A. No. No, not at all. He didn't seem distraught
23 or distressed in any way.

24 Q. Was he upset?

25 A. Not that I could tell.

1 Q. Okay. Was it just a group of friends just
2 getting together at the pool having a good time?

3 A. Yeah.

4 Q. What time did you leave Mr. Hillerby that day?

5 A. It was a little after 3:00. I would say around
6 3:15-ish.

7 MR. BOSNAK: Okay. Thank you. No further
8 questions. Please answer any questions the solicitor
9 has for you.

10 MS. WILLIAMS: Good afternoon, Mr. Shoup.

11 CROSS-EXAMINATION

12 BY MS. WILLIAMS:

13 Q. We've met before, haven't we?

14 A. Yes, we have.

15 Q. And do you remember telling me about an incident
16 where you made some statements in a bar?

17 A. I remember our conversation, but I didn't make
18 any statements.

19 Q. Do you remember telling me that you were
20 intoxicated once in a bar and made some untrue statements?

21 A. I don't think that's what I said. But I do
22 remember saying I was at a bar, yes.

23 Q. And you didn't make any untrue statements during
24 that conversation?

25 A. Not that I'm aware of.

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1 Q. How long have you been friends with the
2 defendant?

3 A. Over ten years.

4 Q. And you -- do you give him money for the -- have
5 you -- back when he was arrested, did you give him money
6 for the commissary?

7 A. Actually, no, I haven't.

8 Q. You didn't tell us that you did that day?

9 A. I don't -- I don't think I gave him any money,
10 no.

11 Q. Okay. Let's go to the pool. On that day what
12 time -- you don't remember what time you saw Justin?

13 A. Oh. Between the hours of when I was with him
14 or --

15 Q. Uh-huh.

16 A. I said it was between the hours of 9:00 and
17 3:00.

18 Q. And where was Justin the previous evening?

19 A. We were -- we were at the pool again that
20 evening, too.

21 Q. I meant the Saturday night.

22 A. Saturday night I don't recall where he was.

23 Q. Do you remember a conversation about him being
24 at someone named Elizabeth's house?

25 A. Elizabeth?

1 Q. Uh-huh.

2 A. No.

3 Q. Was Amy Summers at the pool with you?

4 A. That day I do believe she was.

5 Q. And do you remember Amy Summers telling you that
6 Justin had been caught in a lie about where he was the
7 night before?

8 MR. BOSNAK: Objection, Your Honor. This is
9 hearsay. That would be about what somebody else told
10 somebody.

11 THE COURT: Sustained.

12 Q. [Ms. Williams] Did you ever learn about an
13 untruth that Mr. Hillerby told about where he was the
14 night before --

15 A. No.

16 Q. -- without saying what was told?

17 A. No, I didn't.

18 Q. You didn't observe -- did you observe Jennifer
19 Spoerl at the pool?

20 A. Yes.

21 Q. And did you observe Justin with Jennifer?

22 A. Uh-huh. Yes, I did.

23 Q. And what was their demeanor like together?

24 A. Their demeanor seemed fine to me.

25 Q. And she wasn't upset about anything that

1 happened --

2 A. Not that --

3 Q. -- the night before?

4 A. -- that I could tell.

5 Q. How much did you have to drink at the pool?

6 A. I would say about seven to eight beers, at
7 least.

8 Q. At least?

9 A. Uh-huh.

10 MR. BOSNAK: Your Honor, I'm going object. I
11 don't know how this is relevant at all.

12 THE COURT: Overruled.

13 Q. [Ms. Williams] And how many beers did
14 Mr. Hillerby have, if you know?

15 A. I wasn't counting. I would say about the same.

16 Q. Seven or eight, at least?

17 A. [Indicates affirmatively].

18 Q. And do you remember giving a statement to me
19 when I met with you earlier?

20 A. About?

21 Q. This case.

22 A. I remember us meeting, yes, but what was the --

23 Q. Did you write out a statement?

24 A. Yes, I did.

25 Q. And did we discuss you going to the Ice House at

1 a particular time?

2 A. I don't believe we did. And I didn't go to the
3 Ice House.

4 Q. You've never been to the Ice House?

5 A. I've been there plenty of times, but I didn't go
6 that day.

7 Q. And we didn't discuss a time when you went to
8 the Ice House and saw Jennifer S ?

9 A. After the incident?

10 Q. Yes.

11 A. Yes.

12 Q. And that you were -- tell me about that.

13 A. I had just noticed that she was out and -- after
14 the incident, and I asked her how she was doing and how
15 she was holding up and things of that matter.

16 Q. And did you tell her something that you later
17 admitted was untrue?

18 A. No, I didn't.

19 Q. You never said anything to Jennifer S about
20 this case while you were at the Ice House?

21 A. I'm sure we discussed it but, I mean, as far as
22 when it was going to take place and things of that nature.
23 But, no.

24 Q. Did you ever tell her anything about this case
25 that you later admitted was untrue?

1 A. I don't believe so, no.

2 Q. What about Melissa Georgoulis? Did you ever
3 tell her something about this case that you later admitted
4 was untrue?

5 A. No.

6 Q. You're good friends with the defendant, are you
7 not?

8 A. Yes, I am.

9 Q. Would you do anything for him?

10 A. I'd like to think so.

11 MS. WILLIAMS: Nothing further.

12 THE COURT: Mr. Bosnak?

13 MR. BOSNAK: Nothing else, Your Honor.

14 THE COURT: Mr. Shoup, you may step down. Thank
15 you.

16 THE WITNESS: Thank you.

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

19 THE COURT: Call your next witness.

20 MR. BOSNAK: John Williams.

21 [Whereupon, Mr. Williams comes forward]

22 THE CLERK OF COURT: Please raise your right
23 hand. Place your left hand on the Bible.

24 [Whereupon, Mr. Williams is duly sworn by the
25 clerk of court as follows: do you solemnly swear or

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1 affirm the testimony you will give the Court in the.
2 trial of this case will be the truth, the whole truth,
3 and nothing but the truth, so help you God]

4 THE WITNESS: Yes, ma'am.

5 THE CLERK OF COURT: Please be seated. State
6 your full name, and spell your last name for the
7 record.

8 MS. WILLIAMS: Your Honor, can we approach?

9 THE COURT: You may.

10 Sir, if you'll please spell your name. Go ahead
11 and state your name and spell your last name. Please
12 have a seat.

13 [Whereupon, the witness takes the witness stand]

14 THE WITNESS: John Henry Williams.

15 W-I-L-L-I-A-M-S.

16 THE COURT: Thank you. One moment.

17 [Whereupon, an off-the-record bench conference
18 is held]

19 THE COURT: Ladies and gentlemen, there is a
20 matter of law that I must take up outside of your
21 presence.

22 Do not begin your deliberations. Do not discuss
23 this case amongst yourself.

24 Mr. Williams, please remain seated.

25 We will receive you back in the courtroom in

1 just a few moments.

2 [Whereupon, the jury exits the courtroom at
3 3:31 p.m.]

4 THE COURT: Thank you. Be seated.

5 The objection at the bench was by Ms. Williams
6 that she had not been provided a copy of Mr. Williams'
7 information to which to run a rap sheet.

8 Your response, Mr. Bosnak, just so we're on the
9 record.

10 MR. BOSNAK: Your Honor, beg your pardon. I'm
11 sorry. What was the question again?

12 THE COURT: Ms. Williams is requesting -- she is
13 objecting to this witness being called until she has an
14 opportunity to run his rap sheet.

15 MR. BOSNAK: That's fine, Your Honor.

16 THE COURT: All right. Mr. Williams, I need you
17 to write down your date of birth and social security
18 number and your full name so the solicitor may run your
19 rap sheet. All right?

20 Do you have a note pad, Ms. Hill?

21 THE CLERK OF COURT: Yes, ma'am.

22 [Off the record momentarily]

23 MS. WILLIAMS: And if we could have Rory Shoup,
24 too.

25 THE COURT: I don't know where he is, Ms.

1 Williams.

2 Any objection, Ms. Williams, to continuing with
3 the direct so that we may proceed? Any objections to
4 doing it that way, Mr. Bosnak?

5 MR. BOSNAK: No, Your Honor.

6 THE COURT: All right. Please bring in the
7 jury.

8 Please rise for the jury.

9 [Whereupon, the jury enters the courtroom at
10 3:33 p.m.]

11 THE COURT: Thank you. Be seated.

12 Mr. Bosnak, your witness.

13 - - - - -

14 JOHN H. WILLIAMS,

15 Having Been First Duly Sworn,

16 was Examined and Testified as Follows:

17 DIRECT EXAMINATION

18 BY MR. BOSNAK:

19 Q. Mr. Williams, could you please give us your age?

20 A. I am forty-nine.

21 Q. And what do you do for work?

22 A. I work for a fire and safety company.

23 Q. And how long have you been employed with them?

24 A. I've been in the fire and safety business about
25 eighteen years.

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1 Q. Have you ever been in the military?
2 A. Yes, sir.
3 Q. Which branch of service?
4 A. The navy.
5 Q. And how long were you in the navy?
6 A. I was in the navy for six and a half years.
7 Q. Six and a half years.
8 Do you know the defendant?
9 A. Yes, sir.
10 Q. And what relationship is he to you?
11 A. He's my stepson.
12 Q. Okay. And how long were you married to his
13 mother?
14 A. I was married to his mother for eighteen years.
15 Q. Eighteen years.
16 How old was Justin when you first married his
17 mother?
18 A. Justin was four years old.
19 Q. Four years old. So --
20 A. Oh. When I married his mother, he was nine.
21 Q. Nine.
22 But you had been going out with his mother --
23 A. Yes, sir.
24 Q. -- since he was four?
25 A. Yes, sir.

1 Q. Would that be correct?

2 A. Yes, sir.

3 Q. And you more or less raised Justin?

4 A. Yes, sir.

5 Q. To his mother, was that your first marriage or
6 second marriage?

7 A. My second.

8 Q. Second marriage. And you were married prior?

9 A. Yes, sir.

10 Q. Did you have any children from that marriage?

11 A. Yes, sir. I have two.

12 Q. Two children. Boy and girl, or what --

13 A. Yes, sir. My oldest is a girl, and my youngest
14 a son.

15 Q. Okay. And do they have any children?

16 A. My daughter does. My son has one on the way.

17 Q. So you're a grandfather?

18 A. Yes, sir.

19 Q. Okay. And how long has Justin lived with you?
20 How old was he when he left?

21 A. About seventeen. Sixteen, seventeen.

22 Q. And what disappointments did you have concerning/
23 Justin?

24 A. Mainly that he quit school. He decided that he
25 didn't need to finish, he can get out there and work.

1 Q. And that's mainly, other than this --

2 A. Yes, sir.

3 Q. -- all the things that upset you about him?

4 Can you tell us what kind of person he is?

5 MS. WILLIAMS: Objection, Your Honor. I don't
6 think this is admissible character evidence.

7 THE COURT: Counsel approach.

8 [Whereupon, an off-the-record bench conference
9 is held]

10 THE COURT: Mr. Bosnak, just rephrase your
11 question.

12 MR. BOSNAK: I will.

13 THE COURT: Thank you.

14 MR. BOSNAK: I'm going to withdraw that question

15 --

16 THE COURT: All right. Thank you.

17 MR. BOSNAK: -- and go to --

18 Q. [Mr. Bosnak] Do you know anything about the
19 relationship between Jennifer S and Justin?

20 A. Yes, sir.

21 Q. Tell us what you know about that.

22 A. They kind of been dating on and off for probably
23 the -- well, now it would be about the last four years.

24 Q. About the last how many years?

25 A. Well, counting his time, four years.

1 Q. Four years.

2 And do you know Melissa -- can we pronounce her
3 name -- is it Georgoulis?

4 A. Georgoulis. Yes.

5 Q. Georgoulis. Do you know her?

6 A. Yes, sir.

7 Q. And what's her relationship with Justin?

8 A. She's the mother of our other grandson through
9 Justin -- and she has two children of her own -- and they,
10 as well, have been dating.

11 Q. Okay. And so you're grandfather to Justin's
12 child through Melissa?

13 A. Yes, sir.

14 Q. And how long has that relationship been going
15 on?

16 A. About the same time period.

17 Q. About four years?

18 A. Yes, sir.

19 Q. And do the two know about each other?

20 A. Yes, sir.

21 Q. And the two know that he goes from one to the
22 other?

23 A. Yes, sir.

24 Q. And that's been going on you say now for four
25 years?

1 A. Yes, sir. Uh-huh.

2 Q. Okay. So nothing new during that time when this
3 happened to VICTIM [REDACTED]?

4 A. Nothing that --

5 Q. So --

6 MR. BOSNAK: Okay. No further --

7 THE COURT: Mr. Williams, I'm going to need you
8 to speak up just a little bit for me. Thank you.

9 MR. BOSNAK: No further questions than that,
10 Your Honor.

11 THE COURT: Ms. Williams.

12 MS. WILLIAMS: Thank you, Your Honor.

13 Good afternoon, Mr. Williams.

14 THE WITNESS: Good afternoon.

15 CROSS-EXAMINATION

16 BY MS. WILLIAMS:

17 Q. Do you sometimes go by the nickname of Big John?

18 A. All of the younger ones in the neighborhood call
19 me Big John, yes.

20 Q. Does Justin sometimes call you Big John?

21 A. As well. Yes, ma'am.

22 Q. Mr. Bosnak was asking you about the relationship
23 between Justin and Melissa. Are you aware of the
24 incidents of domestic violence in that relationship?

25 A. Of a couple of instances. Yes, ma'am.

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1 Q. Were you aware of the incident where he beat her
2 up when she was pregnant?

3 MR. BOSNAK: Objection, Your Honor.

4 A. I'm not aware of that incident.

5 THE COURT: Hold on one second.

6 Basis?

7 MR. BOSNAK: Your Honor, we talked about this.
8 Prior bad act.

9 [Whereupon, an off-the-record bench conference
10 is held]

11 THE COURT: Ms. Williams, please --

12 Ladies and gentlemen, I have determined that the
13 last question asked by the solicitor is not to be for
14 your consideration in any way in your deliberations.

15 Ms. Williams.

16 Q. [Ms. Williams] Are you aware of any physical
17 disputes between Justin and Melissa?

18 A. Yes, ma'am.

19 Q. Okay. How many?

20 A. About four.

21 Q. How long have they been together?

22 A. I want to say roughly from the time they started
23 to the present would be about four years. Or maybe five.
24 But I think it's about four.

25 THE COURT: Mr. Williams, I'm having a hard time

1 hearing you -- I think my ears are stopped up -- so I'm
2 going to need you to speak very loudly.

3 THE WITNESS: Can you hear me?

4 Q. [Ms. Williams] And do you live near them?

5 A. Kind of. I live in Summerville.

6 Q. Okay. How often would you say you saw them when
7 they were together?

8 A. To start with, they would come over maybe once
9 or twice a weekend in the month. We would go fishing or
10 something.

11 Q. And you were not at [REDACTED] on
12 September 14th or 15th of 2008, were you?

13 A. No, ma'am.

14 Q. You were not at the pool on the 14th, were you?

15 A. No, ma'am.

16 Q. So you don't know anything about what happened
17 inside the house that night?

18 A. No, ma'am.

19 MS. WILLIAMS: Nothing further. Thank you, Mr.
20 Williams.

21 THE WITNESS: Yes, ma'am.

22 THE COURT: Mr. Bosnak?

23 MR. BOSNAK: No further questions, Your Honor.

24 THE COURT: Mr. Williams, you may step down.

25 THE WITNESS: Yes, ma'am.

1 [Whereupon, the witness is excused and exits the
2 witness stand]

3 MR. BOSNAK: Your Honor, may we approach?

4 THE COURT: You may approach for scheduling.

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

7 THE COURT: Ladies and gentlemen of the jury, we
8 are going to recess for the evening.

9 Do not begin your deliberations. Do not discuss
10 this case amongst yourselves. Do not read, watch,
11 listen to any news accounts regarding this case should
12 there be any. Do not do any independent investigation.

13 Please be back in your jury room at 9:00 a.m.
14 We will begin promptly once all now thirteen of you are
15 present. Please have a wonderful evening.

16 Please rise for the jury.

17 [Whereupon, the jury exits the courtroom at
18 3:49 p.m.]

19 THE COURT: Thank you. Be seated.

20 Mr. Bosnak --

21 MR. BOSNAK: Yes, Your Honor?

22 THE COURT: -- is there anything you wish to put
23 on the record concerning our bench conference about the
24 domestic violence charge?

25 MR. BOSNAK: Bet your pardon, Your Honor?

1 THE COURT: Is there anything you wish to put on
2 the record? Our bench --

3 MR. BOSNAK: No, Your Honor.

4 THE COURT: -- conferences are not recorded.

5 MR. BOSNAK: No. No, Your Honor.

6 MS. WILLIAMS: Your Honor, can we just -- I know
7 it's a scheduling issue, but we still don't have which
8 experts are coming tomorrow. We would like to have our
9 experts come down. Keep saying work it out, but --

10 THE COURT: Ms. Williams, we're starting trial
11 at nine o'clock. Mr. Bosnak has indicated two experts
12 are coming. I can only -- that's all I can tell you
13 that I know.

14 MR. BOSNAK: And I've told Dr. Gibbs and Dr.
15 Ricky Halovich. And then Mr. Hillerby will testify
16 last, Your Honor. Those will be the three witnesses
17 tomorrow.

18 THE COURT: Ms. Williams, do you need anything
19 additional?

20 MS. WILLIAMS: I just would ask if there's any
21 reports generated by Dr. Halovich --

22 MR. BOSNAK: Okay. I don't have -- I don't have
23 anything.

24 MS. WILLIAMS: Can you tell us the order --

25 MR. BOSNAK: I'll start with Dr. Ricky, and then

1 I'll go to Dr. Gibbs and then Mr. Hillerby.

2 MS. WILLIAMS: . Thank you.

3 THE COURT: All right. The charges are done.
4 The verdict form is prepared.

5 Mr. Bosnak, I do not show that there are any
6 lessor includeds. Is that your understanding?

7 MR. BOSNAK: That's my understanding; Your
8 Honor.

9 THE COURT: Ms. Williams?

10 MS. WILLIAMS: No. Nothing else from -- I'm
11 sorry. I missed the Court's question. I was
12 conferring with co-counsel. The Court's indulgence.
13 Would you please repeat it?

14 THE COURT: Ms. Williams, are there any lessor
15 includeds of homicide by child abuse?

16 MS. WILLIAMS: No.

17 THE COURT: Are you requesting -- is the State
18 requesting any special or unusual jury charges?

19 MS. WILLIAMS: Just that voluntary intoxication
20 is not a defense.

21 THE COURT: Mr. Bosnak?

22 MR. BOSNAK: Yes, Your Honor. We have some
23 special instructions on confessions.

24 [Off the record momentarily]

25 MR. BOSNAK: Your Honor, I'll go get the jury

1 instructions and bring them back to you. They're on
2 confessions.

3 THE COURT: All right. Other than that, Mr.
4 Bosnak, are there -- are you requesting any different
5 jury charges from what the Court usually charges?

6 MR. BOSNAK: Your Honor, I think we will have a
7 charge about the police officer, that the testimony of
8 a police officer shouldn't be given any more weight
9 than a regular citizen. And then I'm sure, you know,
10 reasonable doubt, intent, and those type of things I'm
11 sure that you already have. But the confession charge
12 is what we are concerned about more than anything else.

13 THE COURT: Anything before we break for the
14 evening?

15 MS. WILLIAMS: Just that we haven't seen any of
16 these charges so we would just, you know, reserve our
17 right to object to them. I just don't know what they
18 are yet, so I can't articulate on them.

19 MR. BOSNAK: I'll have Ms. Williams a copy of
20 them, too, Your Honor.

21 THE COURT: All right. We are in recess until
22 9:00. Thank you.

23 MR. BOSNAK: Thank you.

24 [JURY TRIAL ADJOURNS AT 3:50 P.M.]

C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the jury trial held before the Honorable Kristi L. Harrington, on February 24th, 2010.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 21st day of August, 2010.


Mia Perron, CCR, CVR-CM
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CCR, CVR-CM

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615 COPY

STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT
INDICTMENT NO.: 2008-GS-08-2594

STATE OF SOUTH CAROLINA)
VS.)
JUSTIN R. HILLERBY,)
DEFENDANT.)

JURY TRIAL

VOLUME 4 OF 4

held before the Honorable Kristi L. Harrington
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Berkeley County Courthouse
Moncks Corner, South Carolina
on Thursday, February 25, 2010, Commencing at 8:59 a.m.

SUSAN "MIA" PERRON, CCR, CVR-CM
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[Exhibits were pre-marked unless otherwise noted in the transcript]

MARKED/ADMITTED

State's

State's Exhibit Number 41
[Rights form]

/ 115

Court's

Court's Exhibit Number 3
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Court's Exhibit Number 4
[Note from the jury]

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PROCEEDINGS

THE COURT: Be seated.

Anything from the State before we bring in the jury?

MS. WILLIAMS: Nothing from the State, Your Honor.

THE COURT: Anything from the defendant?

MR. BOSNAK: Your Honor, just these jury instructions.

THE COURT: All right. And have you provided a copy to --

MR. BOSNAK: I'm going to give the solicitor --

THE COURT: -- the State?

[Whereupon, Mr. Bosnak proffers documents to Ms. Williams]

MR. BOSNAK: Here you go, Your Honor. The main one is confession.

[Whereupon, Mr. Bosnak proffers documents to the Court]

THE COURT: All right. Let's bring in the jury.

MS. WILLIAMS: Your Honor, we're going to address these later, the jury --

THE COURT: That's correct.

MS. WILLIAMS: Okay.

THE COURT: Please rise for the jury.

1 [Whereupon, the jury enters the courtroom at
2 9:01 a.m.]

3 THE COURT: Wait.

4 Ladies and gentlemen of the jury, there is a
5 matter of law that I must take up outside of your
6 presence.

7 Please do not begin your deliberations. You may
8 leave your note pads right in your chair. Thank you.

9 Please rise for the jury.

10 [Whereupon, the jury exits the courtroom at
11 9:03 a.m.]

12 THE COURT: Thank you. Be seated.

13 Mr. Hillerby, you need to be seated in the chair
14 when the jury comes in.

15 Mr. Bosnak, how did you think your client was
16 going to get to the witness stand in leg shackles
17 without the jury seeing?

18 MR. BOSNAK: Your Honor, I apologize.

19 THE COURT: Thank you.

20 Mr. Hillerby, you may have a seat.

21 [Whereupon, Mr. Hillerby takes the witness
22 stand]

23 THE COURT: When the jury comes in, you can
24 remain seated while you are sworn in. All right? And
25 you will need to remain seated. I will have to have

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1 the jury excused after you testify, so I need you to
2 remain seated during the entire portion of your
3 testimony. Do you understand that, sir?

4 MR. HILLERBY: Yes, ma'am.

5 THE COURT: Thank you.

6 Any other procedural matters before we bring the
7 jury in --

8 MR. BOSNAK: Nothing, Your Honor.

9 THE COURT: -- Mr. Bosnak? Ms. Williams?

10 MS. WILLIAMS: Nothing from the State, Your
11 Honor.

12 THE COURT: All right. Let's try this again.

13 [Whereupon, the jury enters the courtroom at
14 9:04 a.m.]

15 THE COURT: Thank you. Please be seated.

16 Mr. Bosnak, your witness.

17 MR. BOSNAK: May it please the Court.

18 THE COURT: Mr. Bosnak, we need to swear Mr.
19 Hillerby.

20 Ms. Hill?

21 THE CLERK OF COURT: Please raise your right
22 hand. Place your left hand on the Bible.

23 [Whereupon, Mr. Hillerby is duly sworn by the
24 clerk of court as follows: do you solemnly swear or
25 affirm the testimony you will give the Court in the

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1 trial of this case will be the truth, the whole truth,
2 and nothing but the truth, so help you God]

3 THE WITNESS: Yes, ma'am.

4 THE CLERK OF COURT: Please state your full
5 name, and spell your last name for the record.

6 THE WITNESS: Justin Hillerby. H-I-L-L-E-R-B-Y.
7 - - - - -

8 JUSTIN HILLERBY,

9 Having Been First Duly Sworn,
10 was Examined and Testified as Follows:

11 DIRECT EXAMINATION

12 BY MR. BOSNAK:

13 Q. Mr. Hillerby, how old are you?

14 A. Twenty-eight.

15 Q. Twenty-eight years old?

16 A. Yes, sir.

17 Q. All right. The first question I'm going to ask
18 you: did you kill VICTIM [REDACTED]?

19 A. No, sir, I did not.

20 Q. You didn't hit that child?

21 A. I had no -- I had no reason to hurt VICTIM, none
22 whatsoever. I loved him just as much as I love Jen and
23 Serena. And she knows that.

24 Q. Okay. What I'm going to do, then, is I'm going
25 to start back on September the 14th, the day before this

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1 happened, at about nine o'clock in the morning. Can you
2 tell us how that morning started out?

3 A. I went and picked up Rory and Amy. And I took
4 Amy home first, and then me and Rory went back to Jen's
5 house.

6 Q. Did you stop anywhere before you went to Jen's
7 house?

8 A. We stopped by the store to get beer, some
9 drinks, Gatorade, bag of ice for the pool.

10 Q. Now, what were y'all planning on doing that day?

11 A. Going to the pool, like we usually do on any
12 other Sunday.

13 Q. So that's what you usually do on Sunday?

14 A. On the weekend, if we're not doing something
15 else, yeah.

16 Q. All right. Who all was going to the pool?

17 A. Me, Rory, Jen, ~~Victor~~, and Serena.

18 Q. Anybody else?

19 A. Some people were supposed to meet us out there.
20 Some people showed up; some people didn't.

21 Q. What time did you get to Jennifer S 's home?
22 Approximately what time did you get to her home?

23 A. Between 10:00 and 11:00, I guess. I don't know
24 the time exactly. I wasn't paying too much -- I don't
25 wear a watch.

1 Q. Who was with you?

2 A. Rory was.

3 Q. -Okay. And what did you do when you got there?

4 A. We just hung out for a little bit, got stuff
5 ready for the pool, got some toys. I loaded up the
6 cooler, put a couple of beers in it, put some drinks in it
7 for the kids. I think we put some grapes in it. She
8 packed up the stuff for Serena.

9 Q. Now, you're talking about stuff for Serena.
10 What are you talking about stuff for Serena?

11 A. Just some little snacks in bags in the little
12 beach bag that we got; got some towels; the boogy board.
13 And I think a little foam surfboard was in the van.
14 That's why I took the van over there.

15 Q. Okay. Now, what time did you go to the pool?

16 A. We probably got there between 11:00 and 12:00.

17 Q. How did you -- how did you go? I mean, did
18 Jennifer go with you?

19 A. No. I took ~~VICTIM~~ with me, which I've done
20 plenty of times before. I put him in his car seat. Me
21 and him rode to the pool first. She walked behind us with
22 the stroller. She probably showed up fifteen, twenty
23 minutes later.

24 Q. And was Serena -- who was Serena with?

25 A. She was with Jen.

1 Q. She was with Jen?

2 A. Yeah.

3 Q. Now, why would you take -- why would you take
4 your van and not ride -- not walk with Jennifer and
5 Serena?

6 A. She had some other stuff to get ready. I'm not
7 quite sure why she walked. I don't remember the details
8 of that. But I know she walked with Serena, took the
9 stroller with her. I think I might have planned on taking
10 somebody home, or something like that, and maybe she
11 walked home. I can't remember why we did it that way.

12 Q. Okay. So you got to the pool.

13 A. Yeah.

14 Q. What did you do when you got to the pool?

15 A. It was just me and ~~JOHN~~ at first. I put his
16 floaties on him, put his tube on him.

17 Q. All right. Explain floaties.

18 A. Little arm floaties. He don't really run around
19 the pool without them.

20 Q. And what kind of tube?

21 A. A little inner-tube that he keeps around his
22 waist. We only had one swimmie diaper. I think her dad
23 brought some later on.

24 Q. Okay. And did Jennifer eventually come and join
25 you?

1 A. Yeah. She showed up about fifteen, maybe
2 twenty, minutes max probably.

3 Q. And what did you do? Did you set up in the
4 area? Did you set up --

5 A. Yeah. We set up shop at the deep end of the
6 pool so we're in the sun all day, we're away from
7 everybody else. We play our music, have a couple of
8 drinks, hang out like we always do. Nothing unusual.

9 Q. Did other people come and join you?

10 A. Rory stayed behind for a little while, but he
11 eventually showed up. I think Beth showed up. I'm not
12 sure if anybody else was there. Maybe Craig. I'm not
13 sure.

14 Q. Okay. What kind of day was it?

15 A. It was hot. It was real hot for September.
16 Everybody was jumping in and out of the pool. I know I
17 was working with ~~VICTIM~~. That's why I took his floaties
18 off. I was trying to get him to doggie paddle.

19 Me and Jen had been trying to teach him how to
20 swim. She was getting him to hold his breath, you know,
21 one, two, three, taking him under. And that's why he
22 didn't have his floaties on that day, because I was in the
23 pool with him and when I put him out I didn't think to put
24 them back on. Me and Jen were talking about something,
25 and I think that's when he took off.

1 Q. All right. I'm going to get to that.

2 A. All right.

3 Q. All right. We heard some testimony when you
4 were here about him jumping in the deep end of the pool --

5 A. Yeah. Yeah.

6 Q. -- and nobody watching him. How about you
7 telling us about that.

8 A. He ran over there with Serena. And we didn't --
9 I didn't think nothing of it. I mean, we should have been
10 watching him better. I mean, I can't deny that we did
11 neglect him a little bit that day. He usually has his
12 floaties and his tube on, you know. He jumps in and out
13 at his own will. And I never put the floaties back on
14 him.

15 The lady screamed, said that he jumped in again.
16 I think Jen went over there to go get him and I said,
17 don't worry about it, I'll go get him. And I went over
18 there. And he was standing on the steps. I picked him up
19 and I stood him on the steps and I was telling him, you
20 can't jump in, you don't have your floaties on.

21 And he started crying because I said, you're
22 going to have to go back and sit with me and your mom for
23 a little while, sit in timeout for a little bit. And
24 that's when he started crying. I said, you can cry if you
25 want to, nobody cares if you cry. Because we were trying

1 to break him of whining. That's where the timeout comes
2 in. I tell him he can get up when he's done crying.

3 Q. All right. You did not say, nobody cares about
4 you anyway?

5 A. No, I never said that. I said that, you can
6 cry, nobody cares, because we were trying to keep him from
7 crying. I mean, he wasn't hurt. He started crying
8 because he knew he was going to timeout, which is what we
9 had been doing with him. We've never hit him.

10 Q. Now, were you drinking at the pool that day?

11 A. I had a couple of beers, yeah.

12 Q. Were you intoxicated?

13 A. No, I wasn't intoxicated. I had drank a
14 Gatorade on the way there. I swam a lot that day. If you
15 drink and swim, you don't -- you don't really feel the
16 full effects of the alcohol, from my experience. I go to
17 the beach and the pool all the time.

18 Q. Okay. What type of mood were you in?

19 A. I was -- regular day; Sunday; another day at the
20 pool. I wasn't upset about anything. I had told Jen that
21 day that I was done messing with Melissa because we
22 couldn't seem to get along --

23 Q. So you were --

24 A. -- and that I was ready to be -- I was ready to
25 give her a hundred percent of my time and effort. Because

1 I had problems with me and Melissa, and it caused problems
2 with me and Jen.

3 Q. Okay. Now, what time did y'all leave the pool?

4 A. I think Jen called about 6:00, so we probably
5 left about 6:30, maybe, right -- shortly after that.

6 Q. Okay. What was the plan? What was the plan for
7 that evening when you decided to leave the pool?

8 A. The plan was for Jen to go out. I had to work
9 the next day. I didn't mind watching the kids. It wasn't
10 even really a discussion. I had been out the night
11 before. I had watched the kids before so she could go
12 out; she watches the kids so I can go out. You know, it's
13 an effort both ways.

14 When we first got there, I think I changed
15 Blaze --

16 Q. Well, I'm asking you, before we get to that,
17 what time -- do you have any recollection of what time you
18 got back to the house?

19 A. Probably 6:30. Between 6:30 and 7:00 maybe.
20 I'm not exactly sure.

21 Q. And tell me whose house did you go to --

22 A. We went to Jen's house.

23 Q. Went from the pool straight to Jen's house?

24 A. Yeah. We all rode in the van.

25 Q. Okay. Came back in the van?

1 A. Yeah.

2 Q. Okay. And when you first got in the house, what
3 did you do?

4 A. Brought all the stuff in. I think she might
5 have jumped in the shower. I think I changed VICTIM. I'm
6 not quite sure which one of us did. But I know she got in
7 the shower, because she was trying to get ready because
8 Jen was going to be picking her up soon. The other Jen.

9 Q. And do you know what time she went out?

10 A. Not -- shortly after. 7:30, maybe. Seven
11 o'clock.

12 I started feeding VICTIM first, and then I think
13 Serena might have fixed herself dinner. I mean, it was a
14 long time ago. I think she fixed noodles or something.
15 She was a real picky eater. She usually fixed her own
16 stuff.

17 Q. So you're saying that you fixed VICTIM supper?

18 A. I fixed VICTIM pizza, leftover pizza. And I
19 stuck him -- I think Jen put him in the highchair before
20 she got in the shower. And I stuck the pizza in the
21 toaster oven, if I remember correctly.

22 Q. Where do you feed VICTIM.

23 A. In his highchair always. Sometimes he sits at
24 the table, if we're all sitting at the table, but -- but
25 it's very rare.

1 Q. Okay. Now, from that, Jen leaves you say 7:00,
2 7:30?

3 A. Yeah. Somewhere in there, I would say.

4 Q. When did Brandi and Eric come home?

5 A. I'm not sure when they got there. I know they
6 came in and out a couple of times. I think the first time
7 they came in was probably after I put -- I sent Serena to
8 bed, and I made sure she brushed her teeth and combed her
9 hair because a lot of times she won't comb her hair before
10 she goes to bed. So I always make sure she brushes her
11 hair, because it gets all nappy. Jen gets on me about
12 that. Sometimes I forget to tell her that. She was in
13 her bedroom watching TV, and they came in about 8:00 or
14 8:30 I guess, right after she laid down.

15 Q. Okay. Was anything going on with ~~VICTIM~~ at this
16 time?

17 A. Yeah. He had spilled my -- I sat my glass on
18 the glass table and he knocked my drink over. I don't
19 think -- I was more upset about the drink than the glass
20 table, because Jen was complaining about him playing on
21 those tables because they're made of glass. And I told
22 him to go sit in time out. And as soon as I say timeout,
23 he ran over there.

24 'And when he was running over there, Eric and
25 Brandi walked in and said, well, what's wrong with him. I

1 said, he spilled a drink. I was in the middle of cleaning
2 it up. I said, I told him to sit in timeout until he's
3 done crying.

4 Q. Okay. Up until the time about the drink, from
5 the time you got home or the time the mother left, until
6 you spilt the drink, did you touch that child, hit that
7 child, in any way?

8 A. I never -- I never put my hands on ~~VICTIM~~. I
9 never have. I never put hands on any children, my son.
10 My sister's kids, I helped raise them. I've never -- I've
11 never put my hands on a child.

12 Q. So you didn't hit him, didn't touch --

13 A. No.

14 Q. -- him?

15 No contact between you, other than feeding him?

16 A. I think I grabbed him by the arm. I said, go in
17 timeout. I mean, I didn't like shake him like. I just
18 grabbed him by the shoulder and said, go in timeout. I
19 mean, he knows where it is. It's a little couch right
20 there by the TV.

21 Q. Okay. And how long did you keep him in timeout?

22 A. Five, ten minutes, maybe. Long enough for me to
23 clean up the mess and fix another glass of tea.

24 Q. And then what did ~~VICTIM~~ do?

25 A. He got up. And I think I dumped his toys down

1 on the floor. He's got a basket full of toys that's
2 underneath that table. I think I dumped the toys out. I
3 was watching TV. He was playing. I was going back and
4 forth between the living room and the bedroom. I think I
5 was doing laundry or something, because I remember I kept
6 walking in the bedroom.

7 Q. Justin, is it -- tell me, is that -- him playing
8 with toys in the living room, is that what they -- what he
9 usually does in the evening?

10 A. Yeah. I mean, for the most part, yeah, unless
11 we're getting him ready for something or getting him ready
12 for bed. But I knew Jen was going to be out, so I let him
13 stay up.

14 Q. All right. Do you have any idea what time that
15 was when he was playing with the toys and that type of
16 thing?

17 A. 8:30, 9:00, probably. Maybe 9:30 at the latest.

18 Q. What type of spirits was he in?

19 A. He was -- I mean, he was staring to get tired,
20 you could tell, but he was happy like he always was. He's
21 always a good kid. He never gave us problems.

22 Q. Did he fall or anything?

23 A. No, he never fell. He was being ~~happy~~. I mean,
24 he's always in a good mood.

25 Q. Okay. Now, they talked about -- you've heard

1 them say, and you've said, that you hit the child with
2 your knee?

3 A. Yeah.

4 Q. Let's talk about that.

5 A. I went into the bedroom to get a cigarette and I
6 caught the TV. I believe that was in my statement. I was
7 watching Comedy Central. I'm pretty sure that's in one of
8 those statements. And I realized ~~VICTIM~~ was in the living
9 room by himself. Well, I hollered, I said, ~~VICTIM~~ come in
10 here for a minute. Because I was watching TV. And he
11 didn't come right away, so I got kind of worried. And I
12 got up and I went to run out there to get him. Well, he
13 was running into me -- he was running to me, too, because
14 he knew I called him. And I caught him when I come around
15 the corner. I ran into him, and I did knock him down.

16 Q. Okay. He hit the floor?

17 A. He hit the floor. They said --

18 Q. Head hit the floor --

19 A. -- that he hit the back of his head. He didn't
20 come off his feet. And they said something about a knee,
21 too. But ~~VICTIM~~'s height, his head would have hit my
22 thigh, not my knee. And we've got thick carpet and thick
23 pad. It's a brand new Cyntex home. If anybody knows
24 Cyntex homes, they've got regular carpet, regular pad.

25 He got up. I said, are you all right, you know,

1 and --

2 Q. Well, let me ask you --

3 A. -- tickled him a little bit and --

4 Q. Well, let me ask you about this. What about
5 this knee shot, get up and walk it off. How about that?
6 Did you say that?

7 A. I did tell him, I -- he got up and I said, are
8 you all right, you know. I was kind of rubbing my leg. I
9 said, you all right. And, you know, I kind of tickled him
10 a little bit, and he kind of giggled a little bit. And I
11 said, well, walk it off, come on, you know. I walked over
12 to the couch and he ran over. He moved, he was healthy,
13 he was fine, and climbed up on the futon like he always
14 does. That's how I know when he's starting to get tired.
15 He'll sit on the futon and watch TV with me.

16 Q. Now, what time do you think that was when all
17 this was going on?

18 A. Probably 9:30, 10:00, somewhere in there.

19 Q. Okay. Now, what did you start doing?

20 A. I think I was still hungry -- I snacked earlier
21 -- and I put some corn-dog bites in the toaster oven.

22 Q. So you were getting ready to eat?

23 A. Yeah. I think I had already -- I'm pretty sure
24 I had eaten earlier. But I was still hungry, so I was
25 fixing another -- a little snack.

1 Q. Did you fix a snack?

2 A. Yeah. I fixed a plate. I fixed about twelve or
3 thirteen of them.

4 Q. Thirteen -- twelve or thirteen what?

5 A. Little corn-dog bites.

6 Q. And did you sit down to eat them?

7 A. Yeah. I sat down at the table like I always do.

8 I noticed he started watching me a little bit, you know.

9 I seen him look at me. I knew what he wanted. You know,

10 I just -- I kept eating them, waiting for him to do

11 something. He kind of walked over to the table and was

12 just kind of staring at me like, you know, are you going

13 to give me some. He always did that when you were eating

14 something. And he eats anything. And I put him in the

15 highchair, and I dropped some corn-dog bites on the

16 highchair so he could eat some.

17 Q. Did he eat any?

18 A. I think he ate one or two, maybe. I don't think

19 he was as hungry as he thought he was because he had had

20 that pizza. I think he just wanted some because he saw me

21 eating.

22 Q. Did you fix him anything to drink?

23 A. I believe I got him a Juicy-Juice or a Capri

24 Sun. I can't remember which one it was.

25 Q. And during that period, how was he acting?

1 A. Same as he always did. I mean, I could tell he
2 was tired. We had been at the pool all day. It was
3 nothing unusual.

4 Q. How was he acting?

5 A. He was just watching Tv. I mean, that's how you
6 know when he's starting to get tired. He stops running
7 around. He just -- he'll start watching TV, just like we
8 do.

9 Q. Did he nod off?

10 A. He started to doze off a little bit. He falls
11 asleep in his highchair all the time. He kind of sleeps
12 with his head tilted to the side, like that, you know.
13 And I looked at him a couple of times. I said, VICTIM, you
14 ready to go to bed. And he said -- he didn't say, but he
15 makes little noises, little one-syllable noises. I think
16 he was like, P. I think he was trying to learn how to say
17 please. Jen's been working with him on that. And I think
18 he said P. And I got him out of the highchair and let him
19 stand up. I told him to go lay down so I could put on his
20 onezie and change his diaper.

21 Q. Stop a minute. You put him where?

22 A. I let him stand up on the floor, and I went to
23 go get his Onezie. And I told him to lay down. He lays
24 down right there in front of the futon where we change him
25 every day.

1 Q. All right. Stop right there. You didn't throw
2 him down?

3 A. No, I didn't thrown him down.

4 Q. Did you hit him?

5 A. No, I did not -- I did not hit VICTIM. I did not
6 hit him.

7 Q. So you told him to lay down?

8 A. Yeah.

9 Q. And you went and got, what, a diaper?

10 A. I went and got his onezie. The diapers are
11 right there. I think I got the onezie out of the closet.

12 Q. Now, what's a onezie?

13 A. It's an outfit that's just like a one-piece
14 jumpsuit, kind of. I think they're called onezie. That's
15 what I have always called them. Got little slick footies
16 on the bottom.

17 Q. Okay.

18 A. And changed his diaper. I think I put some of
19 that cream on him. I'm not quire sure if I did. I know
20 Jen's been getting on me about doing it.

21 Q. What kind of cream? I mean, what kind of --

22 A. He's got eczema real bad on his legs and his
23 arms. That chlorine usually helps it.

24 But I can't remember if I did that day or not.
25 I think I did, but I'm not sure.

1 Q. Okay. Did you put the pajamas on him?

2 A. I put his onezie on, and changed his diaper.

3 Q. Then what did you do?

4 A. I picked him up and I took him to bed.

5 Q. All right. How did you pick him up?

6 A. I put his butt on my arm right there and he just
7 kind of lays against my shoulder like he always does.

8 Q. Did you hit his head on the doorframe?

9 A. No, I didn't hit his head on the doorframe or
10 the crib. And I know that's in my statements, and I'm
11 hoping that we'll get to that.

12 Q. We will.

13 Did you hit his head on the doorframe?

14 A. No, I did not hit his head on the doorframe.

15 Q. Did you hit his head in the crib?

16 A. When I tote ~~UICIA~~ -- and if you tote any child,
17 anybody that's raised kids knows that they lay their head
18 right there on your shoulder.

19 Q. Do you know approximately what time this was?

20 A. It was after 10:00. I was watching Wedding
21 Crashers, so I know it was after ten o'clock.

22 Q. Okay. Did you put him to bed?

23 A. Yeah. I put him in bed and I even gave him a
24 high-five. That's what I did with him. Jen gives him
25 kisses. He's a boy. I'm not -- you know, he's getting to

1 be a little bit older. I think he's a little too old for
2 the kissing from a man, so I always give him a high-five.
3 He was fine. He was just really tired. I mean, I was
4 tired, too. The only reason I stayed up is I was waiting
5 for him to fall asleep, because I was supposed to work the
6 next day. I can't remember why I didn't go.

7 Q. All right. How about the light? Did you cut
8 the light off in his bedroom?

9 A. I know I cut the light off. The --

10 Q. Closed the door?

11 A. -- light was off. Closed the door. I know I
12 shut the light off. He won't go to sleep with a light on.

13 Q. After you put him to bed, what did you do?

14 A. I went and laid down on the couch. I called Jen
15 a couple of times during the night to let her know ~~VICTIM~~
16 had eaten, that Serena was in bed, she was -- you know,
17 she went to bed at a decent -- called her probably six or
18 seven times.

19 Q. All right. Let me go back a minute. As far as
20 you knew, was anything wrong with that child when you put
21 him to bed?

22 A. Nothing was out of the ordinary. I mean, ten
23 o'clock at night, we had been at the pool all day. He was
24 tired just like -- just like any other time we'd been at
25 the pool all day.

1 Q. What would you have done if something was wrong
2 with that child?

3 A. I took infant CPR classes so that my son could
4 come home with us. I know how sensitive a baby's brain
5 is. I know that there's space in the head and that you
6 can't shake them. I know about shaken-baby syndrome. I'm
7 the one that took the CPR class because I was the one that
8 was going to stay home with my son, because he was a
9 preemie.

10 If something was wrong, I would have taken him
11 somewhere. Eric and Brandy were there for Serena. If I
12 would have noticed something, I would have checked him
13 out. I checked him when we found him. I did everything
14 they told me to do in the class. He was fine when I put
15 him to bed. I put him to bed, he was healthy, he was
16 fine. He wasn't hurt. He wasn't bruised. He wasn't
17 bleeding anywhere. Same as I've always put him to bed.
18 There was nothing different.

19 Q. Okay. Put him to bed. What did you do?

20 A. I think I called Jen one last time to tell her
21 that I put ~~LECTIM~~ to bed; and that if she was all right; if
22 she needed a ride let me know, I'd get Eric and Brandi to
23 watch the kids. They were in bed. They wouldn't really
24 have to do nothing but listen. And then I fell asleep on
25 the couch.

1 Q. Okay. Do you remember what time Jen came home?

2 A. I don't remember what time it was. I know her
3 and Marty came in. I hadn't seen Marty in a long time.
4 They say it was 1:00-ish. I'm not really quite sure.

5 Q. Did you talk to them?

6 A. I talked to Marty. Jen came in. I think she
7 gave me a kiss. I can't remember what she did right after
8 that. I woke up. I was surprised to see Marty. Marty
9 lives in Las Vegas. I hadn't seen her in probably six
10 months or a year. So I --

11 Q. What was Marty doing there?

12 A. She was here -- I think she was here just to see
13 her family. She was here on vacation. She had to catch a
14 plane early in the morning. She was wanting to know why I
15 didn't go out. I told her it was Jen's turn to go out.
16 She told me how much she liked Jen, and that she was so
17 much like me, you know, that I had made a good choice.
18 And I think she left shortly after that. And then I went
19 into the bedroom, I think, to lay down.

20 Q. So you went in the bedroom to lay down?

21 A. Yeah. I think I talked to Jen before that. I
22 can't remember what was said, though.

23 Q. And when is the next time you woke up?

24 A. I remember waking up when Jen got up. She got
25 up with Serena. Serena usually gets up on her own, but I

1 think Jen got up with her that morning. And I remember
2 her getting up and walking out of the bedroom.

3 I was supposed to go to work. I can't remember
4 why I didn't that day. I just did that sometimes. I
5 mean, I work for myself. I went to work -- if I didn't
6 want to, I didn't have to.

7 Q. What do you do?

8 A. I do roofing. I've been working for myself for
9 a long time.

10 Q. So you don't remember what time Jen got up?

11 A. I know it was probably around 6:00 or 6:30, the
12 same time Jen and Serena usually get up.

13 Q. Did she come back to bed?

14 A. Yeah, she came back in bed.

15 Q. Okay. And then what time did y'all get up?

16 A. We got up probably 8:30 or 9:00. We got -- we
17 had been up for a while before we actually went into the
18 bedroom. We -- you know, we were intimate that morning,
19 watched some TV. I think she asked me why I didn't go to
20 work. I can't remember what I said. We talked about
21 cooking a big old breakfast and going to the pool that
22 day. We were going to go back to the pool and spend a day
23 in the sun. Take ~~us~~ with us, you know.

24 Q. Who found ~~us~~?

25 A. I opened the door and it looked like he was

1 sleeping, and I went to -- I went -- I said, well, just
2 let him sleep, will get up on his own. Because sometimes
3 he's cranky if you make him get up. And I said, he'll
4 hear us in the kitchen cooking breakfast and then we'll
5 come in and get him.

6 And I went to walk out and she walked past me to
7 look, and she noticed something on his face. And she
8 said, something's on his face. And she went in there and
9 she rolled him over, and when she rolled him over he had
10 blood -- he had blood on his face, and when she moved him,
11 his arm moved with him, like -- I don't know how to
12 explain it. She touched him to see if he was cold. And
13 then she started screaming and freaking out.

14 And I didn't really know what to do or what to
15 expect. It didn't seem like it was really happening. I
16 thought that maybe he was just asleep or something. I
17 touched his chest to see -- to feel if he was breathing,
18 like they said. I bent down to see if he was breathing,
19 but I didn't really touch his face.

20 And she started screaming and I just remembered
21 I had to get her out of there because I didn't want her to
22 see anymore. I kept trying to get her out of the bedroom.
23 She kept wanting to go in there and grab him. I said, no,
24 just let him -- leave him be, let him be, don't touch him.

25 And I think I called 911, and I think she called

1 her mom if I remember correctly.

2 Q. Do you remember what happened after that when
3 you called 911 and she called her mom?

4 A. I called 911. I told them that he wasn't
5 moving, he wasn't breathing, that he had been dead -- you
6 could tell that he had been gone for a while. He was
7 stiff. And I think I said that on the phone.

8 Q. Were they asking you what type of condition the
9 child was in?

10 A. They were asking me, and I was trying to answer.
11 But Jen was screaming and hollering. And then Eric and
12 Brandi came out sometime in there. And Eric went in
13 there, and he seen it, and then they were, oh, my God, oh,
14 my God. Everybody is freaking out, everybody's screaming,
15 everybody's hollering. I'm trying to talk on the phone.
16 They're talking to somebody else. They're not really
17 talking to me anymore.

18 The ambulance didn't get there until later on.
19 I don't know why the ambulance took so long. I kept
20 telling them, we need the ambulance, we need the
21 ambulance. I think a cop showed up first, a Summerville
22 cop showed up first.

23 Q. Do you recall who the police officer was?

24 A. I don't remember who -- I don't remember the
25 officer's name or anything like that.

1 Q. Were you still in the house then? All of y'all
2 still in the house?

3 A. I'm pretty sure we were in the house when they
4 got there, because the door was open. And Jen's dad got
5 there first and he went inside. And then her mom showed
6 up, and she asked him what was wrong. And she said she
7 wanted to see him and he said, no, you can't go in there,
8 keep them out of the house. And I said, that's what I'm
9 trying to do, keep them out. And I think we ended up in
10 the front yard when everybody else showed up. I think we
11 were in the front yard when the fire truck showed up. I'm
12 not sure.

13 Q. Tell me what you were wearing that day.

14 A. I was wearing a pair of shorts, I believe. Just
15 a pair of shorts I wear in bed. I sleep in my boxers. I
16 think I grabbed a pair of shorts when we got up that
17 morning to go cook breakfast.

18 Q. Did you have a tee-shirt on or anything?

19 A. No. Leonard gave me a shirt when the cops said
20 they were going to take me and Jen for questioning.

21 Q. Okay. So you go outside. And what's going on
22 then when y'all were outside?

23 A. Everybody's freaking out. Everybody's crying.
24 Jen's freaking out. I'm -- I didn't really know how to
25 react. I mean, I was scared. I didn't really understand

1 what was going on. I've never seen a body before,
2 especially someone like ~~VICTIM~~.

3 I've been -- I've known ~~VICTIM~~ since almost right
4 after he was born, is when I met Jen. My son is the same
5 age as Blaze. They're about I think two or three months
6 apart. I've spent more time with ~~VICTIM~~ than I have Javin.

7 I've never been through anything like that. I
8 didn't really know what to do. I was just -- I just
9 wanted to be there for Jen. That's all I could think
10 about was -- because I know -- I don't know how she could
11 deal with it.

12 Q. All right. Let's back up. Let's stop right
13 there at that point and we'll come back to that. But
14 let's talk a little bit about your relationship with
15 Jennifer S. How did -- how long had you known her --

16 A. I've known --

17 Q. -- before this?

18 A. I met Jen right after ~~VICTIM~~ was born and right
19 after Javin was born, because Melissa had just come home
20 from the hospital. I was on a dart team, and her and her
21 boyfriend joined the dart team. And I was with Melissa
22 and she was with Ron, I believe, at the time.

23 Q. Okay. And how often would y'all play darts?

24 A. Every -- we played darts every Thursday. It was
25 kind of our night out, you know, away from the work week,

1. before the weekend, you know, kind of take your mind off
2 the work week.

3 Q. Was it an organized --

4 A. Yeah. It's a dart league out of Maguire's. I
5 think the name of our team was the Widgets. Not my
6 choosing of words.

7 Q. So you got to know her that way?

8 A. Yeah. She was on my dart team, so -- I only saw
9 her every Thursday. And when Ron stopped going and
10 Melissa stopped going, we kind of started talking about
11 our problems in our relationships and we kind of started
12 to realize that we had the same problems, and I think
13 that's where our friendship kind of started.

14 Q. So the relationship started as a friendship?

15 A. We were friends for over a year before we
16 started dating.

17 Q. And then you started dating?

18 A. Yeah. When we actually started dating was kind
19 of not usual. Melissa went to California, because we
20 couldn't make it work. I tried to get in touch with her
21 for a while. I even started drinking pretty heavy. And
22 Jen noticed it. I think she called me out on it one
23 night. Well, I stopped the drinking. I slowed down a
24 good bit. Started working out. Stopped smoking
25 cigarettes. That's when me and Jen got really close. We

1 got really close.

2 Q. The closeness between you two, how long -- when
3 did that start up to this period? the length of time?

4 A. Probably nine months until all this happened.

5 Q. So y'all really started dating about nine months
6 before this happened?

7 A. Nine months -- maybe nine months, ten months,
8 something like that. I was there for ~~OLIVIA~~'s first
9 birthday party, I remember that, at the house.

10 Q. What was your -- what are your feelings? What
11 were your feelings for Jennifer S. ?

12 A. She was my best friend.

13 Q. Okay. Now, I'm going to go back to you're all
14 outside. And a lot of things are going on; correct?

15 A. Yeah.

16 Q. Do you know what's going on?

17 A. They don't want us to go inside. I mean, I've
18 seen TV. I know that no one's supposed to touch anything,
19 no one's supposed to go in the house. And I knew they
20 were probably going to want to ask us some questions.
21 They were asking me if I knew anything. Said he had
22 asthma. That's the only thing I could think of. Nothing
23 else came to mind. I even -- I think I mentioned a brain
24 hemorrhage, maybe, because I seen that on a CSI episode.

25 Q. Just stop a minute. Why did you answer the

1 questions? Why were you answering the questions?

2 A. Because nobody else could really talk. I was
3 the only one there that was -- I was the last one to see
4 him awake. Eric and Brandi were in their room most of the
5 night. They usually stay in their room, I mean, unless
6 we're -- you know, unless we're outside smoking cigarettes
7 or something like that. We smoked outside.

8 Q. Why did y'all smoke outside?

9 A. Because of ~~Victim~~'s asthma, and it makes the
10 house stink, and no one really -- I don't like smoking in
11 the house. No one does, I don't think.

12 Q. Okay. So you're answering the questions.

13 A. Yeah. I'm talking to the -- I talked to the
14 police officer. I believe I talked to -- I think I talked
15 to a fireman, too. I'm not quite sure who got there
16 first. They said they -- the policemen got there first,
17 and then the fireman said he got there first. They can't
18 remember who got there first, but they seem to remember my
19 demeanor. I don't understand that.

20 Q. But was it hectic?

21 A. Yeah, it was hectic. There was -- I think a
22 neighbor came. Sharon was really upset. She was -- she
23 was worse than Jen. Jen had -- it had been a little while
24 before Sharon got there and I think -- Jen was still
25 freaking out, but she wasn't screaming like she was.

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1 Q. Now, who's Sharon?

2 A. That's Jen's mom.

3 Q. The baby's grandmother?

4 A. Yeah.

5 Q. Okay. Now, what happens while all this is going
6 on with the police and everything?

7 A. Nothing, really. They questioned us for a
8 little bit, and then they said that they wanted me and Jen
9 to take a ride to the police station.

10 Q. Did you go to the police station?

11 A. Yeah, I did go to the -- we rode together.

12 Q. Okay. And who did you talk to at the police
13 station?

14 A. I talked to the detective that got up here, the
15 one that I had asked for on the ride back from my bond
16 hearing. I don't know his name.

17 Q. Heavy-set gentlemen?

18 A. Yeah.

19 Q. Do you see him in the courtroom?

20 A. No, I don't.

21 Q. Okay. Sharp. Detective Sharp. That's his
22 name.

23 A. Okay. Detective Sharp. Yeah.

24 Q. And what did Detective Sharp ask you?

25 A. He asked me did me and Jen argue a lot. That's

1 where he kind of started off right away was what were we
2 doing the day before, did me and Jen ever get violent with
3 each other, what was I doing the night before, was I upset
4 about anything. I told him, no, you know, everything was
5 the same as always, everything was fine. Did I -- did I
6 have any idea what could have happened. I said, I know
7 he's got chronic lung disease. It looked like he had
8 maybe had a brain hemorrhage because he had blood around
9 his mouth on the mattress.

10 He just kept asking me questions about me and
11 Jen and how we got along. And I kept asking him, I want
12 to talk to Jen, where is Jen at. And he said, well, you
13 can't talk to Jen right now; you can see her later on.
14 And I kept saying, well, I want to see Jen, I want to talk
15 to Jen; why is Jen -- why are we being separated. And he
16 kept saying that it was regular procedure, that's the way
17 they always do it.

18 And I was -- that's when I started feeling
19 dizzy. I was like, why are you separating us; why won't
20 you let me talk to Jen. I didn't understand why they were
21 asking me what was happening instead of telling me what
22 was happening, you know. They're the police. They're
23 supposed to be telling me what happened, not asking me
24 what happened. And I didn't understand why they wouldn't
25 let me and Jen talk together.

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1 Q. Do you know how long you were at the police
2 station?

3 A. Maybe an hour, maybe two. I'm not really sure
4 how long it was.

5 Q. Was it a long time?

6 A. It wasn't that long. It seemed like hours but
7 when we got back to the house, it wasn't really that long.
8 They were already gone when we got back. I mean, I don't
9 understand why they were gone so fast. I mean, if a child
10 would die you would think they would block the house off
11 for a day or two. You know what I mean?

12 I don't -- I don't understand why everything
13 happened so fast. They didn't take anybody's clothes,
14 they didn't check anybody's hands if they thought it was
15 something violent. Everything just happened really fast.
16 We were back at the house in no time. And he was gone.
17 The carpet was cut up.

18 Q. Well, let me ask you this. What other kind of
19 questions did they ask you at the police station then?

20 A. They just kept asking me what happened the night
21 before, did me and Jen fight a lot, how did I discipline
22 the kids, did I ever put my hands on Jen, did I ever put
23 my hands on the kids. They just kept asking me questions
24 like that. And when we got back to the house I even told
25 Jen, I said, something's going on here.

1 I asked Jen what kind of questions they asked
2 her and she said that they asked her did I ever get
3 violent with her, did I have a drinking problem, did I
4 ever hit the kids. They didn't really ask her what
5 happened that night. They asked me what happened.

6 Q. Well, did you feel like that they thought you
7 had been involved in this?

8 A. I told Jen that. We -- and she kept saying, you
9 know, you don't have nothing to worry about; you know, it
10 was probably an accident; you know, it was probably
11 natural causes or something like that.

12 And I kept telling her, I said, you know -- and
13 she remembers me saying that, that something's going on; I
14 think they're going to try and make this look like was my
15 -- this was my fault.

16 Q. Okay. Now, did the police at the police station
17 say anything to you about it being an accident and did you
18 do anything to cause an accident?

19 A. They didn't -- they didn't say nothing about it
20 that day. But when I went to take the lie detector test,
21 that's when they started talking about an accident; you
22 know, maybe somebody dropped him, maybe somebody bumped
23 his head, it was probably an accident. That's what they
24 kept saying, it was probably an accident, nobody gets in
25 trouble for accidents.

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1 Q. Let's finish up with the one on the 15th and
2 then we'll get --

3 A. All right.

4 Q. -- into the one on the 17th.

5 Did you write a statement on the 15th?

6 A. Yes. I wrote a statement the day -- right after
7 it happened.

8 Q. And was that what happened?

9 A. That's exactly what happened, everything that
10 happened that day.

11 Q. Didn't you leave out about hitting Blaze with
12 your leg?

13 A. I left out about me running into him. I didn't
14 think that it was anything that would -- that that would
15 have had anything to do with it. I didn't want them to
16 say something about maybe that I tried to hit him on
17 purpose or something like that. You know how police are
18 about kids. You can't spank your kids. I just know how
19 the police are. I mean, I've been in a little bit of
20 trouble before, but never nothing serious. I know they
21 always assume the worst.

22 Q. All right. Now, you talked about being in
23 trouble before.

24 A. Traffic tickets. I had a motorcycle. I love
25 riding bikes. I ride willies, do tricks. I probably got

1 thirty tickets in six months for speeding and reckless
2 driving. I've always had a problem with my driver's
3 license.

4 Q. Okay. Now, let's go to the 17th. That's two
5 days later.

6 A. Yeah.

7 Q. Okay. What happened on that day?

8 A. They asked me to come in and take a lie detector
9 test. I said that that wouldn't be a problem. They
10 scheduled --

11 Q. Did you take the lie detector test?

12 A. I tried to take the test. They asked me some
13 test questions. I answered the test questions, and they
14 said that we were going to begin, but they didn't hook
15 nothing up. And they asked me if I could have done
16 anything, or if I know anything that could have caused the
17 death of ~~you~~ that night, and I told them that I didn't
18 really know because I didn't know what happened. And he
19 said, are you -- are you refusing to take the test. And I
20 said, no, I'm -- I can't answer that question because I
21 don't know what happened.

22 And that's when he stepped outside and talked to
23 Detective Williams right there. And then they came back
24 in and that's when they said, well, do you want to talk
25 about it. And I said, well, I can't really answer the

1 question if I don't know what happened. And that's when
2 they told me that it was blunt-force trauma.

3 Q. So you didn't know what had happened to that
4 child for two days?

5 A. No, we didn't know. I told my brother what was
6 going on. Him and his girlfriend are the ones that looked
7 up the secondary drowning. And I think Eric and -- or
8 Eric and Amy said that they walked in and saw us on the
9 computer. Jen was pulling it up online to find out about
10 it because we were at the pool, and the way we found Blaze
11 was kind of similar to the way that that dude found his
12 son.

13 Q. All right. So --

14 A. I even called -- I called Ms. Williams and told
15 her about that, to ask the autopsy people to check that
16 out because they don't usually check for that.

17 Q. All right. Jennifer S , the mother, nobody
18 told her how the child died?

19 A. I don't believe so.

20 Q. How about Leonard, the grandfather, and the
21 grandmother?

22 A. I believe I was the first one to find out about
23 it.

24 Q. And you --

25 A. I don't think they found out until that morning.

1 Q. Okay. And you didn't find out about it until
2 the 17th?

3 A. Yeah. I found out when I went to take the lie
4 detector test.

5 Q. And finally, after constantly asking them, they
6 told you what happened?

7 A. Yeah. They told me that it was blunt force
8 trauma.

9 Q. And did they explain to you what happened?

10 A. They said that it looked like it was an
11 accident, that someone might have dropped him, he might
12 have bumped his head. He kept saying -- Sharp kept saying
13 over and over again that it was an accident, people don't
14 get in trouble for accidents, you know, if something
15 happened where you bumped his head, just go ahead and tell
16 me about it and we know -- we'll get you back -- we'll get
17 you back home to Jen. And that's when I told him that I
18 ran into him.

19 Q. You told him you ran into him?

20 A. Yeah.

21 Q. Well, in that statement also there's a statement
22 in there from you or a question in there that you answered
23 yes about hitting the child's head on the doorframe.

24 A. Well, if you'll notice in my statement, the
25 first part of it is separated from the rest of it. When I

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1 gave that first piece of me running into him, Ms. Williams
2 said that just that couldn't have done it, that something
3 else had to have hit his head, that maybe he hit his head
4 again. And she kept asking me if I bumped his head on the
5 doorframe or if I bumped his head on the crib. And I kept
6 saying, no, I know I didn't. And she kept saying, are you
7 sure; you know, it could have just been a little bump,
8 nothing serious. And they both kept saying, you know --
9 you know, if you bumped his head, you know, it was still
10 an accident; people don't get in trouble for accidents.
11 And that's when she said, well, just go ahead and write it
12 down; if you're not so sure, we'll -- you know, we'll work
13 out the details later. And I know she remembers that.
14 And that's what I wrote down, that I might have bumped his
15 head on the doorframe. And she said, which side. And,
16 you know, I said, well, if I was toting him, it would have
17 been the right side. And she said, did you bump his head
18 on the crib. And I said, you know, I was tired; maybe I
19 did bump his head on the crib. And I put that in my
20 statement, too.

21 Q. Did they tell you that the child had been hit
22 twenty-three times?

23 A. No, they didn't. Nobody -- I didn't know how
24 bad it was until I had been in jail about three months
25 when you came to talk to me. I thought that it was just a

1 bump to the head, all the way up until you came to see me.
2 And that's when you said, do you realize what's going on,
3 Justin, and I said, not really. I do now, though.

4 Q. All right. After you finished talking to them,
5 what did they do to you?

6 A. They took me to Summerville.

7 Q. Did they arrest you?

8 A. Yeah, they arrested me right -- they arrested
9 me -- I wrote a part of that statement at the police
10 station. I think they arrested me before I wrote the part
11 about the crib. Because they questioned me at
12 Summerville. They kept putting me in the holding cell,
13 and then they'd bring me back out, and then they'd put me
14 in the holding cell, and then they'd bring me back out. I
15 was there all day. I didn't get to Berkeley County until
16 7:30 that night. It was after dinner. It was dark. It
17 was dark when we pulled in. Nobody mentioned that..

18 Q. All right. Did they tell you -- ask you if you
19 wanted a lawyer?

20 A. They asked me several times about a lawyer, and
21 they told me about my rights. I mean, I -- I mean, yeah,
22 I knew what I was -- I knew what I was signing. I knew I
23 had the right not to say anything. They -- I wanted to
24 cooperate. I wanted to do what they wanted me to do, you
25 know. I wanted to go home. I wanted to be back with Jen.

1 I wanted to get home to Jen, because WJTM was gone,
2 Serena was gone. Her and her parents are close but
3 they're not as close as they could be.

4 Q. All right. So you're telling us, then, you
5 thought by telling the police this, they're going to let
6 you go home?

7 A. That's what I wanted -- I wanted to go home,
8 yeah.

9 Q. And you thought you were going to go home by
10 telling them this --

11 A. Yeah, that's --

12 Q. -- and signing this statement?

13 A. That's what they kept telling me. They kept
14 telling me, if you cooperate, you'll go home, we'll get
15 you back home, people don't get in trouble for accidents.
16 That's what they kept saying: an accident is an accident.
17 That's all they kept telling me.

18 Q. Okay. So they lock you up?

19 A. Yeah.

20 Q. You go before a bonding judge?

21 A. Yeah. The next day I went in front of a judge,
22 yeah. They come and got me that morning.

23 Q. Did they set bond?

24 A. No. They told me that you don't get a bond for
25 a homicide charge. And I didn't really understand that.

1 I didn't know that there was a charge you didn't get a
2 bond for. I thought I was going to be able to -- maybe my
3 parents could get together and get me out. I didn't -- I
4 had never heard of a charge with no bond before.

5 Q. Okay. And where they going -- where were they
6 going to transport you to then? What jail?

7 A. They were bringing me back to Berkeley County,
8 where I've been for eighteen months now.

9 Q. Okay. And who -- officers going to take you
10 back?

11 A. Yeah. Older guy. He was a transport officer.
12 He was a really nice guy. He could tell that something
13 was bothering me. He kept trying to -- he was talking to
14 me. He said, something bothering you back there, son.
15 And I said, I don't understand what's going on. I don't
16 understand why I can't get a bond. And he said, well, a
17 homicide charge is a serious charge, son; you know you're
18 looking at a lot of time. And I said, they said that it
19 was an accident; why are they charging me with homicide
20 when -- why isn't it negligent homicide or involuntary or
21 something like that; why is it homicide by child abuse. I
22 mean, people think -- child abuse, they think of a child
23 molester or that I beat him. And he kept saying, well,
24 you know, if your story doesn't match exactly what
25 happened, they're going to fry your ass, son. That was

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1 his exact words: they're going to fry your ass, son, if
2 your story doesn't match exactly.

3 And I said, well, I don't -- I don't really know
4 exactly what happened; I just -- you know, I know that I
5 ran into him, but they said it was an accident. And he
6 said, do you want to go back and talk to the detective; do
7 you want to talk to the detective again. And I asked him
8 if he thought that might help me. And he said, yeah, you
9 know, maybe you should go and talk to the detective again
10 and that'll probably help your situation; you want to make
11 sure that your story is straight; it has to match;
12 forensics nowadays are very precise; they're going to know
13 exactly what happened to him.

14 So he said -- we got back to the police station.
15 He said, let me make a phone call; I'll see if I can get
16 you back over there. And he called over to the police
17 station, I guess. I sat in the car for probably fifteen
18 minutes. It was hot as hell.

19 Q. But did you ask for Detective Sharp?

20 A. I said that I wanted to talk to the detective
21 that told me that he was going to help me help myself.
22 That's what he kept saying.

23 Q. Well, let me ask you about that. Had you had a
24 pretty good relationship with Detective Sharp?

25 A. Yeah. He seemed friendly. He seemed -- he

1 seemed like he wanted to help me out, like he wanted to
2 find out what happened. He seemed like he -- he knew that
3 it was an accident, he wanted me -- he wanted me to get
4 out. He wanted to get me back to Jen, back to help her
5 deal with what was going on.

6 Q. Okay. So you go back and you talked with
7 Detective Sharp?

8 A. I talked to -- I had my bond hearing probably at
9 9:30. We talked for a little bit about my first
10 statement. And I was asking him about the hitting his
11 head on the crib and stuff like that. And he was talking
12 about, well, maybe it had to be something a little more
13 serious. You know, he kept asking me are you sure when he
14 spilt the drink I didn't put my hands on him. He kept
15 asking me that over and over again, are you sure you
16 didn't, you know, just give him a little smack or, you
17 know -- he just kept bringing up the drink incident over
18 and over again.

19 And then he put me back in my cell. And then
20 he'd wait about thirty minutes, an hour. You know, the
21 smells [sic] of those cells are really small. I hate
22 Summerville. They're the smallest cells I've ever been
23 in.

24 And then he'd come back and he would ask me
25 again, you know, are you sure you didn't put your hands on

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1 him, you know, he said, because it seems like maybe what
2 happened to ~~WCTM~~ might have been a little more serious;
3 you know, maybe somebody popped him once or twice; are you
4 sure you didn't put your hands on him, you know. And then
5 he was like, well, hold on, I've got to go talk to
6 somebody about something; just go ahead and -- I'll come
7 back and get you in a little bit, you know, and he stuck
8 me back in the holding cell for a little while. I was in
9 that holding cell off and on probably four times that day.

10 Q. Okay. Now, how many times did ~~WCTM~~ spill a
11 drink --

12 A. He just --

13 Q. -- spill your drink?

14 A. Just the one time. He spilt the glass of tea
15 the one time. And Eric and Brandi came in after he spilt
16 that drink. I was cleaning it up when they walked in, and
17 he was running to the futon.

18 Q. Okay. Well, let's go back, then. Let's go back
19 to Detective Sharp, because in your statement you state
20 that you slapped that child a few times openhanded.

21 A. That's what we agreed. That's what he said that
22 I should do. That's what I agreed -- that's what I agreed
23 to write down. I said that I would write that down.

24 Q. Why did you -- why did you agree to that?

25 A. Because he said that the forensics have to

1 match. He said the same thing that the detective said,
2 that if my story didn't match that it wasn't going to look
3 good in front of a judge, that I needed to be honest, I
4 needed to be up-front with everything and they would have
5 some leniency on me; I could get probation; they would
6 probably drop it to involuntary or an accident death and I
7 could get probation, or I would only sit for a couple of
8 months and then they would let me go and I could get back
9 to my life.

10 Q. Okay. Now, the forensics: did he tell you any
11 of the forensics that they had?

12 A. They didn't say -- they didn't say nothing about
13 the forensics. They just said that it was a bump to the
14 head. That's all they told me, a bump to the head.

15 Q. You had been sitting here all week; right?

16 A. Yeah. Well, no. I had been sitting here for a
17 day when all that happened.

18 Q. No. But I'm saying you've been here this whole
19 week for your trial; right?

20 A. Yeah. Yeah. I've had to sit there and watch
21 people get up here and lie and I can't say anything about,
22 and I have to sit there and hold my composure. People are
23 saying that this guy showed up first, that guy showed up
24 first. They can't remember details. They didn't check
25 anybody's hands, if someone supposedly hit him. They

1 didn't take nobody's clothes. You know, if this had been
2 a judge's son or a cop's son, they would have done their
3 job, you know. But ~~you~~ wasn't that important now, but
4 now that they have someone to pin it on, now -- now he's
5 important. You know, now they're concerned. Two-hour
6 investigation on the death of a child. That just doesn't
7 seem right to me.

8 Q. All right. Justin, you've heard about the
9 forensic evidence this week, haven't you?

10 A. That's the first time I seen it. I told you I
11 didn't want to seen [phonetic] it until they seen it. I
12 saw what it looked like.

13 Q. But I -- but --

14 A. You told me.

15 Q. What about the forensic evidence? There's no
16 forensic evidence showing you did this?

17 A. No. There is nothing showing that I did this,
18 except for my statements.

19 Q. Okay. Now, there's also some statements in
20 there that people have the wrong story and the wrong
21 impression and you want to get the story straight. What
22 was all that about?

23 A. The people at the pool with -- the story with
24 ~~how~~ how I pulled him out of the water, how I snatched
25 him up by his arm. And then they said me and Jen were

1 arguing. Me and Jen are sitting on the deep end of the
2 pool. Everybody is sitting over in the shallow end.
3 That's a thirty-foot pool. How would they know if me and
4 Jen were arguing or not. I don't even remember seeing
5 those kids. The lady that pulled ~~VICTIM~~ out of the pool
6 was an older woman. Those two younger kids didn't pull
7 him out of the pool. There was a bunch of people at the
8 pool that day.

9 Q. Were you and Jen arguing?

10 A. I think she got on my case about me being at
11 Melissa's house that night. And I told her I was supposed
12 to get Javin that day, it didn't work out, I was sick of
13 her shit -- I'm sorry about my language -- I was tired of
14 arguing with her. I told Jen that day that I was ready to
15 move on and I was ready to be serious with me and her.

16 Q. All right. Now, you said you've been locked up
17 before?

18 A. I've been to a couple of one-nighters --

19 Q. You ever been locked --

20 A. -- for stuff.

21 Q. -- ever locked up for a felony?

22 A. I've never had a felony in my life.

23 Q. What kind of stuff were you locked up for?

24 A. I got a DUI when I was twenty-one, celebrating
25 Elizabeth's birthday, the same girl's house I was at the

1 night before. A bunch of speeding tickets, probably
2 thirty or forty. I think I got fifty-something tickets
3 altogether. I've -- terrible driving record. I like to
4 drive fast, I guess. I got a couple of disorderly
5 conducts. I got robbed in a neighborhood. I shouldn't
6 have been in the neighborhood. I got disorderly conduct
7 on that. I got another disorderly conduct. I can't
8 remember what the other one was for.

9 I got a public intoxication for sleeping in my
10 truck at the Ice House. After I got the DUI I was kind of
11 paranoid about driving, so I slept in my truck one night.
12 And I got one cop from Summerville that's -- Officer
13 Valentine pulls me over a lot, you know. He's always
14 trying to get me for something. And he pulled me out of
15 my truck one night and got me for disorderly -- or public
16 intoxication. I think I got like three of those. Walking
17 home one night they pulled -- said I was wobbling.

18 They've taken me home before, too, because I've
19 had problems with my license forever.

20 Q. All right. Have you ever been in any trouble
21 for something like this?

22 A. I've never been in trouble for any violence.
23 I've never -- I've never been violent with anybody. Me
24 and Melissa have had some altercations before.

25 Q. All right. Before -- I want to ask you a couple

1 of questions. Again, was that child okay when you put him
2 to bed?

3 A. ~~VICTIM~~ was fine when I put him to bed.

4 Q. Did you hurt that child?

5 A. I did not hurt ~~VICTIM~~. I had no reason to hurt
6 ~~VICTIM~~, whatsoever. If I didn't want to watch him, I could
7 have left at any time. I could have went to Melissa's. I
8 could have went to my dad's. my friend Rory, he's like my
9 brother. I could have went to his house. If I didn't
10 want to watch him, I could have put him to bed. I could
11 have done a thousand things. I could have just told Eric
12 and Brandi, hey, I don't feel like watching the kids, I'm
13 going out. I mean, I could have left. All I own is a bag
14 of clothes. I've lost two vehicles, all my clothes,
15 bouncing back and forth between Melissa and Jen.

16 Q. All right. Other than -- other than changing
17 the child, putting the night -- the sleep --

18 A. Onezie.

19 Q. -- onezie on, and feeding him, the only thing
20 that you did to possibly hurt that child, would it be
21 honest to say, was --

22 A. I did --

23 Q. -- running into him?

24 A. I did run into him.

25 Q. And that's all you've done --

1 A. And I didn't tell them that in the beginning.
2 But I did run into him.

3 Q. You did tell Mr. S that, didn't you?
4 Didn't you tell Leonard?

5 A. I think I mentioned it to him, before I got
6 arrested, that I did run into him that night. I think he
7 mentioned that.

8 MR. BOSNAK: Okay. No further questions.

9 THE COURT: Ms. Biagianti.

10 CROSS-EXAMINATION

11 BY MS. BIAGIANTI:

12 Q. You loved ~~VICTIM~~?

13 A. [No response]

14 Q. Sir?

15 A. Yes, I do. I love ~~VICTIM~~. I love ~~VICTIM~~ and
16 Serena and I treated them the same as I treat my own
17 children or my son Javin and Christopher and Nicole.

18 They're like my kids. I've been with Melissa
19 for a long time. I've helped raise them since we got
20 together. I'm the only dad that I think they know,
21 really.

22 Q. Do you tell Javin nobody cares if you cry? Do
23 you treat Javin like that?

24 A. Javin is not as advanced as ~~VICTIM~~. Javin was a
25 preemie. He's probably about six to nine months behind on

1 everything because he was born so early.

2 Both of them, they don't really cry that much.
3 Neither one of them do. They're both good kids. They're
4 both happy all the time.

5 ~~ACT~~ whined a little bit -- me and Jen had
6 talked about it -- I think maybe because, you know, he
7 doesn't really have a father figure around. I know
8 Leonard's really good with him. But that's where we came
9 up with the timeout, was to try and break him of the
10 whining.

11 Q. Do you consider it love to tell a twenty-two-
12 month old nobody cares if you cry?

13 A. No. I was out of line when I said that. I'm
14 not going to deny that. I just -- I know -- I guess I'm a
15 little tougher on boys. My dad was -- he was kind of
16 tough on us.

17 Q. Big John?

18 A. Big John, yeah. He --

19 Q. He treated you with tough love?

20 A. I wouldn't say tough love. You know, he's been
21 the strong, silent type. My mom's been kind of the one
22 you could go and talk to. I guess I kind of inherited
23 some of that.

24 Q. Now let's talk about your relationship with the
25 two women in your life.

1 A. Roller coaster.

2 Q. You're a liar, aren't you?

3 A. I've been -- I've been known to lie to Melissa
4 and Jen, yes.

5 Q. You were bouncing back and forth between the two
6 of them --

7 A. I wouldn't say --

8 Q. -- daily? every other day?

9 A. No. This was weekly. It would be three --

10 Q. Weekly. Excuse me.

11 A. It'd be three weeks, a month, I would be with
12 one. I'd be single for a week or two.

13 Jen was my best friend. She always took me
14 back. She was always there when me and Melissa couldn't
15 make it work. Jen was my best friend.

16 But Melissa was my first love. I had a son with
17 her. I couldn't be with anybody else if Melissa was
18 around. I could never say no to Melissa. I still can't.

19 Q. So you treat your best friend's children the way
20 you treated ~~VICTIM~~?

21 A. I treated -- I treated them all the same. I
22 treated ~~VICTIM~~ the same way I treated Christopher, the same
23 way I treated my nephew Connor. I treated them all the
24 same. I've never shown any --

25 I've never smacked the child. I never hit him.

1 I've watched ~~VICTIM~~ numerous occasions by myself, just me
2 and ~~VICTIM~~. When they -- when I wasn't at work, they would
3 see my van at the house and call me and say, do you want
4 to watch ~~VICTIM~~ today.

5 Q. Sir --

6 A. If I wasn't working, I would. If they didn't
7 trust me, why would -- why would I be with him by myself
8 all the time. I don't understand that.

9 Q. That's not exactly true. This was the first
10 time that you --

11 A. This was not --

12 Q. Sir --

13 A. -- the first time. This was not --

14 Q. Sir.

15 A. -- the first time.

16 Q. Sir. Let me answer [sic] the question, and you
17 can have as much time as --

18 A. All right.

19 Q. -- you want to answer the questions. The court
20 reporter can't take two of us down at once.

21 This was the first time you actually took care
22 of ~~VICTIM~~ for any length of time?

23 A. No, it's not.

24 Q. That's not? That's not true?

25 A. That's not true. I've watched on days I

1 wasn't working, by myself, while Jen was at work.

2 Q. How many times --

3 A. On two different occasions I can recall that Jen
4 called me and said, are you working today; well, my mom
5 wants to know if you'll watch ~~VICTIM~~ this afternoon. I've
6 watched ~~VICTIM~~ by myself -- we've been together off and on
7 for a year. It would be impossible not to watch the kids
8 if you're with somebody. Anybody knows that.

9 Q. So out of the multiple times that you watched
10 him, how many times did you call him a pussy?

11 A. I've never called ~~VICTIM~~ a pussy. I've never
12 called a child a pussy..

13 Q. You've never called Melissa's son a pussy?

14 A. No, I've never called Melissa's son a pussy.

15 Q. Okay. You're telling our jury you never said
16 that?

17 A. I've never called a child a pussy.

18 Q. You say you treat all your children the same,
19 but earlier you said you neglected ~~VICTIM~~ and Serena that
20 day. So you neglect all your children?

21 A. No. Well, there was a lot going on that day.
22 It was a good day at the pool. I mean --

23 Q. I thought you said it was a regular day.

24 A. It was a regular day. Every day is good when
25 we're at the pool. I mean, we were both fried. If you

1 saw the pictures on the news, we were at the pool probably
2 three or four days out of the week. We would go to the
3 pool when I got home from work, we would go to the pool on
4 Saturday and Sunday. I've been at the pool with ~~JICM~~ and
5 Serena before.

6 Q. Nobody wants to hear you cry: is that what you
7 told him that day?

8 A. I said, nobody cares if you cry. Because he
9 didn't start crying until I told him he was going to
10 timeout. He knows what timeout is. You have to sit in
11 timeout until you're done. And he didn't start crying
12 until I said that. And I did say that. I was out of
13 line. I shouldn't have said that. I'm not denying that.
14 I was tougher on boys than girls.

15 Q. Is that how you show your love to a twenty-two-
16 month-old child? Could he even speak, sir? Could he even
17 talk?

18 A. He was working on it. He wasn't saying full
19 words yet but he was -- he was on his way to it. He was
20 working on it, yeah. He could say -- he was trying to say
21 please. Want: he wouldn't say want, but he'd go wha,
22 wha, wha. You could -- and he would stick his hand out.
23 You could tell what he wanted.

24 Q. So he couldn't talk. Did he defend himself the
25 night that you beat him to death?

1 A. I did not beat him to death. I was with Jen's
2 family for two days. If I would have beat him, I would
3 have had something on me showing that -- something
4 somewhere. They would have noticed it. Somebody would
5 have said something about something.

6 Q. You were the only one in that house that night
7 that knew what happened; correct?

8 A. I'm the --

9 Q. You told the -- excuse me. I didn't mean to
10 interrupt you.

11 A. Yeah.

12 Q. You told the police Eric and Brandi had nothing
13 to do with this; correct?

14 A. Yeah, but I didn't say -- no. I told them
15 nobody had nothing to do with anything. I ran into him.
16 That's what I assumed that it was. That's why I said that
17 they had nothing to do with it.

18 Q. You ran --

19 A. I mean, they don't really -- they live in their
20 room, you know. I mean, they're good people. They're
21 really nice. We would hang out once in a while, but they
22 stayed in their room most of the time.

23 Q. So all you did was run into him. You never
24 smacked him?

25 A. I never smacked ~~VICTA~~. I've never hit a child

1 for no reason. I've spanked -- I've spanked him on the
2 butt. And the time that I did it, me and Jen sat and
3 decided before I did it because we decided that I was
4 going to be the one to do the discipline. I was the
5 father figure in the house. That was my job.

6 Q. Remember calling Jennifer from the jail, sir?

7 A. Yeah, I did call Jen. I called Jen as soon as I
8 got a chance. I was more worried about Jen than myself.

9 Q. Do you remember telling Jen that you smacked him
10 but you didn't smack him that hard but he hit the floor?
11 Do you remember telling her that?

12 A. Yeah, because she asked me -- I think we had
13 talked before that. I don't think that was my first phone
14 call. And that she had asked me about what my -- what my
15 statements meant, did I hit him. And I remember the cops
16 saying that it had to match perfect. So I said, that --
17 yeah, I did say that I had popped him, on the telephone
18 call.

19 Q. Sir --

20 A. I didn't even say anything about the running
21 into him because I know that the statement -- the last
22 statement that I wrote is the one that everybody was going
23 by so I was trying to -- I was trying to do what they
24 said, to make sure my story matched, so that I would -- I
25 wouldn't get in trouble because it was an accident.

1 Q. So are you lying now, or are you lying ten
2 seconds ago when you just told this jury that the only
3 thing you did was run into him? Which one is it?

4 A. The only thing I did was run into him. I never
5 lied about that. I did tell Jen that I smacked him. I
6 did say. But I never did. I ran into him. And I've said
7 that over and over again.

8 Q. Why would you possibly tell your best friend,
9 the woman of your life, that you smacked her child, if
10 that's not true?

11 A. I just wanted to make sure -- I don't know why I
12 said it. I wasn't really concerned. If you'll listen to
13 that phone call, the whole phone call is me wanting to
14 know if she's all right, that everything is going to be
15 fine. The whole -- the smacking lasted about two seconds.
16 That wasn't even the topic of our conversation.

17 Q. Right. The death of your best friend's child
18 wasn't the topic of that conversation.

19 A. It was also the topic, but it was done and over
20 with. I was worried about Jen. We can't do nothing about
21 what happened. I just wanted to be with Jen. I wanted to
22 get home to her.

23 Q. How many letters have you written Jen and
24 Melissa from jail, approximately?

25 A. Numerous. I can't even count.

1 I've kept in touch with both of them. I love
2 both of them. I've never been able to decide. I love
3 Melissa. I can't ever say no. I love Jen, too. People
4 say you can't love two women. You can. And it's hard. I
5 could never choose. They say I was bouncing back and
6 forth, but I felt like I was being torn apart. When I
7 wasn't with one, they were with someone else. Then I
8 would get jealous because they were with someone else, and
9 then I would go back to that one. And back and forth,
10 back and forth. For almost a whole year it was like that.

11 Q. Does fifty-three --

12 A. I couldn't ever decide.

13 Q. Does fifty-three letters sound approximate?

14 A. I'm surprised it's not more.

15 Q. You're probably right. That's probably one
16 thing you're right about, sir.

17 A. Yeah.

18 Q. And is it fair to say that you wrote to Jen and
19 Melissa?

20 A. Yeah. I wrote them both constantly. I mean,
21 they had people that could help them with what happened.
22 I didn't have anybody. When I got here --

23 MS. BIAGIANTI: Judge, can I object? It's non
24 responsive.

25 THE COURT: Mr. Hillerby, if you will please

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1 answer the questions --

2 A. Yes, I wrote them --

3 THE COURT: -- to Ms. Biagianti.

4 A. -- letters. They had -- I didn't have anyone
5 else to turn to.

6 Q. [Ms. Biagianti] And one day you would write Jen
7 saying I'm done with Melissa, and the next day you would
8 write Melissa saying I'm done with Jen --

9 A. I never said that I was --

10 Q. Sir.

11 A. -- really done with anybody. I kept telling
12 them that I loved both of them. I told Melissa I was done
13 with Jen. I told Jen that I wasn't dealing with Melissa
14 but to talk about Javin. I kept writing them both. I
15 mean, I love them both. I never could decide. I wrote --
16 I'm surprised there's not more letters. I've been in
17 lockup the whole time I've been here.

18 Q. Sir, October 16th: do you remember telling Jen,
19 I really don't want to hear about Melissa or about the
20 kid, I just want to move on. Does that sound about right?

21 A. I'm sure. If I wrote it, I guess I did. I
22 don't remember. I wrote so many letters I can't -- I
23 couldn't tell you what I said in any of them.

24 Q. What about October 17th to Jen: so please stop
25 worrying about Melissa. I do hate that bitch and I do

1 love you more than anything.

2 A. That's because when I got arrested, Melissa went
3 on the news. I know that she was upset that I -- she
4 found out that I was actually with Jen, because I think I
5 had her under the impression that I wasn't with Jen at the
6 time. And she went on the news and said that I had gotten
7 violent with her before. And I was pissed off about that
8 because I know the publicity on the case was already bad
9 and that didn't really help none. That was --

10 I didn't really talk to Jen until after -- or
11 Melissa until after Christmas. She just wrote me out of
12 nowhere. I thought that -- I thought me and Melissa were
13 never going to talk again.

14 Q. How about a few months later when you tell
15 Melissa: before you know, we'll be together and this will
16 all be over. I'm only getting married once, and that's
17 it. I wish I could flash ahead a year or two just to see
18 where we're living and if there's a little addition to our
19 family.

20 A. That's because right before Christmas is when
21 Jen stopped talking to me. She stopped writing me, she
22 stopped answering my phone calls. I believe she even told
23 me that she was pregnant.

24 And that's when Melissa wrote me the first
25 letter in December. And she told me that -- in the letter

1 she wrote to me, said that she knew I didn't do it and she
2 wanted an explanation what really happened. And I told
3 her. And I said -- and then we talked for a little while
4 before we started to actually talk about being serious,
5 because I told her I didn't know what was going to happen.

6 I didn't want a relationship from in jail
7 because I know that you can't trust somebody when you're
8 in jail. I've had a lot of roommates that had their
9 hearts broken. It just makes your time a lot harder to
10 try and be with somebody when you're locked up. And I
11 think we decided to try and be together.

12 And then a few weeks later I heard from Jen
13 again out of nowhere.

14 Q. Did you tell Jen in one of your letters dated
15 January 21st: again, I knocked --

16 A. That's about the time.

17 Q. -- him down not because -- I knocked him down
18 not because it was hard, but because he had on his onezie
19 and the floor was slick.

20 A. That's what -- me and the detective had talked
21 about that when I was writing my statement. And that's
22 what I was -- that's what I was saying, yeah. I said
23 that.

24 Q. So you really didn't knock -- so you deny ever
25 smacking him. You tell her you smacked him in the phone

1 call --

2 A. Yeah, I told her that --

3 Q. -- you tell her -- sir.

4 You tell her you smacked him in the letter
5 several times. But all that's a lie?

6 A. You say it's a lie, but --

7 Q. I'm asking you. I'm not --

8 A. It wasn't a lie. I didn't --

9 Q. -- is it a lie.

10 A. I didn't smack VICTIM. But people in my room
11 were talking about my stories and how you can't change
12 your stories and how everything had to match. So that's
13 what I was trying to do. I didn't think --

14 I thought that the forensics was going to come
15 through. I've been waiting for a year and a half for them
16 to come and say, Justin, we found out it wasn't you; you
17 can leave now. And I keep waiting and waiting and
18 waiting. I heard about some blood. I heard about a hair.
19 My lawyer said he was going to send it off. I never heard
20 nothing about it.

21 I just kept -- I kept doing what I thought I was
22 going to do because I thought the truth was going to come
23 out, that someone was going to come and tell me this is
24 just a nightmare, Justin; we had you --

25 Q. Well, did you think, sir --

1 A. -- confused with someone else.

2 Q. -- that someone was going to come in and say it
3 was me who did it, a third person off the street --

4 A. Yeah.

5 Q. -- was going to come in and say --

6 A. Yeah.

7 Q. -- that they killed VICTIM?

8 A. Yes, I did.

9 Q. Is that what you believed?

10 A. I believed that some evidence was going to come
11 forward, some forensic evidence, or somebody was going to
12 feel guilty or somebody was going to say something. Yeah,
13 I did. I thought that they were going to come and get me.
14 I thought they were -- I thought I was going to be getting
15 out. For this whole eighteen months I kept waiting for
16 the day for them to come and get me. I kept -- it's even
17 in my letters, I'll be out soon, I'll be out soon; I know.
18 I can get a bond reduction with some evidence.

19 Q. That's right. In your letters I don't know --
20 how many times did you say, I know I'm going to beat this
21 charge?

22 A. I didn't say beat this charge. I said -- I
23 might have wrote that in there because I knew that I
24 didn't do it.

25 Q. Oh, wait. You might have wrote it in there?

1 You just said you didn't write it in there, and now you're
2 saying you might have wrote it in there?

3 A. Well, if you're saying it. You have the
4 letters. I don't have the letters I'm going by what
5 you're telling me.

6 Q. Sir --

7 A. I said I'm going to beat this charge because I
8 know that I didn't do it and I know that somebody knows
9 what really happened.

10 Q. What about in the letters when you say, I'm
11 going to plea bargain. Did you ever say that?

12 A. Yeah. I talked about a plea bargain because I
13 didn't know what was going to happen. They said if you
14 plea out to it, that -- I didn't want to plea out to what
15 they had. I thought they were going to drop it to
16 involuntary. At the time I said that, I didn't know how
17 bad it was. I thought it was still a bump to the head --

18 Q. You're right, sir --

19 A. -- an accident.

20 Q. -- you didn't know how bad it was because you
21 hit him several times, right --

22 A. No, I didn't.

23 Q. -- and you didn't know he was going to die? Is
24 that what you're telling us?

25 A. I did not hit him several times. I didn't know

1 that he had been beat several times. I did not know that
2 he had been hit several times. Until my lawyer came to
3 talk to me, I was under the impression that it was a blow
4 to the head, a bump to the head, an accident. People
5 don't get in trouble for accidents.

6 Q. It was an accident when you told the police,
7 your last statement, where you said: where did you hit
8 him, on what part of the body. And you said, the head.

9 A. That's where they said -- the blows to the head.
10 That's -- me and Sharp and Ms. Williams talked about that
11 statement for hours.

12 Q. Sir, does it make sense that the police and you
13 were going to come up with a story when you're the only
14 one that's going to be spending a night in jail and --

15 A. I was under the impression --

16 Q. -- they're going to make you write these lies?

17 A. I was under the impression that I wouldn't be
18 spending the night in jail. That's what we had talked
19 about.

20 Q. All over the head, or just in one place.

21 And what was your answer, sir.

22 A. I don't recall.

23 Q. Would it refresh your memory if I showed you?

24 A. You can tell me, if you would like.

25 Q. All over. You hit him all over the head, sir.

1 You were upset. You were --

2 A. I wasn't upset.

3 Q. -- upset because he spilled your drink, you were
4 upset because you were angry at Melissa.

5 A. Me and Melissa argue every day. That's nothing
6 unusual. I've never --

7 Q. You were --

8 A. Why would I be angry for a whole day? That's --

9 Q. You were --

10 A. -- nothing unusual.

11 Q. You were upset because you were stuck with kids
12 that weren't yours.

13 A. I wanted to watch the kids. I was supposed to
14 work the next day. I had been out the night before. I
15 was not wanting to go out that night.

16 Q. And Jen caught you in the lie the night before.
17 You told her --

18 A. Yeah.

19 Q. -- you were at some party --

20 A. That's why she --

21 Q. -- and you were; right?

22 A. No. I was at the party. I went to the party,
23 but I left the party and went to Melissa's.

24 Q. And Jen found out about it. She found out --

25 A. Yeah.

1 Q. -- that you spent the night at Melissa's. and
2 that was a lie; correct?

3 A. What was a lie?

4 Q. That you told her originally that you did not
5 spend the night at Melissa's.

6 A. We never -- she never asked me about it.

7 Q. Well, let's --

8 A. She found out through --

9 Q. -- you were with Jen, weren't you, sir, that day
10 or two-day --

11 A. Yeah.

12 Q. -- period?

13 A. Yeah.

14 Q. Okay. Do you normally, when you're with
15 somebody, spend the night at someone else's house?
16 Another female?

17 A. Oh, yeah.

18 Q. You normally do that?

19 A. At Elizabeth's house -- for the girl's house I
20 was at, me and Jen have stayed over there. I have a lot
21 of female friends: Elizabeth, Amy, who I think you were
22 supposed to get to testify but for some reason she
23 wouldn't do it because she knows how I am, I believe. Jen
24 Angel, who also testified, she knows -- I've stayed at her
25 house before while I was with another woman. I have a lot

1 of friends with kids.

2 Q. You're just a romantic man, sir, aren't you?

3 A. I'm not a romantic man.

4 MR. BOSNAK: Objection, Your Honor.

5 A. I just -- I'm a nice guy.

6 MR. BOSNAK: I'm going to object.

7 THE COURT: Hold on one second. Basis?

8 MR. BOSNAK: We don't need the commentary.

9 MS. BIAGIANTI: It was a question.

10 THE COURT: Sustained. please ask it --

11 A. I would --

12 THE COURT: -- please ask a question, Ms.

13 Biagianti.

14 Q. [Ms. Biagianti] You enjoyed being with multiple
15 woman at -- multiple women at one time?

16 A. I've never been with multiple women at one time.
17 I've been with one woman at a time, and that's the way
18 it's always been. I've bounced back and forth a lot
19 between Melissa and Jen. And people think it was all fine
20 and dandy, but it was very stressful. I couldn't -- I
21 hurt both of them, and I hurt myself, I hurt the kids. It
22 was stressful on everybody, even her friends. I know
23 Darnique [phonetic] was very upset with me because of it.
24 We used to be good friends.

25 Q. Sir, it was a very stressful situation; right?

1 A. It always was, yeah.

2 Q. Let's talk about the lie detector test you
3 brought up.

4 A. Yeah.

5 Q. Very interesting, sir, that --

6 A. Very interesting.

7 Q. Why didn't you take the lie detector test?

8 A. I agreed to take the test. I rode up there. I
9 went over the test questions. They asked me the first
10 question, did I know of anything that could have caused
11 his death, or could I have caused his death, and I said,
12 well, I don't really know because I don't know -- I don't
13 know why he -- I don't know what happened. I -- that's
14 what I kept saying. They -- and then they asked me, are
15 you refusing the test and I said, no, I'm refusing to
16 answer the question because I can't answer it. And that's
17 when they stepped outside and talked to Ms. Williams
18 there.

19 Q. Do you remember telling the Detective Dixon --
20 do you know who I'm referring to if I say Detective
21 Dixon? The officer from Dorchester County Sheriff's
22 Office.

23 A. Dorchester? I believe that's the guy that was
24 trying to give it.

25 Q. Yes, sir. You know who I'm referring to, then?

1 A. Yes, ma'am.

2 Q. Okay. Remember telling him that he hit -- you
3 hit -- Blaze hit your knee that night. You remember
4 telling him that?

5 A. Me and Ms. Williams talked about that --

6 Q. Sir --

7 A. I don't think -- I never talked to that about --
8 with that officer.

9 Q. Okay. Okay. Remember telling the officer that
10 when you grabbed him, you might have shook him a little?
11 Remember telling him that?

12 A. Again, I don't believe I talked to that. I
13 talked to Ms. Williamson [sic] and then I talked to
14 Detective Sharp.

15 Q. Okay.

16 A. When I -- when I -- when we stopped the lie
17 detector test, I think that was where his job ended, if
18 I'm not mistaken.

19 Q. Okay. And you remember testifying that -- with
20 your lawyer that you never shook him? That's a --

21 A. I never shook him.

22 Q. That's a correct statement, then?

23 A. Yes.

24 Q. Okay.

25 A. I never shook -- I know -- like I said, I took

1 the classes. I know about shaken babies and infants. I
2 know about all that stuff.

3 Q. Speaking of which, sir, when you spoke with the
4 police when ~~WIT~~ died that morning, you brought up the
5 fact that you thought it was a brain hemorrhage; right?

6 A. Yeah, because he was bleeding from his nose and
7 his mouth.

8 Q. And, interestingly enough, that's what he died
9 from, sir.

10 A. That's what it looked like, yeah.

11 Q. Jen never told the police she thought it was a
12 brain hemorrhage.

13 A. I saw it on a CSI episode a couple of weeks
14 before where a dude had a brain hemorrhage and he fell --
15 he died in his sleep. It wasn't from a blow to the head,
16 though. It was just a brain hemorrhage. And I guess
17 after you fall asleep the blood drains to whichever way
18 you're -- whichever way you're laying. That's where I got
19 the idea from.

20 Q. You watch a lot of CSI, sir?

21 A. I've seen a couple of episodes, yeah. Me and
22 Jen watch it.

23 Q. And in CSI you see, I'm sure, people who talk to
24 the police and give statements? Does that happen in some
25 of the episodes?

1 A. Yeah.

2 Q. Okay. And --

3 A. I also seen the forensics, which I thought would
4 have cleared me by now but they didn't.

5 Q. Right. Because they were closed-head injuries,
6 sir; is that correct?

7 A. I'm talking about everything in the house, not
8 the closed-head injury.

9 Q. But that's what he died from, a closed-head
10 injury --

11 A. Yes, I know that.

12 Q. -- from you smacking him a couple of times;
13 right? Right?

14 A. That's what they say, yes, ma'am.

15 Q. Yeah. I'm asking you, sir, if you smacked him a
16 couple of times.

17 A. No, I did not smack him. I did not smack ~~ACTM~~.

18 Q. So the last statement that you gave on the 18th,
19 where you tell the officer that this is the truth --
20 correct?

21 A. He said that if I wrote -- if I -- we talked
22 about the story, and he said that he would get me a bond
23 if I -- if I said that I had hit him.

24 Q. So the officer told you to lie, and you would
25 just confess to something --

1 A. We didn't say --

2 Q. -- you didn't do?

3 A. We didn't -- it wasn't a lie. It was -- we went
4 over the story for hours. I guess he kept saying it and
5 saying it and saying it until I had almost believed it. I
6 didn't believe it. But I knew that I didn't do it, but he
7 kept telling me that I was helping -- help me help
8 yourself, I believe were his exact words. Help me help
9 you --

10 Q. So helping yourself --

11 A. -- let's get you out of jail.

12 Q. -- would be to lie and say you smacked him when
13 you really didn't?

14 A. That's why -- I went back to the police station
15 to clear my name, and I ended up making it worse.

16 Q. Sir, you were already arrested at this point;
17 correct?

18 A. Yes, ma'am, I was.

19 Q. And you actually requested the interview with
20 Detective Sharp?

21 A. Yes, I did, because I wanted to understand -- I
22 wanted to know why I was being charged with homicide when
23 it was supposedly an accident.

24 Q. Isn't it true when you were being transported by
25 the officer back to speak to Detective Sharp -- remember

1 you talked about that conversation --

2 A. Yeah.

3 Q. -- on direct with Mr. Bosnak?

4 A. Yeah.

5 Q. You wanted to be charged with a lesser charge,
6 didn't you?

7 A. For an accident, yeah. That's what they said
8 had happened, was an accident. That's what I thought I
9 was going to -- that's what I thought happened, an
10 accident.

11 Q. Remember telling Jennifer in that conversation
12 that we played earlier: I gave a true statement on
13 Thursday.

14 A. Yes, I do.

15 Q. Okay. Sir, which is it? Was that a lie? Is
16 the statement a lie? Is today a lie? Pick which one.
17 Which one is the lie?

18 A. I never -- I never put my hands on -- I had no
19 reason to. If I was angry, I could have just left.

20 Q. So you would have left them at the house --

21 A. With Eric and Brandi --

22 Q. -- just asleep in bed?

23 A. -- we've done it before.

24 Q. Oh. You've done that before?

25 A. No, he wasn't asleep in bed. I was saying that

1 if I was upset, if I was having a problem with anything, I
2 could have just left. I could have put him in bed. I
3 could have put him to bed early. I let him stay up
4 because I know Jen was going to want to sleep in.

5 Q. So you're telling our jury that you would have
6 just left the house with two roommates -- and they're not
7 the roommate's kids --

8 A. If I didn't want to be there, yeah, I would have
9 just left. All I had was a bag of clothes. I could have
10 left at any time. I had no reason to be violent or angry
11 with anybody. If I wanted to go out, I could have went
12 out. There was nothing stopping me from going out.

13 Q. Were you intoxicated that night?

14 A. I would say I had a buzz. I wouldn't say I was
15 drunk, though. I said -- me and the detective said if
16 there was something in my story that didn't match, that
17 being drunk would be better. So I said, yeah, I was
18 probably drunk.

19 I had drank probably six to eight beers all day
20 at the pool. All day at a pool while you're swimming,
21 eating. I drank some Gatorade, too. Anybody that drinks
22 beer knows that eight, nine hours later you're not still
23 going to be drunk. But I did have a buzz. I did have a
24 good buzz.

25 Q. So you're telling our jury that you had a buzz

1 from drinking six or eight beers earlier in the day, when
2 you told us earlier that you're an experienced drinker?

3 A. I drink pretty regular. Not every day, though.

4 Q. Okay. And so, what, seven, eight hours later
5 you're still feeling the effects of this beer? That's
6 what you want us to believe?

7 A. Well, I drank beers through that whole period at
8 the pool. I probably finished my last beer thirty minutes
9 before we left. I think I might have even had a beer on
10 the way -- on -- just before we left to the -- to go to
11 the house. I didn't start drinking tea until I fixed the
12 food.

13 Q. Did ~~you~~ -- do you think ~~you~~ spilled your
14 drink on purpose?

15 A. No. He played --

16 Q. Or was it an accident?

17 A. I'm sure it was an accident. I know it was an
18 accident. I mean, kids --

19 Q. And so --

20 A. -- knock drinks over.

21 Q. Because he's twenty-two months; right?

22 A. Yeah. He's a child. He's --

23 Q. Right. He's a child --

24 A. -- an infant.

25 Q. He's an infant. Right.

1 A. Yeah.

2 Q. You said in your statement: I called him in the
3 kitchen. I knelt down and said, what is wrong with you.
4 Is that what you tell a twenty-two-month-old
5 child, sir?

6 A. I never -- that was something that me and Sharp
7 had discussed. That's something --

8 Q. Why are you scratching your --

9 A. Because I'm --

10 Q. Nervous?

11 A. I'm breaking out right here because of --

12 Q. Right. You're nervous.

13 A. -- the soap and the hard water.

14 I'm not nervous. I mean, yeah, I'm nervous. I
15 mean, I'm looking at twenty-five years or life for
16 something I didn't do. Of course I'm nervous.

17 MS. BIAGIANTI: Your Honor, I would move to
18 strike.

19 MR. BOSNAK: Your Honor, she asked him.

20 THE WITNESS: She asked me.

21 MS. BIAGIANTI: I asked if you were nervous.

22 THE COURT: Mr. Hillerby.

23 Ladies and gentlemen, please disregard that last
24 statement by Mr. Hillerby. Do not discuss it at all.
25 It should not be considered in any form or fashion in

1 your deliberations.

2 Ms. Biagianti.

3 MS. BIAGIANTI: Thank you, Your Honor.

4 Q. [Ms. Biagianti] You said to police officers on
5 the 18th: I smacked him openhanded a couple of times.
6 The last time his head hit the floor.

7 A. That's what I wrote.

8 Q. That's what you wrote. But you're telling us
9 today that that's not true?

10 A. I've been saying it's not true for a while, but
11 who's going to hear me when I'm locked down. This is the
12 first time I've ever got to say anything about anything
13 that's happened. I've had people stab me, I've been beat,
14 I've had -- I've been stuck in lockup since I've been
15 here. I've never had a chance to tell my side until
16 today.

17 MS. BIAGIANTI: Can I approach the witness, Your
18 Honor?

19 THE COURT: You may.

20 Q. [Ms. Biagianti] Sir, I'm showing you what's
21 been marked as State's Exhibit Number 40. I believe this
22 is your statement from the 18th, the one I've been talking
23 about. Read that statement to the jury, sir, please.

24 A. I have read -- I had read to me the foregoing
25 statement which I have made freely and voluntarily. The

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1 facts contained therein are true and correct to the best.
2 of my knowledge.

3 Q. Because this was the truth that day, and you've
4 had time to think about your story since then; correct?

5 A. That wasn't the truth. The truth I wrote on the
6 15th.

7 Q. When you picked up ~~WOTM~~ to move him to the --
8 to move him, did you see any red marks or bruises on his
9 face. I didn't look.

10 A. I never picked him up to move him.

11 Q. How did he get to his crib, sir?

12 A. I toted him to bed, yeah. But he was -- I was
13 looking right at him. How could I not see it if something
14 was wrong with him? I changed him. How could I not
15 notice if something was wrong with his face or anywhere
16 else, for that matter.

17 Q. Did he look like that when you put him in the
18 crib?

19 A. No, he did not. He did not look like that. I
20 don't even --

21 Q. Did he move or make any sounds. You said he
22 moaned like he was tired.

23 Was he in pain, you think?

24 A. He was -- he was fine. He give me a high-five.
25 I told Jen that in one of my letters. Why don't you put

1 that on the screen?

2 Q. I don't think you said that in any of your
3 letters, sir.

4 A. I believe I did write her a letter that he gave
5 me a high-five.

6 Q. Did you seek any type of medical treatment at
7 all, or tell anyone about what you did to VICTIM, his
8 condition.

9 What did you say?

10 A. Nothing was wrong. I didn't -- I didn't hit
11 him.

12 Q. You told Detective Sharp that night that you're
13 making this statement because you just want to get some
14 sleep.

15 A. I haven't been able to sleep since the whole
16 thing happened. I wanted to get some sleep because I
17 thought he was going to work with me and help me clear my
18 good name. And he said that if I said that I had put my
19 hands on him, if he [phonetic] said that I hit him, that
20 he would give me a bond and I could get on with my life,
21 that it had to match the forensics, it had to match the
22 forensics perfect. That's what him and the detective kept
23 saying. Or not the detective, but the guy that
24 transported me.

25 Q. You slept well the night that VICTIM was laying

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1 in his crib dying, didn't you?

2 A. We both did. We all did.

3 Q. Is there anything else that you would like to
4 add. I'm sorry I waited so long to tell the truth.

5 Because this is the truth, sir, isn't it?

6 A. That's what he said I had to put down. That's
7 what I was promised for a bond. And I did what he said.

8 Q. So you're going to lie about that you smacked
9 him a couple of times, you're going to lie that you --
10 your knee hit him, because you think that that's going to
11 let you go home?

12 A. That's -- under the impression -- I mean, seven
13 hours of back and forth, back and forth, talking with the
14 detective --

15 Q. That's not true, sir, is it?

16 A. -- I would have said I shot the President if
17 that -- if that would have made -- you know, get me out of
18 jail. I would have said anything. If you sit and deal
19 with a cop long enough, and you get stuck in that little
20 holding cell, you would be surprised what you would say --
21 anybody that's ever been locked up knows that --
22 especially for something you know that you didn't do or
23 that wasn't your fault. Trying to tell people --

24 Q. When you called 911 that morning -- when you saw
25 him that morning, you were surprised to see the blood on

1 his face because he didn't look like that when you put him
2 down; right?

3 A. I was surprised to find my stepson dead in his
4 crib, yes. Anybody would be.

5 Q. What did you think would happen to him, sir,
6 when you smacked him openhanded a couple of times
7 according to you?

8 A. I didn't smack him openhanded.

9 Q. Did you punch him?

10 A. I never put my hands on ~~VICTIM~~ or any children.

11 Q. Did you push him down?

12 A. No, I did not.

13 Q. Did you clip his head on the door? You know, as
14 you're holding him, and you just clip his head?

15 A. I ran into him. And I said that. When me and
16 Ms. Williams talked about clipping his head on the door
17 and the crib, she said that it didn't really -- wasn't
18 that really big of a deal. That's why if you'll notice in
19 my statement there's a big gap between that and when I
20 told them about me running into him. That was probably an
21 hour or two later after we discussed it, that maybe just
22 the running into him wasn't enough, that, you know, you
23 had to have bumped his head somewhere else.

24 Q. But you admit, sir, that if you -- if that's
25 what we're going with, that your knee hit him, that you

1 didn't get him any medical treatment?

2 A. I don't think that my knee hit him. But, yeah,
3 if that's what happened --

4 Q. Sir, you don't think your knee hit him?

5 A. Well, ~~Victim~~'s height, his head would have hit my
6 thigh, not my knee.

7 Q. So then it's not sure that your knee hit him?

8 A. My knee might have hit him. I mean, I don't
9 know the exact details of that running into. I was coming
10 out, he was coming in.

11 Q. On the 911 tape you said, yes, ma'am, there's
12 blood all over his face and he's stiff as a board; he's
13 fucking dead.

14 A. No, I didn't.

15 Q. Is that what you -- is that how you describe
16 someone you love?

17 A. That's how you describe a shocking experience.
18 Find someone that you love and see how you react.

19 Q. That's how you refer to your best friend's son?

20 A. I didn't refer to him in that manner. I
21 referred to the fact that he was dead in that manner.

22 I've never seen a dead body before, especially a
23 child and especially someone that I had helped raise not
24 quite two years, but probably a year I've been in his
25 life. Nine months, I would say, when we got serious.

1 [Whereupon, Ms. Biagianti and Ms. Williams
2 confer]

3 MS. BIAGIANTI: Showing to defendant's counsel
4 State's Exhibit Number 36.

5 [Whereupon, Mr. Bosnak reviews documents]

6 Q. [Ms. Biagianti] January two -- 21st, 2009, did
7 you write Jen a letter that day?

8 A. I'm sure I did.

9 Q. So that's about, what, September, October,
10 November, December, January -- four months after --

11 A. Yeah.

12 Q. -- the death of *VICTIM*; right?

13 A. Yeah.

14 Q. Did you tell Jen: I called him in the kitchen
15 and popped him on the head no harder than we have smacked
16 his hands. I knocked him down.

17 Did you tell her that?

18 A. If it's on that paper, then, yes, I wrote it.

19 Q. You said on direct you didn't know how bad it
20 was going to be, until you spent three months in jail.

21 A. I didn't know that he had been beaten. I was
22 under the impression it was a bump to the head, maybe
23 somebody dropped him. That's what they -- that's what
24 they told me.

25 Q. Okay. So we have a possible knee hit, somebody

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1 dropped him, not you --

2 A. That's what the detective said.

3 Q. -- could have been the roommate?

4 A. Never thought that much about it.

5 Q. It could have been some stranger off the street?

6 A. I wouldn't point the finger at anybody, because
7 I don't know what happened.

8 Q. It could have been an accident?

9 A. That's what the -- that's what the detective
10 told me, that it was an accident, people don't get in
11 trouble for accidents.

12 Q. Right. You're right, sir. People don't get in
13 trouble for accidents.

14 A. You're right.

15 Q. And this wasn't an accident, was it?

16 A. What happened to him, whoever did that, no, it
17 wasn't an accident.

18 Q. You're right,

19 A. Maybe --

20 MS. BIAGIANTI: Thank you.

21 A. Maybe you'll find out --

22 MS. BIAGIANTI: Thank you.

23 A. -- who did it. I hope you do. Do your fucking
24 jobs.

25

- - -

REDIRECT EXAMINATION

BY MR. BOSNAK:

Q. Justin, have you been contacting Jennifer S during this period?

A. Yeah. The whole time pretty much until up about two months ago. She believed me until about two months ago.

Q. All right. Do you remember me coming to see you?

A. Yeah.

Q. And do you remember telling me about a plea negotiation?

A. Yeah. I -- my roommates had told me that, you know, if it was an accident like I thought it was that they would probably drop it to involuntary, or something like that, that maybe I could plea out to that.

Q. I never said anything about a plea, did I?

A. No. Huh-uh. Me and my roommates had talked about it.

Q. Didn't Jennifer say something about her lawyer had said something?

A. She might have on one of the phone calls, yeah.

Q. And that you could get probation or something like that?

A. I believe that is on one of our phone

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1 conversations, on the recorded phone conversations, as a
2 matter of fact.

3 Q. And I'm going to ask you again: did you hit
4 this child twenty-three times?

5 A. No. I did not hit ~~UTCTA~~. When I put him to
6 bed, he was fine. Somebody had to go in there after I --
7 I know somebody did. When I put him to bed, he was fine.

8 Q. Did you ever say anything about hitting him with
9 your fist?

10 A. No.

11 Q. Is there any statement in there that you ever
12 said anything about hitting that child with your fist?

13 A. No. Huh-uh.

14 Q. Is there anything about hitting him with
15 anything?

16 A. No.

17 Q. Did you ever drop him on his head?

18 A. No.

19 Q. You didn't do anything like that?

20 A. Huh-uh.

21 Q. The only thing you did was run into his knee
22 [sic]?

23 A. I ran into him. And, yeah, they say my knee,
24 but I don't think -- the height doesn't match up right.
25 But if my knee did hit him, then, yeah. And they said

1 something about his head hitting the floor, but it's
2 carpeted and padded. I mean, I don't think it would have
3 killed him.

4 Q. Was the child okay when you put him in the crib
5 that night?

6 A. Blaze was fine when I put him in bed.

7 MR. BOSNAK: Okay.

8 THE COURT: Ms. Biagianti?

9 MS. BIAGIANTI: I have nothing further, Your
10 Honor.

11 THE COURT: Ladies and gentlemen, this is an
12 appropriate time for us to take our midmorning break.

13 Do not begin your deliberations. Do not discuss
14 this case amongst yourselves.

15 Please rise for the jury.

16 [Whereupon, the jury exits the courtroom at
17 1:36 a.m.]

18 THE COURT: Thank you. Be seated.

19 Mr. Hillerby, you may step down.

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

22 THE COURT: Mr. Bosnak, do you have additional
23 witnesses?

24 MR. BOSNAK: No, Your Honor. We rest.

25 THE COURT: All right.

1 MS. WILLIAMS: Your Honor, the State has
2 rebuttal witnesses.

3 THE COURT: All right. How many rebuttal
4 witnesses do you --

5 MS. WILLIAMS: Two. We have Melissa Georgoulis,
6 and Officer Dixon from Dorchester County, and both are
7 here.

8 THE COURT: All right. We'll take our
9 midmorning break, as well.

10 I'll allow you to rest in front of the jury, Mr.
11 Bosnak.

12 We'll take a ten-minute recess.

13 MR. BOSNAK: All right.

14 [Whereupon, a recess is taken from 10:36 a.m. to
15 10:48 a.m.]

16 THE COURT: Please be seated.

17 Mr. Bosnak, you've rested. Any motions or
18 matters?

19 MR. BOSNAK: Beg your pardon, Your Honor?

20 THE COURT: You have rested. Any motions or
21 matters?

22 MR. BOSNAK: Just other than the jury
23 instructions. That's all.

24 THE COURT: All right. Ms. Williams, you've
25 indicated that you have two rebuttal witnesses?

1 MS. WILLIAMS: Yes.

2 THE COURT: Ms. Williams, what are you intending
3 to call those witnesses to rebut?

4 MS. WILLIAMS: During the testimony, Mr.
5 Hillerby said he would never -- he has never put his
6 hands on a child and he has never called a child a
7 pussy. Ms. Georgoulis gave a statement at the time of
8 the murder -- it's in the discovery materials -- where
9 she said that he called Javin a pussy after he spilled
10 his drink and that he hit him, and they argued about
11 that.

12 We are also going to call Officer Dixson to
13 dispute the many things he said about what transpired
14 during that polygraph interview, the pre interview, and
15 his failure to take it.

16 THE COURT: All right. Ms. Williams, you are
17 very familiar with the purpose of calling a rebuttal
18 witness and the purpose of that witness.

19 MS. WILLIAMS: Yes, Your Honor.

20 THE COURT: Let's bring in the jury.

21 [Whereupon, the jury enters the courtroom at
22 10:50 a.m.]

23 THE COURT: Thank you. Be seated.

24 Mr. Bosnak?

25 MR. BOSNAK: Yes, Your Honor?

1 THE COURT: Call your next witness.

2 MR. BOSNAK: At this time -- at this time, Your
3 Honor, the defense rests.

4 THE COURT: All right. Thank you.

5 Ms. Williams, any rebuttal witnesses?

6 MS. WILLIAMS: Yes, Your Honor. We have two
7 rebuttal witnesses.

8 THE COURT: All right. Call your next witness.

9 MS. WILLIAMS: Melissa Georgoulis.

10 [Whereupon, Ms. Georgoulis comes forward]

11 MS. WILLIAMS: Your Honor, I think she was
12 released from her subpoena. I'm not sure if she has to
13 be re-sworn.

14 THE COURT: I'm going to swear her in. Thank
15 you, Ms. Williams.

16 THE CLERK OF COURT: Please raise your right
17 hand. Place your left hand on the Bible.

18 [Whereupon, Ms. Georgoulis is duly sworn by the
19 clerk of court as follows: do you solemnly swear or
20 affirm the testimony you will give the Court in the
21 trial of this case will be the truth, the whole truth,
22 and nothing but the truth, so help you God]

23 THE WITNESS: I do.

24 THE CLERK OF COURT: Please be seated.

25 [Whereupon, the witness takes the witness stand]

1 THE CLERK OF COURT: State your full name.
2 Spell your last name for the record.

3 THE WITNESS: Melissa Georgoulis. G-E-O-R-G-O-
4 U-L-I-S.

5 THE COURT: Ms. Williams.

6 - - - - -

7 MELISSA GEORGOULIS,

8 Having Been Previously Sworn,

9 was Examined and Testified as Follows:

10 DIRECT EXAMINATION

11 BY MS. WILLIAMS:

12 Q. Ms. Georgoulis, you and Mr. Hillerby have a son
13 together?

14 A. Yes, we do.

15 Q. And what's his name?

16 A. Javin [REDACTED] G[REDACTED].

17 Q. And has he ever called Javin any names?

18 A. He never called him a name like pussy. No, he
19 didn't.

20 Q. Okay. Would it refresh your memory to look at
21 your statement?

22 A. I know what my statement says.

23 Q. Would it refresh your memory to see what you
24 said in your statement?

25 A. If you will.

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1 MS. WILLIAMS: May I -- let me show it to
2 counsel.

3 [Whereupon, Mr. Bosnak reviews documents]

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

5 THE COURT: You may.

6 Q. [Ms. Williams] Can you just read this last part
7 and into the next page and see if that refreshes your
8 memory.

9 [Whereupon, the witness reviews documents]

10 A. As we discussed in our interview, when I said --

11 Q. [Ms. Williams] Does it refresh your memory?

12 A. Yes, it refreshes my memory.

13 Q. Ms. Georgoulis, I am sorry we had to bring you
14 here. You don't want to be here, do you? You don't
15 want --

16 A. No. I don't want any of this to be happening.

17 Q. Okay. And I understand that. But you have to
18 tell the truth.

19 A. I am telling the truth.

20 Q. So what did you --

21 A. I know Justin --

22 Q. -- say in your statement --

23 A. -- Hillerby never called --

24 Q. -- that he called your son?

25 A. -- my son a pussy.

1 Q. Excuse me?

2 A. No. He did not call my son a pussy.

3 Q. Is that what you told the police, that he did
4 call your son --

5 A. He says things, but it's not like that, just
6 like I talked to you about.

7 Q. What did you say in your statement?

8 A. I said that he called names. He didn't directly
9 call --

10 Q. What did you say --

11 A. -- any of my children --

12 Q. -- in your statement?

13 A. -- a name --

14 Q. What did you say --

15 A. -- because I would have had a fit.

16 Q. Okay. Ms. Georgoulis, did you tell the police
17 that Mr. Hillerby, the father of your son, called --

18 THE WITNESS: Your Honor --

19 Q. [Ms. Williams] -- his son a pussy?

20 THE COURT: Please answer the question that the
21 State asked you, Ms. Georgoulis.

22 A. What's on the paper. But --

23 Q. [Ms. Williams] Does it --

24 A. -- it's not -- if I can elaborate --

25 Q. I'm sorry.

1 A. -- what it was.

2 Q. If you would answer the question, I will let you
3 elaborate.

4 Did you tell the police in that statement that
5 he called your son a pussy?

6 A. It does say that, yes, there was a time that he
7 called our son Javin a pussy.

8 Q. And why was that?

9 A. He wasn't directly talking about him being a
10 pussy.

11 Q. Did you tell the police it was because he
12 spilled his drink?

13 A. He spilled a drink. Justin was more upset that
14 he went to -- yes, it was a beer. It was more out of
15 concern for our son than concern for the drink.

16 Q. So he calls him a pussy and that's how --

17 A. He didn't call him a pussy.

18 Q. -- he shows concern? But that's what you told
19 the police?

20 A. It wasn't all at the same time..

21 Q. But that's what you told the police?

22 A. If Javin was whining or crying or whatever, just
23 like I would do -- I've got two boys. I've got three
24 kids. And, yes, I expect my boys to be a little tougher.

25 Q. A twenty-two-month old? You want them to be

1 tougher?

2 A. I don't baby my children.

3 Q. Apparently neither does Mr. Hillerby.

4 A. Justin was a good father to my children, all
5 three of them.

6 Q. Okay. Did he ever hit --

7 A. He has never hit my children. He never laid a
8 hand on my thirteen-year-old or my ten-year-old. He never
9 beat my son like the first time we spoke in here with his
10 bond reduction. He never beat Javin.

11 Q. Ms. Georgoulis, you're --

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

13 THE COURT: You may.

14 MS. WILLIAMS: May I see that real quick?

15 Q. [Ms. Williams] Did you ever tell the police
16 that he had hit your children?

17 A. No.

18 MS. WILLIAMS: Your Honor, the Court's
19 indulgence --

20 THE COURT: Yes, ma'am.

21 MS. WILLIAMS: -- for me to just find it in here
22 for her to look at.

23 [Whereupon, Ms. Williams reviews documents]

24 MS. WILLIAMS: May I approach?

25 THE COURT: You may.

1 MS. WILLIAMS: I'm just going to refresh -- it's
2 the same --

3 Q. [Ms. Williams] Can you just read that question
4 and answer and see if that refreshes your memory.

5 [Whereupon, the witness reviews documents]

6 A. The one where he -- with the one -- you're
7 talking about spilling his beer?

8 Q. [Ms. Williams] Yeah. The one I put --

9 A. Is that the one?

10 Q. Yes, ma'am. Is that --

11 A. The same thing I just said.

12 Q. So after reading that, does that refresh your
13 memory as to --

14 A. What is your question?

15 Q. -- what you told the -- does that refresh your
16 memory as to what you told the police?

17 A. Nothing any different than I just said.

18 Q. That he hit Javin after he spilled his beer?

19 A. He popped him on his bottom.

20 Q. Okay.

21 A. I wouldn't call it a hit.

22 Q. And you told the police that he called Javin a
23 pussy?

24 A. Not --

25 Q. You told the police that he called Javin a

1 pussy. We just went through that.

2 A. It was not in conjunction with that.

3 MS. WILLIAMS: Nothing further.

4 THE COURT: Mr. Bosnak?

5 CROSS-EXAMINATION

6 BY MR. BOSNAK:

7 Q. You and Justin have one child?

8 A. [No response]

9 Q. You and Justin have one child?

10 A. Yes.

11 Q. And then you have two other children?

12 A. Yes.

13 Q. And he acted as a father to all three children?

14 A. Yes.

15 Q. Did you use corporal punishment with your
16 children? I mean, hitting?

17 A. I will spank my children if they get out of
18 line, yes.

19 Q. Okay. Did Justin spank them?

20 A. No.

21 MR. BOSNAK: Thank you.

22 THE COURT: Ms. Williams?

23 MS. WILLIAMS: Nothing further.

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

25 [Whereupon, the witness is excused and exits the

1 witness stand]

2 THE COURT: Call your next witness.

3 MS. BIAGIANTI: Sargent Raymond Dixon.

4 THE COURT: Sargent, please come forward and be
5 sworn.

6 [Whereupon, Mr. Dixon comes forward]

7 THE CLERK OF COURT: Please raise your right
8 hand, and place your left hand on the Bible.

9 [Whereupon, Mr. Dixon is duly sworn by the
10 clerk of court as follows: do you solemnly swear or
11 affirm the testimony you will give the Court in the
12 trial of this case will be the truth, the whole truth,
13 and nothing but the truth, so help you God]

14 THE WITNESS Yes, ma'am, I do.

15 THE CLERK OF COURT: Please be seated.

16 [Whereupon, the witness takes the witness stand]

17 THE CLERK OF COURT: State your full name, spell
18 your last name, for the record.

19 THE WITNESS: Raymond Dixon. D-I-X-S-O-N.

20 MS. BIAGIANTI: Good morning, Sargent Dixon.

21 THE WITNESS: Good morning.

22

23

24

25

- - -
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1 RAYMOND DIXSON,

2 Having Been First Duly Sworn,

3 was Examined and Testified as Follows:

4 DIRECT EXAMINATION

5 BY MS. BIAGIANTI:

6 Q. Could you please tell us where you are employed,
7 in what capacity, and for how long you've been employed
8 there.

9 A. Dorchester County Sheriff's Office. I'm
10 assigned to the investigative division, and my main
11 responsibility is I'm a polygraph examiner.

12 Q. And how long have you been with Dorchester
13 County?

14 A. Ten, almost eleven, years.

15 Q. And did you have a chance to get involved in
16 this case and interview and/or polygraph the defendant in
17 this case, Justin Hillerby?

18 A. Yes, ma'am, I did.

19 Q. And what date was that on?

20 A. September 17, 2008.

21 Q. And tell us a little bit about how you got
22 involved.

23 A. Summerville police detectives gave me a call and
24 asked me if they could schedule a polygraph. I gave them
25 a date and a time, and they come up.

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1 Q. And tell our jury if you polygraph -- your
2 policy for polygraphing people. Is it voluntary, is it
3 not voluntary? Tell us about that.

4 A. Polygraphs are completely voluntary. We can't
5 force or anything else. A polygraph is completely
6 voluntary, just by the nature of the test. They have to
7 do certain things during the test in order for it to even
8 be done appropriately. So it's completely voluntary.

9 Q. Okay. And are you aware of how Mr. Hillerby got
10 there that day?

11 A. He drove himself, I believe. Or maybe his wife
12 drove him. I don't know.

13 Q. And when you say his wife, you mean his
14 girlfriend Jennifer?

15 A. Yeah. I'm sorry.

16 Q. And are you aware of whether or not he was under
17 arrest at that point?

18 A. He was not under arrest.

19 Q. Tell us what you did when he got to you.

20 A. What I did is what I do with everybody that
21 comes in for a polygraph. They come into the room. There
22 is a desk, there's three chairs. The one chair behind the
23 desk is mine, and then there's two additional chairs. We
24 walk in the room. I said, just go ahead and have a seat.
25 He -- I allow the -- well, the examinee to pick the seat

1 that he wants to sit in. He chose a seat. He sat down.
2 We sit there and we talk.

3 The very first thing that we go over is their
4 basic information: name, birth date, where they live,
5 stuff like that.

6 Q. And are you aware of his highest level of
7 education? What did he tell you?

8 A. Ninth grade. He got a GED.

9 Q. And then what happens from there?

10 A. From the background --

11 Q. After you go over the --

12 A. -- basic information?

13 Q. -- general information.

14 A. We go over what's called the Miranda rights.
15 And the Miranda rights, what I do is I hand them the
16 original.

17 Q. Let me just stop you. I'm showing you what's --
18 I'm going to show you what's been marked as State's
19 Exhibit Number 41.

20 Sir, if you can tell me -- do you know what that
21 is?

22 A. Yes, ma'am. It's my Miranda rights that I have
23 in our polygraph packet.

24 Q. Okay. And tell us what you did. You were
25 beginning to explain what you did with Mr. Hillerby.

1 A. What I do is give the original packet, or in
2 this case the Miranda warnings, to the person that I'm
3 going to be testing, or the examinee. I ask them -- the
4 first thing is, before we ask -- before any questions are
5 asked, you must understand your rights. And I explain to
6 them we're going to go over each one of these rights; if
7 you have any questions about any of these rights, please
8 feel free to ask; if you have no questions, what I need
9 you to do is put your initials to the side.

10 Then I go over the first one. You have the
11 right to remain silent; do you have any questions about
12 that. And I get a response. Usually it's a no. Then I
13 say, okay, if you understand it, please put your initials
14 to the side.

15 Q. Did he do that in this case?

16 A. And he did.

17 Q. Okay.

18 A. On each -- on each one of the rights that were
19 read to him that we went over.

20 While he's looking at this -- and I tell them
21 you can review this as I'm reading to you. My -- I have a
22 separate copy. It's the exact same thing.

23 And we just go over his rights. And each one of
24 them, same question: do you have any questions about
25 anything you just read or anything we just read to you.

1 No. Okay. Please put your initials to the side.

2 Q. And if you could just go through them one by one
3 for our jury's edification.

4 A. Okay. The first one is you have the right to
5 remain silent. The next one is anything you say can and
6 will be used against you in a court of law.

7 Q. Did he understand that second right?

8 A. Yes, ma'am, he did.

9 Q. And did he initial it?

10 A. Yes, ma'am, he did.

11 Q. Okay. And what's the third one?

12 A. You have the right to talk to a lawyer for
13 advice before we ask you any questions, and to have him or
14 her present with you during questioning.

15 Q. Did he seem to understand that?

16 A. Yes, ma'am.

17 Q. Okay. And --

18 A. And he initialed the side.

19 Q. Okay.

20 A. If you have -- if you have no money for a
21 lawyer, the court will appoint one to represent you
22 without cost to you, if you wish.

23 Q. Did he understand that?

24 A. He did. And he initialed.

25 Q. Okay.

1 A. If you decide to answer any questions now with a
2 lawyer present, you will still have the right to stop
3 answering questions at any time; you also have the right
4 to stop answering questions at any time until you talk to
5 a lawyer.

6 Q. Did he understand that?

7 A. He understood it, and he initialed it.

8 Q. Okay. Then what does it say?

9 A. The next part of this form it says: I have read
10 this statement of my rights and I -- and I understand what
11 my rights are. And I tell them, do you have any questions
12 about any of the rights we just went over. Of course, his
13 answer would be no and I know that because he signed that
14 he had no questions, he understood it.

15 Q. And what would have happened if he did not
16 understand it?

17 A. Then we would have gone over them again. And if
18 at any time I felt that no matter what happened, he just
19 wasn't going to -- he just wasn't able to understand his
20 rights, then the interview would have been stopped.

21 Q. And why is that?

22 A. Because in order for me to interview somebody,
23 they have to -- they have to make sure that they
24 understand what their rights are.

25 Q. And is that also because of the exam itself?

1 A. Correct. The exam itself, of course. And like
2 I said, it's voluntary and I want to make sure that they
3 understand that anything they do, they do not have to do.
4 And so therefore if I get the impression that they don't
5 understand what their rights are, then we won't continue.

6 Q. And what does it say on the latter part of the
7 page?

8 A. It says: I am willing to make a statement and
9 answer questions. I do not want a lawyer at this time. I
10 understand and know what I am doing. No promises or
11 threats have been made to me, and no pressure or coercion
12 of any kind has been used against me.

13 Q. Did he seem to understand that?

14 A. He did. And he signed.

15 Q. And is there anyone who was in the room with you
16 when you advised him of his Miranda rights?

17 A. Detective Sharp.

18 Q. Okay. And does his signature appear upon that
19 page?

20 A. Yes, ma'am, it is.

21 MS. BIAGIANTI: Your Honor, at this time I would
22 move State's Exhibit Number 41 into evidence.

23 MR. BOSNAK: Without objection.

24 THE COURT: State's 41 into evidence without
25 objection.

1 [Whereupon, State's Exhibit Number 41 is
2 admitted into evidence by the Court]

3 Q. [Ms. Biagianti] What happened next?

4 A. The next thing we do is we go over -- well, if
5 you want to -- each step.

6 The next step is the -- is what's called the
7 consent to interview -- I'm sorry -- consent to interview
8 with a polygraph. It's an additional form. This form has
9 the place where the polygraph is being -- where the
10 polygraph is taking place, which is the Dorchester County
11 L.E.C. The date --

12 Q. L.E.C. meaning?

13 A. Law enforcement Complex, which is on 212
14 Demmingway.

15 The date, which is September 17th, 2008, and the
16 time that I'm readying -- or that we've going over the
17 consent form, which is --

18 Q. What time is that?

19 A. 9:46 a.m.

20 Q. Okay.

21 A. The next thing that's on the form is: I'm a
22 parent or legal guardian of. What that is is a consent
23 for a parent to give -- I'm sorry -- a parent gives
24 consent to a person under the age of eighteen. They give
25 their consent for the child to be polygraphed. In this

1 case we obviously didn't need that.

2 So we moved on to the next one. It says:
3 before we begin examination by means of the polygraph
4 concerning -- and what's written in there is the death of
5 victim. And VICTIM is the name of the child.

6 Q. The victim?

7 A. Correct.

8 Then it says: you must understand your rights.

9 Then we -- then I go over each one of his rights
10 under polygraph.

11 Q. And what are those?

12 A. It's -- the first one is you have the right to
13 refuse to take a polygraph test.

14 Q. Did he seem to understand that?

15 A. Yes, ma'am, he did, because he initialed to the
16 side.

17 The next one is: if you agree to take a
18 polygraph test, you have the right to stop the test at any
19 time. And he understood that by signifying -- by putting
20 his initials to the side.

21 If you agree to take the polygraph test, you
22 have the right to refuse to answer any individual
23 questions. Again, he understood, because he put his
24 initials to the side.

25 The last part is the waiver and consent. It

1 says: I have read the statement of my rights and I
2 understand what my rights are. I voluntarily agree to be
3 examined by means of the polygraph during this interview.
4 I understand and know what I am doing. No threats or
5 promises have been used against me to obtain my consent to
6 the use of the polygraph. I understand the examination
7 room does -- and I have them put their initials on the
8 line where it says does -- contain an observation device.
9 The examination may be monitored or recorded.

10 The reason that I have them put their initials
11 where it says does is because the computer -- the computer
12 itself records the polygraph, so it's technically a
13 recording device. And he understood it. And I know that
14 because he signed his name to the bottom that he
15 understood his rights.

16 Q. Okay. Then tell us what's the next step after
17 you fill out that form.

18 A. The next step is we go over -- it's a
19 preliminary -- it's like a medical-type questionnaire,
20 because I need to make sure that he is able to take a
21 polygraph -- what I mean by that, he doesn't have any
22 physical or psychological problems or any problems that
23 would prevent him from taking a polygraph -- questions
24 such as does he have a history of heart disease, things
25 along those lines.

1 Q. And what were Mr. Hillerby's answers?

2 A. To all the questions was to -- well, heart
3 disease, no; neurological disorder, no.

4 Q. Current medications?

5 A. Okay. Current medication was no. And then I
6 asked him if he's had any drug or alcohol use in the past
7 twenty-four hours.

8 I ask him that because I ask everybody that
9 question. The reason for that is because sometimes people
10 might try and influence their physiological responses by
11 taking some form of medication or alcohol. And his
12 response to that was he had had -- he had had a drink --
13 or, I'm sorry -- he had a few beers and took sleeping
14 pills the night before.

15 Q. And, again, this was on what date?

16 A. This was on the -- the test itself, or the
17 exam -- the interview was on the 17th. So if he had it
18 the night before it would have been the 16th, I'm
19 assuming.

20 Q. Did he appear to be intoxicated or in any way
21 impaired by what --

22 A. No, ma'am. And as soon as somebody answers that
23 question with a yes, with a yes response, my next question
24 is and always has been, always will be, are you still
25 feeling the effects of that alcohol or that medication.

1 If I hear a yes, the interview is cancelled and I'll
2 reschedule it. If I hear a no, then we'll move on, we'll
3 continue on. And due to the fact that we continued on,
4 his answer was obviously no.

5 Q. Now, tell our jury what happened next.

6 A. The next part of this is basically -- well,
7 Detective Sharp leaves the room. And I ask everybody the
8 same question: do you have any questions for Detective
9 Sharp before he leaves. Or, well, in this case Detective
10 Sharp. The investigator. And if he did, he would have
11 asked. I asked Detective Sharp, do you have any questions
12 for Mr. Hillerby. If he would have had any questions,
13 then he would have asked. Normally, there's no questions.

14 So then Detective Sharp leaves the room and the
15 two of us will sit in there and talk. And we'll spend
16 time talking about basically his background information,
17 where he's from, who raised him, just basic information
18 about his personal history.

19 Q. And then at some point do you talk to them about
20 the testing issue?

21 A. I do.

22 Q. Okay. In this case tell us about that.

23 A. What we do is I go through their background
24 information, and then at some point in time we will start
25 to talk about the issue under investigation. In this

1 case it was UICITM's death. And once he gives me basically
2 his statement as to what happened, which usually mirrors
3 what he told the investigators, we'll move on to the
4 question -- the questioning phase. And in this case --

5 Do you want me to go over that?

6 Q. Yes, please.

7 A. Okay. Before any polygraph is given, the
8 examinee knows the questions I'm going to ask him because
9 it's what's called a pre-test overview. What I'll do is
10 I'll have the test questions in the computer and then I'll
11 ask the examinee. And in this case the question -- one of
12 the questions about the case under investigation was: did
13 you inflict any injury to UICITM that would have caused his
14 death. And his response to me was: not that I know of.

15 The polygraph is set up for a yes or no
16 response, so in order -- for somebody to answer not that I
17 know of, I have to ask further. Well, what do you mean
18 not that I know of, what came to mind, what are you
19 thinking about, what's bothering you.

20 Q. Now, let me stop you right there. Before he
21 told you that, did he tell you -- what did he tell you
22 about the only thing that he did to UICITM that night?

23 A. The only thing that he did?

24 Q. Would it refresh your memory to look at the
25 testing under the testing issue --

1 A. I'm sorry.

2 MR. BOSNAK: Objection, Your Honor. Let her --
3 let him answer the question.

4 THE COURT: Overruled.

5 Q. [Ms. Biagianti] Would it refresh your memory to
6 look at the testing under the testing issue portion of
7 your report?

8 [Whereupon, the witness reviews documents]

9 THE COURT: Detective --

10 THE WITNESS: Yes, ma'am?

11 THE COURT: -- could you please answer the
12 question.

13 THE WITNESS: I'm sorry.

14 THE COURT: Thank you.

15 THE WITNESS: I'm trying to --

16 A. Yes, ma'am. I'm reviewing it now.

17 [Whereupon, the witness reviews documents]

18 MS. BIAGIANTI: Can I approach the witness, Your
19 Honor?

20 THE COURT: You may.

21 Q. [Ms. Biagianti] Just have you read the testing
22 issue?

23 A. Oh. I'm sorry.

24 Q. That's all right.

25 A. Yes, ma'am.

1 Q. Do you have a copy of your own report?

2 A. Yes, ma'am, I do.

3 On the 14th of this month, Summerville Police
4 Department responded to a report --

5 Q. Slow down, sir.

6 A. -- of a child fatality. Upon completion --

7 Do you want me to read the whole thing?

8 Q. No. Just if you could tell us about what
9 Mr. Hillerby told you.

10 A. The last person with the child was the examinee,
11 which would have been Mr. Hillerby. He advised me that he
12 did not do anything to the child that night he was with
13 him except send him to the corner when he spilled his
14 drink.

15 Q. So he told you he didn't do anything except send
16 him to the corner?

17 A. Correct.

18 Q. And then you start to ask him specific
19 questions?

20 A. Yes, ma'am.

21 Q. Okay. And I believe you said he answered, I
22 don't know. And if you can just elaborate from there.

23 A. When I asked him what do you mean you don't know
24 if you did anything -- there's a lot to this. But
25 basically what happened is --

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1 Q. Did he ever take the polygraph exam?

2 A. No, ma'am.

3 Q. Okay. And --

4 A. And what --

5 Q. -- did he tell you why? Did he elaborate on, I
6 don't know?

7 A. Yes, ma'am. The examinee stated that he hit
8 Blaze with his knee.

9 Q. Did he tell you it was an accident?

10 A. He actually said that he did not do it on
11 purpose.

12 Q. Okay. What else did he tell you?

13 A. Well, what I did from that point is if somebody
14 says that they did -- if somebody answers a question, I
15 don't know, and then I -- I will reword the question if
16 they give me some sort of response. In this case it was
17 not that -- not on purpose. So my question would have
18 then turned into did you cause -- did you hit Blaze or do
19 anything to Blaze that would have caused his death on
20 purpose, or I would have put something in there that would
21 have made it more specific. In this case when I reworded
22 the question, he asked me if he could refuse the test.

23 Q. And what happened next?

24 A. And of course I told him yes. I asked him why.

25 Q. And what was his response?

1 A. He didn't want to take the test because he knows
2 what happened. I then asked him -- I asked him what. And
3 he said that he hit VICTIM with his knee and that must have
4 been what happened.

5 Q. Did you ask him any other questions?

6 A. I asked him -- yes, ma'am. I asked him if he
7 did anything else that could have caused any trauma to the
8 child's head and he stated that when he grabbed him, he
9 may have shook him a little.

10 Q. So he admits to you that he might have shook him
11 a little?

12 A. Yes, ma'am.

13 MS. BIAGIANTI: Okay. Hold on a moment.

14 [Whereupon, Ms. Biagianti and Ms. Williams
15 confer]

16 MS. BIAGIANTI: Thank you. Please answer any
17 questions the defense might have.

18 THE COURT: Mr. Bosnak?

19 CROSS-EXAMINATION

20 BY MR. BOSNAK:

21 Q. Detective Dixon, you are a polygraph examiner?

22 A. Yes, sir.

23 Q. And your job is being concerned with the truth?

24 A. Yes, sir.

25 Q. And you don't video-record any of these

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1 sessions, do you?

2 A. No, sir.

3 Q. Well, if we really wanted to be truthful, we
4 would video-record the sessions with audio and video where
5 we could hear everything, wouldn't we?

6 A. Why is that?

7 Q. Yes or no answer.

8 A. Oh. Probably not. No.

9 Q. Probably not? Why?

10 A. Well, because in video recording you can take a
11 lot of things out of it; however, my honesty and integrity
12 is here.

13 Q. That's what you say?

14 A. Well, yes, sir.

15 Q. All right. But we could hear -- with an audio
16 and video recording, we could hear what was said prior to
17 the test, couldn't we?

18 A. Yes, sir.

19 Q. And we could observe everybody's demeanor,
20 couldn't we?

21 A. Yes, sir.

22 Q. And we could hear what was happening after the
23 test?

24 A. Yes, sir.

25 Q. And then we could verify your honesty and

1 voracity, couldn't we?

2 A. Yes, sir.

3 Q. Because we could hear it for ourselves, couldn't
4 we?

5 A. Yes, sir.

6 Q. And everything is not a yes or no answer, is it?

7 A. During the test?

8 Q. No. I'm saying every question that somebody
9 asks is not yes or no.

10 A. Well, that's true. That's true, yes, sir.

11 Q. Sometimes you have to elaborate, don't you?

12 A. Yes, sir.

13 Q. And Mr. Hillerby was explaining to you he didn't
14 really understand what was going on, didn't he?

15 A. No, sir.

16 Q. Oh. He didn't do that?

17 A. No.

18 Q. He didn't say he didn't understand what he
19 was -- what was going on?

20 A. No, sir.

21 Q. Okay. But if we had a recording, we could hear
22 all that and see all that, couldn't we?

23 A. Yes, sir.

24 Q. Okay. And we don't have that?

25 A. No, sir.

1 Q. We just have your word; correct?

2 A. Yes, sir.

3 MR. BOSNAK: Thank you.

4 MS. BIAGIANTI: Just one.

5 REDIRECT EXAMINATION

6 BY MS. BIAGIANTI:

7 Q. Are you going to put your career on the line for
8 Mr. Hillerby?

9 A. No, ma'am.

10 THE COURT: Mr. Bosnak?

11 RECROSS-EXAMINATION

12 BY MR. BOSNAK:

13 Q. We don't know that, do we?

14 A. Yes, sir. I do.

15 Q. No, sir. I said we don't know that, do we?

16 A. I would hope so.

17 Q. We have to take your word for it?

18 A. Yes, sir.

19 Q. Correct?

20 There's always been something called trust and
21 verify?

22 A. Yes, sir.

23 Q. We want to trust in you but we would like to be
24 able to verify it; correct?

25 A. Yes, sir. But I'm --

1 Q. And if we had it all recorded, we could judge
2 for ourselves, couldn't we?

3 A. Yes, sir.

4 Q. Let me ask you something, since you're -- how
5 long have you been in law enforcement?

6 A. Fifteen years.

7 MS. BIAGIANTI: Your Honor, I believe I would
8 object. I did not go into this on redirect.

9 THE COURT: I'm going to give Mr. Bosnak a
10 little leeway.

11 Q. [Mr. Bosnak] You've been in law --

12 THE COURT: Thank you.

13 MR. BOSNAK: Excuse me, Your Honor.

14 Q. [Mr. Bosnak] You've been in law enforcement
15 fifteen years?

16 A. Yes, sir.

17 Q. Are you aware of the new DUI laws?

18 MS. BIAGIANTI: Your Honor, I would object.
19 Relevance.

20 MR. BOSNAK: We're talking about truthfulness.

21 THE COURT: Sustained. Sustained.

22 MR. BOSNAK: Thank you.

23 THE COURT: Thank you.

24 MS. BIAGIANTI: Can he be released from his
25 subpoena, Your Honor?

1 THE COURT: Any objection, Mr. Bosnak?

2 MR. BOSNAK: None, Your Honor.

3 THE COURT: Detective, you may step down. Feel
4 free to remain with us.

5 THE WITNESS: Thank you, ma'am.

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

8 THE COURT: Ms. Williams?

9 MS. WILLIAMS: Your Honor, at this time we would
10 rest. We have no further rebuttal witnesses.

11 THE COURT: Ladies and gentlemen of the jury,
12 this signifies to the Court there is a matter of law
13 that I must take up outside of your presence.

14 Do not begin your deliberations. Do not discuss
15 this case amongst yourselves.

16 We'll receive you back into the courtroom
17 momentarily.

18 Please rise for the jury.

19 [Whereupon, the jury exits the courtroom at
20 11:20 a.m.]

21 THE COURT: Thank you. Be seated.

22 Any motions or matters from the State?

23 MS. WILLIAMS: Nothing from the State, Your
24 Honor.

25 MR. BOSNAK: Nothing from the defense, Your

1 Honor.

2 THE COURT: All right. We will go over your
3 charge requests.

4 The State is requesting a charge on voluntary
5 intoxication. Is that -- and that's the only --

6 MS. WILLIAMS: Yes, Your Honor. We would just
7 ask for the standard instructions that are always used.
8 I don't --

9 THE COURT: Ms. Williams, other than the
10 standard charges that the Court typically charges, the
11 only one that would be out of the ordinary to charge
12 would be voluntary intoxication; is that correct?

13 MS. WILLIAMS: That is correct, Your Honor.

14 THE COURT: All right. Mr. Bosnak, I'll be
15 happy to hear from you regarding the inclusion of that
16 charge.

17 MR. BOSNAK: That's fine, Your Honor.

18 THE COURT: All right.

19 MR. BOSNAK: One other charge I think now --

20 THE COURT: All right. One at a time. I just
21 want -- I am including the charge on voluntary
22 intoxication.

23 With that, Ms. Williams, Ms. Biagianti, there
24 are no other requests from the State; is that correct?

25 MS. WILLIAMS: None from the State, Your Honor.

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1 THE COURT: All right. Mr. Bosnak, we're going
2 to go through. You did not number your charges, so I
3 don't know how you have them in your general proposed
4 so I'll just go on the general heading if that's --

5 MR. BOSNAK: Yes, ma'am. That's fine.

6 THE COURT: All right. As to your general
7 charge on proof: that is included in the Court's
8 general charge.

9 The burden of proof, of course, is beyond a
10 reasonable doubt. So that is included.

11 Your definition of reasonable doubt: the Court
12 charges a combination hybrid of Needs and McHoney
13 [phonetic]. The Court will charge firmly convinced.

14 As to your confession request: the Court is
15 charging its standard confession. I have reviewed your
16 proposed charges. All of the -- everything that you
17 have included is included in the Court's charge.

18 MR. BOSNAK: Thank you, Your Honor.

19 THE COURT: The resolution of doubt in favor of
20 defendant: if you have a reasonable doubt as to
21 whether the defendant is guilty of homicide, then you
22 must resolve that doubt in favor of the defendant and
23 find him not guilty. That is included.

24 The defendant's right to testify is not
25 applicable at this time.

1 MR. BOSNAK: Correct.

2 THE COURT: Circumstantial evidence is included.
3 Direct evidence is included.

4 And I will be happy to hear from you as to the
5 testimony of a police officer charge.

6 MR. BOSNAK: Your Honor, I just ask that no more
7 weight be given to the police officer's testimony than
8 any other witness. That's all. I think that's all
9 that charge states.

10 THE COURT: Ms. Williams?

11 MS. WILLIAMS: Your Honor, I don't think there's
12 any case law to support that we should have a separate
13 instruction for a police officer. We would just ask
14 that this not be included in the Court's statement --
15 standard instructions on credibility.

16 THE COURT: Anything further, Mr. Bosnak, as to
17 that?

18 MR. BOSNAK: No, Your Honor.

19 THE COURT: And I notice you have done a very
20 nice job in citing case law. The only law that you
21 cite regarding the inclusion of a specific credibility
22 of a police officer's testimony is Rule 608 and 609.
23 Do you have any recent case law?

24 MR. BOSNAK: No, ma'am, I don't.

25 THE COURT: All right. Based upon my review of

1 the case law and the rules, I am not going to include
2 specifically your proposed request to charge as to the
3 police officer. My thorough review of my charge on
4 credibility of witnesses does include that the jury
5 must -- or may consider the witness' bias, interest,
6 prejudice, or other motive in this case, the appearance
7 and manner of the witness while on the witness stand.

8 Mr. Bosnak, I will note your objection for the
9 record. I will include your proposed request to charge
10 as a packet, and we will mark those as a Court's
11 exhibit.

12 [Whereupon, Court's Exhibit Number 3 is marked
13 by the court reporter]

14 MR. BOSNAK: Your Honor, one thing I just
15 thought of this morning that possibly we may need to
16 request is a mere presence.

17 MS. WILLIAMS: Your Honor, none of the evidence
18 supports a mere presence instruction.

19 THE COURT: Mr. Bosnak --

20 MR. BOSNAK: That's all right, Your Honor. I'll
21 withdraw that.

22 THE COURT: You'll withdraw your --

23 MR. BOSNAK: Yes, ma'am.

24 THE COURT: -- request for a mere presence? Are
25 you sure, Mr. Bosnak?

1 MR. BOSNAK: Yes, ma'am.

2 THE COURT: Do you need a moment?

3 MR. BOSNAK: No. That's fine.

4 THE COURT: All right. With that -- and,
5 counsel, if you will approach just for the verdict
6 sheet, the verdict form, just to make sure it is in
7 order.

8 [Whereupon, Ms. Williams and Mr. Bosnak review
9 documents]

10 THE COURT: Any objections to the Court's
11 verdict form? From the State?

12 MS. WILLIAMS: None from the State, Your Honor.

13 MR. BOSNAK: None from the defense.

14 THE COURT: All right. Counsel, my inclination
15 is to go ahead and close and charge.

16 MS. WILLIAMS: That's fine, Your Honor.

17 Are you planning to send the indictment back?
18 We would ask that you not send the indictment back.

19 MR. BOSNAK: I would ask that we would hold the
20 indictment, too, Your Honor.

21 THE COURT: All right. Since you are both in
22 agreement on not sending the indictment back, the
23 indictment will not go back to the jury.

24 Fifteen minutes, counsel, to get prepared for
25 closing?

1 MS. WILLIAMS: That's fine, Your Honor.

2 MR. BOSNAK: That's fine.

3 THE COURT: All right. We will be in recess for
4 fifteen minutes. We will close --

5 Who is doing the closing?

6 MS. WILLIAMS: I am, Your Honor.

7 MS. BIAGIANTI: I'm going to start, Your Honor.

8 MS. WILLIAMS: Oh. I'm sorry. Ms. Biagianti is
9 going to close on the law briefly and then after Mr.
10 Bosnak closes, I will do the final close.

11 THE COURT: Mr. Bosnak?

12 MR. BOSNAK: That's fine, Your Honor.

13 THE COURT: All right. Thank you.

14 We will be in recess for fifteen. Thank you.

15 [Whereupon, a recess is taken from 11:26 a.m. to
16 11:45 a.m.]

17 THE COURT: Please be seated.

18 Is the State ready?

19 MS. WILLIAMS: Your Honor, I wasn't sure if
20 before the jury came in if -- because we had rebuttal
21 testimony, if defense had been renewing his motions on
22 the record. I was just --

23 THE COURT: I inquired, Ms. Williams.

24 - - -

25 - - -

RENEWED MOTIONS

THE COURT: Mr. Bosnak?

MR. BOSNAK: I would just like to renew all the previous motions. Thank you, Your Honor.

THE COURT: Thank you, Mr. Bosnak.

I'll be happy to hear from you if you have any additional argument.

MR. BOSNAK: Nothing, Your Honor.

THE COURT: Based upon the Court's previous ruling, I deny your motion for directed verdict.

Is there any additional motions that you wish to renew at this time?

MR. BOSNAK: Nothing, Your Honor.

THE COURT: All right. The plan is for closing arguments, then we will break for lunch, I'll send the jury out, and then I will instruct, and then they will begin deliberations.

Any objections to doing it that way, Ms. Williams?

MS. WILLIAMS: No objections from the State.

THE COURT: Mr. Bosnak?

MR. BOSNAK: Nothing, Your Honor.

THE COURT: All right. Let's bring in the jury.

[Whereupon, the jury enters the courtroom at

11:46 a.m.]

1 THE COURT: Thank you. Be seated.

2 Ladies and gentlemen of the jury, we have
3 reached the stage of the trial where you will now hear
4 closing arguments on behalf of counsel. As I indicated
5 to you before, what is contained in the closing
6 arguments is not to be considered evidence in this
7 case.

8 After you have heard closing arguments on behalf
9 of counsel, we are going to take our lunch break. We
10 will come back, and then I will instruct you on the law
11 applicable to this case. At that point I will advise
12 you that you may begin your deliberations. Until I
13 advise you to begin your deliberations, do not begin
14 your deliberations or do not discuss this case amongst
15 yourselves or decide any issue until you have been
16 instructed to do so.

17 Ms. Biagianti?

18 MS. BIAGIANTI: Thank you, Your Honor. May it
19 please the Court, counsel.

20 - - - - -

21 CLOSING STATEMENT

22 MS. BIAGIANTI: What I am going to do is explain
23 the law to you briefly and if anything I say is
24 different from what the Judge instructs you, you have
25 to follow her charge. But then Mr. Bosnak will speak

1 and give you his argument, and then Ms. Williams will
2 stand up and tell you why we think the defendant is
3 guilty in this case. We have the burden of proof;
4 therefore, Ms. Williams gets to go last.

5 Homicide by child abuse, in this state, the
6 State must prove beyond a reasonable doubt. And all
7 reasonable doubt, the judge is going to tell you, is
8 firmly convinced. If you're firmly convinced that he
9 did it, then you must find him guilty.

10 That the defendant caused the death of a child
11 under the age of eleven -- that's obvious; I'm not
12 going to -- the child was twenty-two-months old --
13 while committing child abuse or neglect. Now, what
14 does child abuse and neglect mean?

15 And that the death occurs under circumstances
16 manifesting an extreme indifference to human life.

17 Those are the three elements that we have to
18 prove.

19 Now, homicide by child abuse is similar to
20 murder, but not really because with murder the State
21 has to prove premeditation even for a split second;
22 that you have an evil heart, evil mind, and I'm going
23 to go out and kill somebody. Not in homicide by child
24 abuse.

25 Child abuse or neglect means an act or failure

1 to act. And in this case it's really the act. The
2 beating is the act. The twenty-three blows to the head
3 is the act.

4 Which causes harm to the child's physical health
5 or welfare: harm; the bruising, the hemorrhaging, the
6 hemorrhaging that the defendant out of his own mouth,
7 on the date of the death, what caused his death.
8 Interesting.

9 And what is harm? Harm to the child's physical
10 health or welfare means that the defendant either --
11 and there's three options. And we don't have to prove
12 all three, we just have to prove one. And what Ms.
13 Williams is going to focus on is inflicted or allowed
14 to be inflicted physical injury. I think it's obvious
15 in this case what the truth is. And the truth is that
16 that defendant smacked that child God knows how many
17 times and because of that, the child died. Or -- or --
18 failed to supply the child with adequate food,
19 clothing, shelter, or physical care and that failure
20 caused the child to die. It could be this either --
21 this, too. He admits to you not only in hearsay
22 statement, but also on the stand, no reason to get him
23 medical care, I thought he was fine. That failure, in
24 and of itself, means he's guilty of homicide by child
25 abuse.

1 Or he abandoned the child, causing his death.
2 And I think that it can be argued that after hitting
3 the child repeatedly, putting him down in his crib,
4 letting him die, is abandoning him.

5 Again, listen to the evidence which Ms. Williams
6 recaps for you and go back there and use your common
7 sense. And when you use your common sense, this case
8 is really pretty easy. That man right there beat ~~DETECTIVE~~
9 [REDACTED] to death.

10 MR. BOSNAK: Your Honor, may it please the
11 Court.

12 - - - - -
13 CLOSING ARGUMENT

14 MR. BOSNAK: Ladies and gentlemen, I wish it was
15 that easy. I really do. I wish it was that easy.

16 You've heard a lot, especially when you heard
17 Mr. Hillerby talk. I don't know if you can get any
18 more live interaction than what he said, the good and
19 the bad and the ugly.

20 I'm very concerned, very concerned, with the
21 Summerville Police Department. If y'all recall, I
22 asked Detective Sharp a question and the question was
23 every time they questioned Justin Hillerby, did he have
24 a lawyer? No. Was there a judge in the room to make
25 sure fair questions were being asked, the proper

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1 fairness, the law was being obeyed? No. Did they have
2 a court reporter writing everything down? Well, we
3 didn't have all this. Well, I didn't say that. Well,
4 he said this, do this, do that. He-said, she-said
5 stuff. And I asked him, did you have a court reporter.
6 No. He didn't like that question. He didn't want to
7 answer it.

8 And if you'll remember, beforehand I asked him a
9 question about videotaping: is the confession
10 videotaped or audiotaped. In other words, if we can't
11 videotape it with pictures and sounds, which we should
12 do, why don't we at least have it audiotaped? Why
13 are they afraid to let y'all decide? Why are they
14 afraid -- why are they afraid of that? If all this
15 stuff was done properly, if it was all done by the
16 book, and Justin Hillerby gave this confession and he
17 said this, and this is what he said, and he did all
18 this, and it was under the conditions that they said,
19 and they did nothing, then tell me, ladies and
20 gentlemen, what are they afraid of? What are they
21 afraid of? Why don't they want you to see? I don't
22 know.

23 Now, I'm going to talk about the law. And the
24 judge is going to charge you with the law on
25 confession. But if you'll remember Detective Sharp, I

1 asked him a question and I said, did you tell Justin
2 Hillerby that if this was an accident, just tell him if
3 you did something, and if it was an accident that
4 nothing would happen to you, or something like -- or
5 you don't get in trouble for accidentally doing things.
6 And he says, yeah, I said that; yeah, I said that.
7 That's what Justin Hillerby said all along. He said
8 that all along: I hit the child with my knee. He even
9 told Mr. S Leonard S., the granddaddy, yeah,
10 I hit him with the knee. His testimony was, yeah, I
11 think Justin said he hit him with the knee. If you
12 need that, the court reporter can find the testimony
13 for you. You can replay it. Anything you need, any
14 testimony that you have doubt about, they can get you
15 that where you can hear it.

16 But it bothers me today that when people get in
17 trouble and they're confessing and they're being read
18 their rights and all this kind of stuff, we don't
19 record it where when we get in a situation like that,
20 the jury can look and can hear the tone of the voice,
21 who all was in the room, what exactly was asked, what
22 exactly was said. That's why we have live testimony in
23 the court, because we want you -- you're the finder of
24 the fact, and we want you to observe those witnesses on
25 that stand. And not only are you hearing their words,

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1 but you're also looking at their demeanor. And we want
2 you to do that, because you make the decision here on
3 what to believe and what not to believe based on what
4 you hear, based on what you see, and the demeanor of
5 that witness. Why don't they want that? They're law
6 enforcement. They're supposed to be held to a higher
7 standard. They're supposed to be telling the truth.
8 They enforce the laws against us. Shouldn't they play
9 fair?

10 Now, I'm going to talk a little bit more about
11 that, and I'm going to talk about the legal safeguards,
12 the burden of proof, beyond a reasonable doubt,
13 presumed innocent until proven guilty. Very important
14 rights, constitutional rights; probably what separates
15 our country from other countries. It gives us our
16 rights. It allows us to live like we live.

17 But I'm going to first get into why would Justin
18 Hillerby do this? Now, this is -- like the solicitor
19 said, your common sense, your common sense. Why would
20 he do this? Their theory is that he got into an
21 argument with his girlfriend, that they had a child
22 together. Melissa is sitting there. They got in an
23 argument that morning, and he got mad about that and
24 stayed mad all day at the pool and at night, and ~~victim~~
25 [REDACTED] just did a little something, knocked over a

1 drink, or did something -- it kind of gets confusing --
2 and Justin killed the kid, hit the kid.

3 You heard the doctor. You heard the doctor on
4 the stand. There were twenty-three blows to this
5 child. Now, he said some of them could have been made
6 by the child falling to the floor, he didn't know if
7 the child had been picked up and dropped, he didn't
8 know where the bruises came from. But he said there
9 were twenty-three. So I don't know if we can say that
10 all twenty-three somebody hit the child twenty-three
11 times. Maybe somebody hit the child, knocked the child
12 down, he hit a table, they picked him back up and maybe
13 they hit him again. I don't know. I don't know.

14 And I told you when we first started this case
15 it's not our job to prove who did this case. That's
16 the police's job. My job is to prove to you -- is for
17 the State to prove beyond a reasonable doubt that
18 Justin Hillerby did this. That's what's here. I'm
19 just here defending Mr. Hillerby. They have all the
20 burdens.

21 Why would he do this? Why would you kill the
22 child of a woman you loved? I mean, I'm asking y'all.
23 Y'all think about that when you go back there. Why?
24 Why would he kill -- he professed his love for her.
25 And she even got on the stand and said she cared about

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1 him, loved him at one time. They're corresponding.
2 He's been locked up and put in jail for abusing her
3 child, killing her child, and they're still
4 corresponding. That tape, the tape, that jailhouse
5 tape they've got, when you read that, most of that is
6 about love: I love you; I miss you; are you okay; how
7 are you; how's things going; what's going on. A
8 boyfriend-girlfriend type of thing, or people that miss
9 each other, is what it sounds like to me.

10 Now, you've got to believe that because a two-
11 year-old spills a drink that you hit him twenty-three
12 times or you caused twenty-three injuries to that child
13 and face for knocking over a drink.

14 Then you fed him prior. You came in. You
15 agreed to keep the children. That's funny in itself.
16 Justin Hillerby has absolutely no responsibility to
17 those children. He is not their biological parent. He
18 has no financial obligation to them. There are two
19 roommates in the house, Brandi and Eric. And you heard
20 both of them. They're in the house. They got there
21 about eight o'clock at night. They're in the house.
22 If he got mad he could have gone in and said, Brandi,
23 Eric, man, I can't take it; I'm going to call Jen on
24 the phone and tell her to come home; how about y'all
25 watching the children; I'm leaving.

1 Now, we know that they came home at eight
2 o'clock at night. We know that. That's testimony.
3 And when they came home, they said the child was fine.
4 They said he was crying over in the corner, but he was
5 running around, was good. And they asked, what's he
6 crying for. And Justin said, because he spilt my tea
7 and I put him in timeout. That was their testimony.

8 And you heard Jennifer S say that that's
9 how she disciplined her children. You heard that. She
10 said, Justin and I do not use corporal punishment. She
11 specifically said, I don't use corporal punishment;
12 I've patted my children on the behind before, I put
13 them in timeout, or I send them to their room, but I
14 don't whip my children, I don't put my hands on the
15 children. That's what she said, the mother of the dead
16 child, and said Justin didn't do it. You heard from
17 Justin's baby's mama. She says she spansks her older
18 kids; Justin never did.

19 So if he's mad and upset, he can leave. What
20 I'm having a hard time believing is how in the world
21 you could strike a child or cause twenty-three blows to
22 a child's head and his sister is in the house and the
23 two roommates are in the house. Now, you've got to
24 remember the seven-year-old, Serena S [REDACTED], she came
25 back home with Justin and [REDACTED]. The roommates,

1 they're not sure when they got home, somewhere around
2 7:40 to eight o'clock. They had been at Logan's
3 eating. There's different times. You can pick
4 whatever time you want. Somewhere around there.

5 The little girl came home. She got up. She
6 fixed her something to eat, is what Justin said, and he
7 fixed the little boy some pizza, and they were eating,
8 and they had ate. And I think the roommates might have
9 said they were eating. The little girl goes in her
10 room. She doesn't go to sleep. She goes in there to
11 watch TV. You're going to hit -- inflict twenty-three
12 blows to a child's head and face and nobody hears
13 anything?

14 And I asked the doctor, I said, if the child got
15 hit here in the face or whatever, didn't get hit in the
16 head right off the bat but got hit in the face, the
17 child would cry, wouldn't he. And he said, yeah, yeah;
18 more than likely he would cry, just like if one of us
19 got hit in the face real hard we're liable to say, oh,
20 whatever, depending on how hard we get hit.

21 What they want you to believe is that one blow
22 was laid right off the bat to the child and I guess
23 that blow put the child in a coma or knocked him
24 unconscious, and then the other twenty-three blows,
25 however they happened, just kept on when the child

1 died, I guess. I can't -- I don't know. Y'all heard
2 the evidence. I guess that's what they're saying. But
3 that's the only way that could work. And nobody hears
4 anything.

5 Now, Justin at some time does all this to this
6 child, but he puts the child in the highchair and gives
7 him some corn-dog bites and a juice, one of these
8 little Juicy Juices, whatever. Then he changes the
9 child's diapers and puts on the baby's pajamas. You're
10 going to hit a kid twenty-three times or cause twenty-
11 three injuries to the child's skull and face area, and
12 you're going to change his diapers -- you're going to
13 put him in a highchair, feed him, you're going to
14 change his diapers, and then you're going to put him in
15 his little sleeping outfit, and then you're going to go
16 put him in bed. Okay?

17 Then after you've done that, just a few feet
18 away -- after you put the kid to bed a few feet away,
19 you're going to go and sleep on the couch. Does that
20 make sense? I'm just asking you to use your common
21 sense. Does that make sense? I'm going to cause
22 twenty-three injuries to a child's head and face and
23 I'm going to put him in a crib and then I'm going to go
24 outside -- I'm going to go walk a few feet down the
25 hall and get on the couch and go to sleep. I think I

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1 would want to get out of there. But that's what he
2 did.

3 The mother comes home. The mother comes home,
4 and she's intoxicated. She and Justin had both been
5 drinking at the pool that day. Now, before I go much
6 further, I think we can all agree that these are
7 immature adults and maybe shouldn't have kids. And
8 they certainly needs some lessons in caring for their
9 kids and parenting their children. I think we can all
10 agree that -- all agree about that.

11 They're at a pool drinking. They're not
12 watching the little boy. The little boy could have
13 very easily drowned. Thank goodness he didn't. There
14 were people there. We're not even debating that point.
15 But the mother has been drinking and Justin has been
16 drinking. She goes out and continues to drink. She
17 comes home, 12:30, one o'clock, something like that.
18 The roommates have been there the whole time.

19 She comes in. She's intoxicated. She doesn't
20 even check on her child. Now, I find that amazing that
21 a mother, when she comes in at night, intoxicated or
22 not, doesn't open the door to the bedroom and peep in
23 and look and see if her child is okay. Didn't do it.
24 Said she's got a baby monitor.

25 But she's concerned about her rent. She wants

1 that rent money. And Eric and Brandi didn't pay that
2 rent money. And you heard them testify. You heard
3 Eric say that she unlocked our door; our door was
4 locked; she unlocked it and came in and started fussing
5 and started a fight over the money at one o'clock,
6 twelve o'clock, whatever. Can't check on the child but
7 going to come into the roommates and going to start a
8 fight with them. Break into their bedroom. I mean,
9 unlock the door -- she doesn't have the right -- and go
10 in and start a fight with them. And both of them say
11 she was very intoxicated.

12 Now, who's mad? Who's mad? They want you to
13 believe that Justin Hillerby is mad and kills the child
14 because the child knocks over a drink. But who sounds
15 like they're really mad? Again, we don't have to prove
16 anything. I'm just talking about the facts.

17 Then she goes in, gets in the bed with Justin
18 Hillerby. Now, okay. Let's say Justin is drunk. But
19 there's no evidence of that. They haven't given you
20 any evidence at all other than Justin said, I had six
21 or seven, eight beers at the pool and I still had a
22 little buzz going on. That's all. Nothing about him
23 being intoxicated and all that. The person that's
24 intoxicated is Jennifer. Justin -- she goes in and
25 gets in the bed with Justin.

1 She says she gets up the next morning and checks
2 on her child. But she doesn't check on her son. She
3 says her son doesn't get up until about ten o'clock.
4 Y'all, I've been around two-years old. I don't know
5 two-year-olds that sleep until ten o'clock. Most of
6 them go to bed pretty early and they're up pretty
7 early. They want to eat. They're up. They're crying.
8 You've got to tend to them. I don't know. A lot of
9 y'all probably know a whole lot more about that than
10 me. But that's the story. That's the story that
11 they're presenting.

12 She gets up. Justin -- now, he's supposed to
13 have done all this, put twenty-three blows, cause
14 twenty-three blows, to this child's head, and he's
15 still sleeping in the bed. And then he gets up. And
16 he gets up and they find the child. Ladies and
17 gentlemen, I don't know how many of y'all have children
18 or don't have children. If you've got maybe
19 grandchildren or you've got -- I mean, you've got
20 nieces and nephews and cousins or maybe one of your
21 best friends has a child or something. That's
22 horrible. That's horrible stuff. That's horrible.
23 I've been doing this a long time, and that's horrible
24 stuff to sit there and see that pretty little child at
25 two years old, that pretty little blond boy, and see

1 him all bloated and disfigured like that. That would
2 be awful. And even if it wasn't my child, if I walked
3 in and saw something like that, I tell you what, it
4 would affect me. It would put me in shock.

5 Justin Hillerby has a relationship. He loves
6 the mother. He's been in this child's life for a
7 while, and he sees it. The mother is crying.
8 Certainly, I think most mothers would be crying. He
9 says he's in shock, he doesn't know what's going on.
10 The reason that he's answering these questions to the
11 police and to firemen is because she's not able to
12 answer.

13 The grandfather is there. The grandfather
14 didn't answer. And I can understand that, too. I feel
15 very sorry for him. And I would be highly upset if I
16 had a beautiful two-year-old grandson like that, and
17 that young, and he got killed that way. I don't blame
18 -- I would be terribly upset. He's very calm for how I
19 would be. But even he is having a hard time relaying
20 all this.

21 And it's total confusion. You can imagine it's
22 total confusion. And Justin just tries to tell the --
23 tell the firefighters what happened and the police what
24 happened. Nobody knows what happened. Nobody knew.
25 The police, nobody, knew. There's a dead child in the

1 crib. There's blood coming out of his mouth. The
2 child has a problem with asthma and breathing.

3 Listen, Justin Hillerby would like -- he's got a
4 ninth-grade education. He did get a GED, but he
5 dropped out of high school, dropped out of school, in
6 the ninth grade. He doesn't know how somebody dies.
7 He doesn't know things about medical terms. He doesn't
8 know all that. He's just guessing.

9 Then what really angered me -- and I hope my
10 anger didn't show too bad -- is when those firemen got
11 up here and started talking about how he acted: he
12 didn't seem too upset to me, he didn't do this, and he
13 didn't do that. Let me ask you something. Do we ever
14 know what's in people's hearts?

15 Is there a particular way we're supposed to act
16 in a particular situation? Because I'm going to tell
17 you flat-out, I would fail. I very seldom cry. I very
18 seldom tell people, that I love greatly, that I love
19 them. It's been to my detriment many times. I've got
20 a friend of mine now sick with cancer, one of my best
21 friends. I could never repay him for everything he's
22 done for me, and I don't tell him how I feel about him.
23 I don't know what it is. It's a bad trait.

24 I know people that are alcoholics and other
25 things like that because they've been hurt and they

1 deal with that pain through drinking -- there is no
2 such thing as a person is supposed to act a particular
3 way. We don't know. Everybody acts different. And to
4 say -- and you don't even know the person. And to get
5 up and say, well, they didn't act like they're too
6 concerned to me. I won't say anything more about that.

7 Justin is taken to the police station. The only
8 statement that he is allowed to write out himself is
9 the first statement. Now, this again bothers me about
10 these so-called confessions. Why did they not let him
11 -- if you're not going to videotape or audiotape it,
12 why not let him write out what he did? I'm talking
13 about the total thing. I'm not talking about bits and
14 pieces, and yes and no. No such thing as everything is
15 yes and no. Why didn't they tell him if he wanted to
16 confess to this, tell him right out of the stakes,
17 start at seven o'clock at night what happened when you
18 got back in the house. I don't care. We got -- well,
19 the first time they kept him there for two hours.
20 Lord, you can write a whole bunch in two hours. Write
21 it out. Write it out. Start at seven o'clock. I want
22 you to go -- I want you to go minute by minute, as
23 detailed as you can. And then let the officer look at
24 it and say, well, it seems like there's a gap in this
25 period; what happened here; tell us; write it out.

1 That's another thing. Why didn't they do that?

2 Now, let's get back to when the police came.
3 The police came in and they took the child out of the
4 house. The coroner took the child I think to MUSC
5 where they performed an autopsy on the child. The
6 police came in. And I believe it's a Detective Olsen
7 that was the crime scene person that took the pictures.
8 Older gentleman, I believe, with gray hair, took the
9 pictures and the crime scene. Now, what I was kind of
10 amazed at -- and I asked him this question -- is why
11 didn't you do this, why didn't you do that. He said,
12 well, I don't really know what's going on; all I know
13 is that there's a possible homicide; and they just tell
14 me to go in the house and collect pictures -- I mean,
15 take pictures and collect evidence. I'm kind of
16 thinking, well, how -- how are you really going to know
17 -- how are you really going to know what's going on if
18 somebody didn't give you some background.

19 And he goes through the house. And he says
20 whatever he thinks out of the ordinary he took pictures
21 of. Took pictures -- said he checked the linens and he
22 checked towels, because there was blood and some blood
23 smears. They thought there was blood on the door and
24 so he went and checked that. He seemed to do a good
25 job.

1 What's real interesting to me, and what's real
2 strange -- and I hope y'all will talk about this.
3 Please talk about this when you go out -- is there's a
4 paint-roller kit in the child's bedroom. And he says
5 that it was kind of moved off the bed, it was -- it
6 looked like it was kind of pulled out. Nobody said
7 anything about painting the child's bedroom. I don't
8 even know if they want to do that with the child's
9 breathing problems. And he picked up a stick. There's
10 a stick somewhere up here in evidence. I don't know
11 where it is. It's a roller handle. Y'all will have
12 that back there. Y'all look at it. It's in here
13 somewhere. And it's right down there next to the crib.
14 Now, why would a paint roller stick be right next the
15 crib of a baby that has twenty-three hits to its head
16 and face? Why would it be there? Jennifer S
17 didn't testify that it wasn't there before or how it
18 got there. Nobody else did.

19 Now, they thought there was some blood on it so
20 they went and they sent it to SLED and they checked for
21 hair and for blood. Okay? Now, I talked to the lady
22 with SLED and we talked about DNA. And we talked about
23 the more you handle things and touch things, you can
24 get DNA from clothes and other things. Not any DNA
25 analysis was performed on that wooden handle.

1 And the doctor said he didn't know how those
2 bruises got to that child, how those injuries. He said
3 that it could have been done with a closed fist. I
4 asked him, how about open. No. Closed fist. He said
5 to kill that child, to cause the brain injury, it would
6 have had to have been hard, hard blows because of the
7 skull. But he said he couldn't say it was a person's
8 fist, that it could have been from dropping the child,
9 the child could have hit a table, a stick, a
10 screwdriver, anything hard. He said it wasn't a knife
11 or anything, but it was something hard and he couldn't
12 tell what it was. And nobody has said what did this to
13 the child.

14 Why wasn't that stick tested for DNA? When you
15 realize a child was beat up like that, why didn't you
16 take everybody's hands and photograph them, check them
17 for any DNA, scrape underneath their fingernails, to
18 see if any of the child's flesh or DNA was under your
19 fingernails? Why didn't they do that?

20 There is not one bit of physical evidence in
21 this case that said Justin Hillerby did anything to
22 this child. His DNA is not anywhere, there's no blood,
23 he has no injuries to his hands. There's nothing
24 whatsoever as far as physical evidence, DNA, blood,
25 fluids, a weapon, nothing. Nothing, nothing.

1 Do you remember me talking to Detective Sharp?
2 I said, on the 15th you didn't have enough probable
3 cause to arrest Justin Hillerby. There wasn't any..
4 Now, wouldn't you think that if you hit a child in the
5 head with your fist real hard, maybe twenty-three times
6 and all up here in the face and under the chin and in
7 the mouth, that you would have cut your hands or you
8 would have some bruising on them? That's something
9 y'all need to think about.

10 Now, the 17th comes around. The police know
11 this child has been beat up real bad, and they know
12 it's a high-profile case, high-profile case, on TV.
13 Summerville, a small town. This type of stuff doesn't
14 happen. I wanted to ask Detective Williams, but let's
15 get an arrest, let's get an arrest now, need to get an
16 arrest on this case, this don't look good. Summerville
17 is real concerned about their image anyway. Let's get
18 an arrest.

19 You heard him talk about Justin Hillerby. He
20 told Justin the first day he went over there -- they
21 kept him two hours, and he thought then that they were
22 going to put it on him. He said that: I thought that;
23 I thought it; I talked to Jen and said, they're going
24 to get me for this; they're going to arrest me for
25 this. Even told Eric Riggins.

1 Eric got up on the stand and said, yeah, Justin
2 was acting all paranoid and everything, said they were
3 going to pin this on him, they were going to get it on
4 him. No forensic evidence, nothing back, had no
5 evidence that Justin -- and even Eric said that then.

6 Justin was right. Justin was right. They
7 brought him in, and he told them about hitting the
8 child with the knee. The doctor even said that if a
9 child ran around and you happened to be coming out of a
10 door and the child hit your leg and knocked him down on
11 the floor, even if he hit the back of his head on
12 carpet it wouldn't have been enough to do these
13 injuries. The doctor said that. Justin Hillerby had
14 said that from day one. Every statement, except that
15 last one, is what he says. The child spilled his
16 drink, he put him in time-out. The roommates verified
17 that.

18 It was 9:40, ten o'clock at night, he's coming
19 out of the bedroom, the child is coming around, he hits
20 him with his leg, it knocks the child down, he tells
21 the child to get up, he thinks the child is tired.
22 Now, look, it's 9:40 at night. 9:40, ten o'clock at
23 night. A child has been up since 9:00, 9:30 in the
24 morning, a two-year-old, and he's been in a swimming
25 pool from twelve o'clock to six o'clock, in hot

1 weather, running around, jumping in and out of a pool.
2 Doesn't it make sense that the child is tired at 9:40,
3 ten o'clock at night? And what happens when children
4 get tired? They're kind of like sometimes when people
5 go to church and they do this number [indicates]. They
6 start falling asleep. They're tired. They start
7 falling. They go lay down somewhere. They start
8 getting tired. Nothing unusual.

9 But they want to make this heinous. They want
10 to make it sound like -- some doctor said, he's zombie-
11 like. Oh, well, these are that and that conditions.
12 Same conditions if you're tired. Same conditions. And
13 it's 9:40, ten o'clock at night and the child is tired.
14 He's sleepy.

15 They get Justin Hillerby to talk about that, and
16 this time he talks about the knee. And then they add
17 in about hitting the kid's head on a doorframe. Okay.
18 How many of us carry a child like we're trying to carry
19 -- maybe a big child. But none of us carry a child
20 like we carry a bundle of wood. Most of us take a
21 child and put a child up on our shoulders like this and
22 carry them like this.

23 Hit the child on the doorframe. I asked
24 Detective Sharp, I said, did you find out which side of
25 the doorframe, did you find out the height of the

1 doorframe, and did you send somebody back over there to
2 check the doorframe to see if there was a dent in the
3 doorframe, to see if there's blood, to see if there's
4 hair, saliva, or something from this child's DNA. No,
5 I did not do that -- don't you think that's important,
6 especially when a man is on trial for homicide by child
7 abuse? Don't you think that's important? And a child
8 has been killed?

9 Then, well, he hit his head on the crib. Well,
10 did you go over and check the crib for any hair, for
11 any blood, for any knots, DNA? No, we didn't do that,
12 either. Don't you think he has a right -- don't you
13 think we all have a right -- to have a case thoroughly
14 investigated where a guilty party could be convicted,
15 or if a person is innocent that the evidence could set
16 them free? Don't you think they have a right to do a
17 good job, a good job on police work, where we can
18 really determine who did this and to run out every
19 lead? Don't we have a right for that? But that's not
20 important. It's important here we get to court. It's
21 important to these statements. But it wasn't important
22 at the time.

23 Now, twenty-three, twenty-three, injuries to the
24 child's face and to the child's head. Twenty-three.
25 Let's say that did happen. Justin's knee hits him,

1 one. The child hits the floor, two. He hits the
2 doorframe, three. He bumps the baby's head on the back
3 of the crib, four. Where's the other nineteen? Y'all
4 have seen these pictures. Somebody beat this kid up.
5 You've seen it. You've heard me through this trial. I
6 haven't objected to much of anything, because this is
7 what it is. This child was beat. This is no accident.
8 No accident. And y'all have seen it. You know it's no
9 accident. Nobody bumping somebody -- somebody beat
10 this kid, beat it bad, in the head and face.

11 Now, we go through that. Confession changes.
12 Justin gets locked up. A magistrate in South Carolina
13 cannot set bond on a homicide or a first degree
14 burglary, things that would carry -- could carry a lot
15 -- can't -- they can't set bond. Only somebody like
16 Judge Harrington, a circuit court judge, can set bond.
17 So Mr. Hillerby was denied the bond when he went to
18 bond court. That's why he wanted to talk to Detective
19 Sharp: hey, man, I told you -- you know, I told you
20 guys that if y'all -- you know, if I would give these
21 statements and help you out and everything, you said
22 you would help me out; you said this was just an
23 accident and that people didn't get in trouble for
24 accidents; man, I need help; I can't -- I mean, I've
25 been -- they're locking me up in jail; they think I

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1 killed this kid. Nobody told him. He didn't know
2 anything about twenty-three blows to the face and head.
3 He didn't know that until I told him months later. Is
4 it -- does he have a right to be concerned and
5 confused? I think we would all be concerned -- would
6 be concerned and confused.

7 So he starts talking to this deputy or person
8 for the Summerville Police Department and says, look, I
9 don't understand this; why did they charge me with
10 this; I don't understand. And the officer talks to him
11 and tells him, and tells him all kinds of things:
12 well, you need to tell the truth; if you tell the truth
13 and it all matches up with the forensic evidence and
14 all this stuff, if it does then that will show you
15 didn't do it. Well, get me Detective Sharp back on the
16 phone because I need to talk to him again, because
17 something is wrong here. That's what he testified to.

18 If you look at what happened and the sequence it
19 happened, it makes sense, it's logical. Justin is
20 already charged. What he said was hit the child -- if
21 we believe the worse case scenario, hit the child on my
22 knee, bumped his head on the doorframe. He doesn't
23 say, I pounded his head twenty-three times on the
24 doorframe -- I bumped the child's head on the doorframe
25 and the crib. Four. There are twenty-three. Nineteen

1 others.

2 Now, he's already in trouble and he's already
3 being charged,, and he already knows he's going to jail
4 and he ain't got a bond. Why would you call Detective
5 Sharp on the phone and say, hey, man, I want to talk to
6 you because I want to tell you more stuff about what I
7 did? Does that make sense? Y'all, hey, man, come on;
8 come back over here and get me because I want to tell
9 you about doing more; I did a lot more.

10 If you were going to do that, why wouldn't you
11 just tell him what you did? Yeah, I hit the kid; I hit
12 him with that paint roller; I rammed his head up
13 against the doorframe, whatever he did. Whoever did
14 this to the child -- if Justin Hillerby did it, he
15 would have told him, I hit him this many times, I did
16 this, I did that, to him. That's where those marks
17 came from.

18 Nobody ever sat down and said, look, this is
19 what happened to this kid; did you hit this kid like
20 this; did you do this, did you do that, did you do
21 this; you said you did this; where did you do this.
22 None of that. So he gets Detective Sharp back and now
23 it gets worse.

24 Now we don't have anything -- the tea incident
25 changes from eight o'clock -- from eight o'clock the

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1 tea incident changes. Now it goes to the ten o'clock.
2 He knocked my tea over and I slapped him in the head
3 three or four times and then he went and got on the
4 futon. The original story was he knocked the tea over,
5 the roommates were coming in, he put the kid over in
6 timeout, they saw the child crying, what's wrong, he
7 knocked my tea over. That was at eight o'clock. He
8 hit the child with his knee. The child got up, went
9 and laid on the futon.

10 Now, the third story, the best story, is, well,
11 he knocked my tea over, then I slapped him three or
12 four times, then he got on the futon. No time, no
13 date, no time, no nothing. Nothing in context. Ask
14 yourself why. A child has been killed. Don't you
15 think -- times and where things happened and in what
16 order they happened, don't you think that's important?

17 What bothers me so bad about this is if they
18 just had recorded this on a video, we could have heard
19 it all for ourselves. Now we've got to believe this or
20 believe that. Okay? Just like -- I didn't mean to be.
21 I hope I wasn't rude to Detective Dixson about the
22 polygraph. When I said -- he said, well, it's my --
23 you've got to trust me, you've got to believe what I
24 say. And I said it's called trust and verify. We
25 trust you, but we want to verify what you said. Trust

1 and verify. We don't have any verification in this.
2 It's all trust.

3 [Whereupon, the bailiff proffers water to Mr.
4 Bosnak]

5 [Off the record momentarily]

6 MR. BOSNAK: Thank you. I'm sorry, y'all.

7 All this goes on. While Justin is being
8 investigated, he's still living with Jennifer S
9 He's still comforting her. They're still having
10 conversations. She certainly didn't suspect him of
11 doing anything to her child. And that's the mother.

12 Again, the State has the -- now, let me tell you
13 what they have done, what the State has done here. You
14 haven't heard anything negative about Justin Hillerby
15 with forensics, autopsy, nothing like that. Nothing
16 bad at Justin Hillerby at all. But what the State has
17 brought in here is a bunch of people to badmouth him.
18 It first started off with the firemen: well, he didn't
19 look like he was too upset to me. Then the
20 grandparents said, well, he didn't look too upset; now
21 that I think about it, he wasn't too upset to us.
22 Well, he was at the pool and he said some things about
23 nobody cares about you anyway, he wasn't looking after
24 the child.

25 Then they bring up all this other stuff about

1 his relationships with these two girls, and that he
2 drinks, you know, and all this kind of stuff. What has
3 that got to do with anything? What has it got to do
4 with anything? All it is is badmouthing somebody.
5 That's all it is. Let's bring in a group of people to
6 badmouth him and if we can make you think he's bad
7 enough and show you these horrible pictures, then
8 you'll say --

9 And then we've got these bits and pieces of
10 these false confessions that are all over the place,
11 you'll convict him. That's what this case is based on
12 from the State. That's all. They've got a bunch of
13 bits and pieces, out of context, this and this and
14 that. No hard evidence whatsoever.

15 If he hadn't said a word, he wouldn't be here
16 today. You heard him on the stand. I talked to him.
17 Remember, we're going to be honest about all this. I
18 talked to him. I don't want you saying this; I don't
19 want you talking about this; I don't want you bringing
20 this up because if you do, they're going to get on you
21 about it. I don't want you bringing up Melissa, your
22 baby's mama. I don't want you bringing that up. I
23 don't want to get into that.

24 One reason I didn't want to get into it, it's
25 got nothing to do with the baby's death. Seems like if

1 they spent as much time talking about forensics and DNA
2 and autopsies and what the police should have done as
3 talking about -- badmouthing him, that he drinks, that
4 he's got two girlfriends. Seems like -- that's all --
5 basically all they did.

6 This letter, this letter says this. He wrote
7 fifty letters, fifty or sixty of them. He's been in
8 jail. He's sitting there writing letters. That's all
9 he can do. He's writing them letters. Most of them
10 are love letters. Yeah, maybe some of them say stuff
11 back and forth. What would most of us do if we're in
12 jail? Does he know how to say the right thing? No.
13 Does he write the rite letters and say the right -- no.
14 He's human.

15 You heard him on that stand. And I told him not
16 to talk about things. He said, no, I'm not going to do
17 it; I'm going to take the stand and I'm going to say
18 everything. And that's what he did. You couldn't get
19 anymore live than what happened today. He told you
20 everything that he wanted to tell you today. I think
21 he told you the truth. I know he told you the truth.
22 He looked you in the eye, he told you what happened.
23 He didn't try to poo-poo anything. He didn't try to
24 cover up anything. He didn't try to make anything look
25 good. He told you the truth. There's a lot of

1 embarrassing stuff up there.

2 Now, the judge -- the key to this, other than
3 not the evidence, is they have got to prove beyond a
4 reasonable doubt. And I'm going to tell you what
5 reasonable doubt is. Okay? Or make a person stop and
6 hesitate, or would make a person stop -- not act to do
7 something. It's called beyond a reasonable doubt.
8 Well, let me tell you how I explain that. Let's say
9 for example you bought a new house and you're out
10 planting some azaleas or flowers and as you're planting
11 them you cut your hand on a piece of metal that's down
12 in the ground. And you cut it -- you cut it pretty
13 bad. And you don't think much about it. Let's say
14 you're a man, because I don't pay much attention to
15 that. But you don't pay much attention to it. And you
16 put a little Mercurochrome on it and you go on.

17 And three or four days later your hand starts
18 hurting. And it's swollen and red and you think, well,
19 it'll be all right. And then a couple of days later it
20 really starts hurting, puss and things start coming out
21 of it. You say, well, maybe I need to go to the
22 doctor. And you go to the doctor.

23 And you go to that doctor and the doctor says,
24 look, you've got problems, you've got gangrene in your
25 hand, and serious trouble, we're going to have to cut

1 your hand off. Let's say it's your right hand, like
2 mine. I would be out of business if I didn't have a
3 right hand. We've got to cut your right hand off or
4 you could die of blood poisoning. Okay?

5 Now, the decision that you have to make -- and
6 this would be equated to reasonable doubt -- do you let
7 them cut your hand off, do you not believe the doctor
8 and possibly die, or do you get a second opinion.
9 Okay? And let's say that you know you've got to do
10 something. So it's between letting the doctor cut your
11 hand off, or getting a second opinion. Okay? That
12 would be equivalent to reasonable doubt.

13 Now, let's say, for example, that you know that
14 as you're -- this doctor has got these lab reports back
15 and stuff, and he just tells you you've got to have
16 this procedure. But let's say you find out that the
17 doctor didn't do certain procedures. Are you going to
18 let him cut your hand off, or are you going to get a
19 second opinion? Then you go and learn that a lot of
20 the procedures he's done is screwed up. You going to
21 let him cut your hand off, or are you going to get a
22 second opinion?

23 This confession -- we're going to go through
24 this -- you will decide whether or not those
25 confessions were given freely and voluntarily. That's

1 going to be your decision. The State has to prove
2 everything beyond a reasonable doubt. They have to
3 prove that those confessions were not coerced. That
4 means promises, promises, weren't made, threats weren't
5 made. That's what coercion is.

6 You heard Detective Sharp get up there on the
7 stand and say, yeah, I might have told him that; I
8 think I told him that, that if he would just say he did
9 something to the child and it was an accident that, you
10 know, we would work that out, we would help him.
11 That's -- I might have said that. He said something
12 like that. I might have said -- the transcript is back
13 there.

14 Justin said they told him all along, say you did
15 this, do this and we'll get you a bond. When you look
16 at the scenario, I think that's -- I think you can
17 infer that. That's going to be beyond -- you've got to
18 believe that statement and what they told you beyond a
19 reasonable doubt.

20 Now, how can you -- how can you believe
21 something if you can't see it? In other words, if
22 I tell you -- you go to that doctor and that doctor
23 says, well, you've got blood poisoning and I've got to
24 cut your hand off, and you say, well, doctor, let me
25 read those lab reports, and let me see some of -- I

1 want to read that for myself, I want to go check it;
2 I'm going to let you -- I'm probably going to let you
3 do it, but let me read all these reports and stuff and
4 let me just look at this and let me see. And the
5 doctor says, oh, no, no, I can't let you do that, I
6 can't let you do that. Are you going to let him cut
7 your hand off, or are you going to get a second
8 opinion?

9 We don't know what was said. They don't want us
10 to know what was said. If they did, they would have
11 recorded it. If they did, they would let Justin write
12 it out. We don't know. How can we make a decision on
13 something when we're not allowed to see the evidence?
14 That's what this is about.

15 The judge will instruct you that if you find
16 that Justin Hillerby was coerced or was promised things
17 or was threatened in any way, you cannot consider those
18 confessions. That's what she'll instruct you on the
19 law.

20 Again, how can you make a decision about
21 something if you can't see it and you can't hear it?
22 Again, trust and verify. Well, they can't verify that.
23 We've just got to listen to what they say. And let's
24 look. They want to make this case. This is a feather
25 in their cap. They can't have things like this going

1 on in Summerville. This is a big case. These two
2 detectives, if they lose cases like this, they won't be
3 detectives too long.

4 Ladies and gentlemen, through all this bad-
5 mouthing Justin Hillerby and all -- bringing up all
6 this bad stuff about two girlfriends, and drinking, and
7 all this kind of stuff, what the solicitor -- because
8 the solicitor has no hard evidence except these
9 confessions, so-called confessions. That's all they've
10 got. And y'all know that. That's all they've got.
11 They've got nothing else.

12 What they've done is they want you to take these
13 confessions, and what people have said bad about him,
14 some of them he doesn't even know, and they put forth
15 an illusion. They've got an illusion that he killed
16 this kid because he was there, and the confessions, and
17 how bad the child looks and all this, they've created
18 an illusion.

19 I'm going to tell you a story, and this is the
20 last story I'm going to tell you because I've talked
21 too long. When I was a child about six years old, my
22 mother and father divorced and I moved by -- we moved
23 back to Lancaster, South Carolina, and my grandfather
24 helped raise me. And I love my grandfather. Greatest
25 man in the world. And the county fair came along.

1 Now, back in the '70s when I was growing up, the county
2 fair was a big deal, one of the big events. And he
3 agreed to take me to the county fair.

4 And I went to the county fair and I asked him to
5 let me go in this -- we called it a fun house, but it
6 was a house of mirrors. And I went in by myself, and I
7 got lost. And you could go, and about halfway in the
8 house there was a big, huge windowpane that you could
9 look out onto the fair, the other people at the fair,
10 and people could look at the people in the glass house
11 walking into the mirrors, and lost, and they could sit
12 out there and see their kids and laugh. And I finally
13 found that, and I started beating on the window. Six
14 years old, crying, I can't get out, I can't get out.
15 My granddaddy came over and he went to the man at the
16 fair and said, sir, could you go get my grandson out of
17 there, he got lost, he can't get out.

18 The man from the fair came and got me, and he
19 came and got me out. And when I got out, I'll never
20 forget the words that he said. He said, son, if you
21 ever go into a house of mirrors again and you get lost
22 and you can't find your way, look at the floor; look at
23 the floor, and the floor will -- you can find your way
24 out.

25 What the solicitor has done here today, with no

1 physical evidence, no blood evidence, no DNA evidence
2 at all, nothing that shows Justin Hillerby was angry
3 that night, nothing shows that he was drunk -- he was
4 drinking, we'll admit that -- nothing he was drunk,
5 nothing that he was angry about, has tried to create
6 through these false statements, bits and pieces of
7 different interviews over a period of time, putting him
8 in a jail cell, bringing him back out, back and forth,
9 they've tried to create an illusion to blame this on
10 this young man, even though there were other people in
11 the house, even though other people were angry in the
12 house.

13 I'm sure Brandi and Eric were angry that the
14 girl that had the house, S , came in and got them
15 up at one o'clock and broke into their room, I'm sure
16 they were mad, too. So there were a lot of people mad
17 and stuff there that night. But they've decided to put
18 all this on Justin Hillerby, and that's all they have.

19 But you'll have to make the decision, again, on
20 these confessions, so-called confessions. But, again,
21 how do you make a decision on something when you can't
22 see it, when you only hear their side of it, you don't
23 hear anybody else's side. And they don't want you to
24 hear anybody else's side. Thank y'all.

25 THE COURT: Ladies and gentlemen, we are going

1 to go ahead and break for our lunch. Please be back in
2 your jury room at 2:00 p.m.

3 Do not discuss this case amongst yourselves. Do
4 not begin your deliberations. You have not been given
5 the charge on the law.

6 Please rise for the jury.

7 [Whereupon, the jury exits the courtroom at
8 12:45 p.m.]

9 THE COURT: Thank you. We'll be at recess until
10 2:00.

11 [Whereupon, a recess is taken from 12:46 p.m. to
12 1:58 p.m.]

13 THE COURT: Let's bring in the jury.

14 Ms. Williams, I'm going to limit you at forty-
15 five minutes.

16 MS. WILLIAMS: There will not be a problem, Your
17 Honor.

18 [Off the record momentarily]

19 THE COURT: All rise.

20 [Whereupon, the jury enters the courtroom at
21 2:03 p.m.]

22 THE COURT: Ms. Williams.

23 MS. WILLIAMS: Thank you, Your Honor.

24 - - -

25 - - -

CLOSING ARGUMENT

1
2 MS. WILLIAMS: Ladies and gentlemen, I want to
3 thank you, first of all, for your patience these few
4 days. I am going to be mercifully brief. I sense that
5 you are weary. You have really paid close attention.
6 And you have seen a lot of very graphic and disturbing
7 evidence, and I apologize for that. We have had to
8 share some very inappropriate language with you, and I
9 apologize for that. But this is what the case is,
10 unfortunately. It's a very disturbing set of facts.

11 We also had to go through some very tedious sort
12 of steps to get some evidence in. I know it seems
13 boring and useless, but we just have to do those things
14 in order to give you all the evidence, because we want
15 you to find the truth. We want you to have the truth.

16 Now, Mr. Bosnak wants to know why there's not a
17 court reporter and a judge in the interrogation room
18 with the defendant. He wants to know why you don't
19 have a video of the interviews. You know what? You
20 got something better than a video. You got it live.
21 You got to hear it straight from the horse's mouth.
22 That man sitting right over there was out best witness.
23 You are the judge of credibility. Truth and verify?
24 Absolutely. You are the sole judges of credibility.
25 And I would put these police officers' credibility up

1 against this man, who sat up here and lied and lied and
2 lied to you over and over again.

3 Mr. Hillerby would have you believe that there
4 was some kind of police conspiracy, that he gave these
5 statements only because they made him give these
6 statements. Well, what about the phone call? Y'all
7 sat here and listened to the phone call and followed
8 along with the transcript. And let me tell you, you
9 can listen to that call again. If any of you have
10 questions or you can't remember everything he said, I
11 encourage you to look at all of the evidence. If
12 anybody wants to listen to that tape again, you can.

13 But just in part, this was on the 26th of
14 September, eight days after he was interviewed by
15 detectives. There was no detective there on the phone
16 with him. And what he said was, baby, I smacked him,
17 and when he hit the floor is I guess when it started.
18 And I find that very interesting: when it started.
19 Then he said, I didn't notice it because I was drunk.
20 Mr. Bosnak says there's no evidence that his client was
21 drunk. He, himself, said he was drunk. And then he
22 said, I gave the true statement on Thursday.

23 Well, if you think about it, the 18th is
24 Thursday because it happened on the 14th, which was
25 Sunday. Monday is when they found this poor child.

1 Just do the math. Thursday is the 18th.

2 Mr. Bosnak says that from the beginning he's
3 maintained this knee story, this story where the child
4 is running down the hall and poor Mr. Hillerby enters
5 the hallway and his knee accidentally hits this child
6 and the child falls back and hits his head on the
7 floor. He's always told that story. Well, that's not
8 true, either, because if you look at the statement on
9 the 15th -- and, again, you're going to have this
10 evidence back here -- he says nothing. Nothing. It's
11 not until the 17th, when he is told that the child died
12 from blunt-force trauma to the head, that he dreams up
13 this story about the knee.

14 Now, I believe that you will see, when you look
15 at the evidence, that probably the statement on the
16 18th is the true statement. Is it all the details?
17 No. Is it the whole story? Probably not. He
18 requested to speak with Detective Sharp because he
19 thought if he gave him a little bit more information,
20 he could get a lesser charge. That was the testimony.
21 So he gave a little bit more. But clearly he didn't
22 give all the details, because you saw that baby.

23 You saw the injuries to that baby. And Mr.
24 Bosnak would have you believe that he had to hit him
25 twenty-three times. Well, that simply wasn't the

1 testimony by the doctors. There were nine separate
2 points of impact on the head. There were many bruises
3 on the face. But when you look at those pictures, if
4 you can even stomach to do that, if you count every
5 bruise, yes, there's twenty-three bruises. You can
6 even see on his eye a fist mark. Of course he says he
7 hit him openhanded. But he's already worried about the
8 way that the press is portraying him as a monster, so
9 he wants to put his story in the best light possible.

10 Yes, the statement on the 18th is the true
11 statement. Does he give all the details? Probably
12 not. But the only two people that know, and I told you
13 this from the beginning, is that poor baby and that man
14 right there. And that is the person who tells the most
15 about what happens.

16 Before, when I was talking about the police
17 conspiracy, I said, well, where are the police on the
18 phone. Even after that, four months later, he writes a
19 letter. You heard Ms. Biagianti ask him, did you write
20 this letter. Yeah. Is this what you wrote. Yeah. He
21 writes to the mother of this child: I called him in
22 the kitchen and popped him in the head. I knocked him
23 down.

24 He's still telling part of the story. But how
25 can that be part of a police conspiracy if he's writing

1 it to her four months later? Nobody else that was in
2 that home had anything to do with this child's death.
3 And how do you know that? Because he tells you. On
4 the 18th they ask him, did the roommates have anything
5 to do with this. No. Now, he could have said, I don't
6 know. You know why he said no? He knows they had
7 nothing to do with it because he knows that he did it.

8 Also, on the tape with the girl, the mother of
9 the child, she says, Justin, what happened, what
10 happened. Why would she be asking that question? And
11 that's when he tells her, oh, baby, I smacked him, and
12 he hit the floor. And then the whole rest of the tape
13 is about him and how he got beat up in jail. More
14 about me. There's no sense of feeling about this
15 child. None. And why should there be? You heard
16 about the way he treated this child. Who calls a
17 twenty-two-month-old child a pussy? I hate to even use
18 that word in that context.

19 And then he sits up here and says, I have never
20 called a child a pussy. And the mother of his child,
21 who really doesn't want to testify, admits that he
22 calls his own kid a pussy, a child who is the same age
23 as the victim in this case. He sat up here and told
24 you, oh, I have never struck a child, I have never
25 struck a child, and yet the mother of his child had to

1 admit that he struck his own child. And interestingly
2 enough, the time she recounts in her statement is when
3 he knocks over his drink. And that child is the same
4 age as Victim [REDACTED] was, except that child is still
5 alive, thank goodness.

6 Mr. Hillerby's whole police conspiracy also
7 doesn't work for another reason. He would have you
8 believe -- I think he told you, because those holding
9 cells are the worst ones he's ever been in. He sat up
10 there and told you about all the experience he had with
11 the police. We're not talking about some naive kid
12 who's never been with the police. He went on and on
13 and on about all the different arrests: some officer
14 that just knows him by name that picks him up all the
15 time when he's drunk, and resisting arrest, and
16 disorderly conduct. We're not talking about someone
17 that doesn't have experience with law enforcement.

18 Now, I'm going to go through -- and I'm going to
19 stick to my promise and be short. I'm going to go
20 through each witness very, very briefly, just because
21 this is so important. And I just want to remind you
22 what the testimony was. But having said that, I also
23 want to remind you that that you -- you're going to
24 take the evidence back with you. But if there is
25 something you want to rehear, then I encourage you to

1 do that. I want you to have all the information,
2 because you are the finders of the truth. If we could
3 just go through each witness -- oh, one other thing,
4 too.

5 You can go ahead and put that up.

6 Reasonable doubt is not what I say it is, and it
7 certainly isn't what he says it is. It's what the
8 judge says it is. Now, as charming as that story was
9 about the azalea bushes and the gangrene and getting
10 your hand cut off and all that, that is not what
11 reasonable doubt is. Because there is nothing that you
12 can prove beyond any doubt. And the judge is going to
13 give you a specific instruction about reasonable doubt.
14 Listen to her. She is the authority on reasonable
15 doubt.

16 Anyway, as we go through the evidence, the first
17 witness was Leonard S. , the grandfather of this
18 child. Clearly, this man was heartbroken. This child
19 was loved. ~~VICTA~~ was acting normal at the pool. Why
20 is this significant? Because you heard testimony about
21 the way a child acts when he's got brain injury. He
22 showed you -- or we showed you, through Mr. S , a
23 picture of ~~VICTA~~ three days before his death. You're
24 going to have that picture back there. There is no
25 mark on this child. You heard the doctor say that if

1 there would have been bruises, the kind of bruises he
2 saw at autopsy, he would have expected to see things
3 like that three days before.

4 He describes Jen as hysterical at the scene.
5 You don't need testimony for that. Listen to that 911
6 tape. That woman is shocked to find her child like
7 that. Justin feels faint. Oh, I'll bet he does,
8 because I think when he put that child in that crib, he
9 did not know that child was going to die and the gig is
10 up the next morning. He feels sick to his stomach. He
11 has to stop the first interview and get some medical
12 treatment because he's been caught, and he knows it.

13 This is the first time we hear this little
14 running-into-the knee story. And what's interesting
15 about it is he says, suck it up. And you also heard
16 this would have been the 16th. The 16th is the day
17 that the autopsy came out. And that's why I showed
18 that to Detective Sharp, because that is the day that
19 everybody finds out that it's blunt-force trauma to the
20 head.

21 The next witness was Sheila Peck, 911 tape.
22 He's stiff as a board. I don't even want to use the
23 word. He's F'ing dead. Who talks about a baby like
24 that? No emotion. This is very interesting. If you
25 listen to that tape and look at the transcript, while

1 they're connecting him from one agency to the other,
2 almost to himself he says, why is he F'ing bleeding.
3 Well, that is interesting because when he put that kid
4 in that crib, there was probably no blood.

5 You heard the doctor talk about purge and about
6 how the only injuries that were bleeding were from his
7 mouth and his saliva because of the teeth going through
8 his lips because he was probably hit so hard in the
9 face. When he put that child in the crib, all this kid
10 had was closed-head injuries and bruising on the face.
11 There was probably no blood. And that probably was a
12 shock to him. And I find that very interesting, and I
13 would like you to -- if you remember that, that is a
14 very interesting fact that Mr. Hillerby reveals without
15 even knowing it.

16 Her demeanor is -- speaks for itself; his
17 demeanor speaks for itself.

18 Brandon H. [REDACTED], sixteen-year-old kid, doesn't even
19 know these people. If you want to judge someone's
20 credibility, what bias does he have? He has no dog in
21 this fight, as we say. He's just going to tell you
22 what he saw. He doesn't know him. He sees the child
23 acting normally. Again, the doctor told you how a
24 child would act with brain injury. When the child
25 falls in the pool, in the deep end, the mother runs

1 over and says, thank you, thank you, for saving my
2 child. What does the defendant say? You should have
3 left him there. Go in the corner, because nobody cares
4 about you. And he admitted that he said that on the
5 stand.

6 Courtney Thayman, she doesn't know them. She,
7 too, has no reason to lie. Justin calls him a pussy.
8 Remember she got up there and said, can I say the bad
9 word. She was shocked to hear someone call a child
10 that word. Go ahead and cry, because nobody wants you.

11 Sharon S : she describes her daughter as
12 hysterical. Justin is sick and dizzy. I'll bet he
13 was. Justin seemed nervous. That's a consistent
14 description of Justin in the days following. The
15 family was very upset.

16 Eric Riggins, the roommate: the way that he
17 describes Justin with the children is tough love
18 without the love, and has heard him say suck it up
19 several times. Doesn't like ~~victim~~ to cry. And at 7:30
20 or 8:00, it looked like ~~victim~~ had been crying. What do
21 we know about Eric Riggins? His DNA is on his own
22 door. Is that a big shocker? No.

23 Justin's -- this is what I alluded to before.
24 On the statement on the 18th, question: did the
25 roommates Eric and Brandi have anything to do with this

1 incident. Answer by Justin, in his own handwriting,
2 no.

3 Brandi: Jen was not much of a disciplinarian.
4 Justin didn't seem to care for the kids. He just kind
5 of put up with them. Justin seemed nervous the next
6 day and said they were trying to get him. Again, the
7 statement on the 18th. Did the roommates have anything
8 to do with this. Answer: no. How does he know that?
9 Because he knows he did it.

10 Jennifer Angel: she's a friend of Justin's.
11 she's known him for six years. Called to invite Justin
12 out for the evening. But guess who intercepts the
13 call? Jen. It's her turn to go out. She was with Jen
14 until 10:00 or 10:30 and left her at the Ice House.
15 And you have evidence that she wasn't in that home --
16 she wasn't back in that home until about 1:30 or 2:00.
17 And she sees ~~VICTIM~~ acting normally about 7:00 or 7:30.

18 Jennifer S, the mother of the child: she
19 found out he was at Melissa's the night before and she
20 took his phone. So took his phone away, you're not
21 calling her, it's my turn to go out, and they have
22 words that day because she finds out that he's two-
23 timing her again. This was the first time he had ever
24 been with the children for more than half and hour.

25 That is significant. Anybody that has children -- and

1 some of the witnesses talked about this -- it is a
2 challenge to have a two-year-old, especially if you
3 don't particularly want to be around that two-year-old.
4 She heard him call her child a pussy.

5 Why did she leave the child with him? It's
6 inexplicable. When she left she saw no bruises on her
7 child's face. The next morning when she goes and gets
8 him, he says, oh, let him sleep, let him sleep. If you
9 do listen to the 911 tape, her demeanor speaks for
10 itself.

11 Is she a good mother? That's something we need
12 to think about here. I don't know how you are going to
13 evaluate the behavior of Jennifer S. Should she
14 have left her child with this man after the way she saw
15 him act toward her child at the pool? You may all come
16 up with a different conclusion. But does it have
17 anything to do with him beating the child to death?
18 Regardless of what you think about her as a mother,
19 evaluate the evidence against Justin Hillerby. She is
20 facing her own charges about the pool, about neglecting
21 her child at the pool.

22 The other interesting thing about the tape from
23 the jail is after she said, Justin, what happened, and
24 he tells her that, later on she says -- or maybe it's
25 before -- she said, I got arrested, too. And he says,

1 why; you didn't do anything. He knows she didn't do
2 anything. It's just like the neighbors [sic]. How did
3 he know that? Because he did it.

4 Melissa: Justin's mother is staying with
5 Melissa. Obviously, Melissa does not want to testify
6 for the State. It was like pulling teeth to get
7 information out of her. So the things that we got out
8 of her were the truth. She didn't want to tell it to
9 us. She refused to answer questions. But she had to
10 admit Justin was very upset with her when he left the
11 morning of 9/14. He tried to get back together with
12 her and she rejected him. Let's add to that. She also
13 told us today that he used to call her son a pussy and
14 that she -- that he hit her child after he spilled his
15 drink.

16 Officer Jason Workman, I don't know if you
17 remember him. He was the -- one of the first officers
18 at the scene. What does he hear Mr. Hillerby say? I'm
19 sorry. I'm sorry.

20 Officer Laura Sloan: again, I'm sorry, I'm
21 sorry.

22 Randy Olsen: he is the crime scene technician.
23 He's not involved with detective work. His job is to
24 go to the scene and look for anything that could be
25 relevant to the case. He collected a lot of evidence.

1 And we have all of this evidence for you to look at.
2 Some of it really doesn't help. It's just that we want
3 you to have everything. He did an excellent job. He
4 did no presumptive test for blood. On some of the
5 evidence he wrote, blood, on a swab he took either from
6 carpet or a door.

7 What you have to remember is that was an
8 assumption he made. There was no presumptive testing
9 for blood. We have no idea what some of those swabs
10 were because they didn't test them for blood, because
11 as you heard the DNA analyst say, if they were to test
12 it for blood there wouldn't be enough left over to test
13 for DNA. So we have no idea what some of those items
14 say, even though it says blood.

15 Not a lot of blood at the scene. This is not
16 surprising, given what Dr. Batalis told you about these
17 injuries. The only injuries that bled were the
18 injuries inside of his mouth. He was bleeding inside
19 his skull. His brain was bleeding, unfortunately.

20 It's also a very interesting fact that today
21 Mr. Hillerby said that he wondered if the child had a
22 brain hemorrhage. Now, was that something that the
23 ordinary person would wonder? And we've not heard that
24 before in any of his statements. No forced entry.
25 Nobody from the outside coming in and going inside the

1 kid's room and beating him to death while he's in his
2 crib. Captain Flog [phonetic]. Again, Jen was
3 hysterical; Justin, unemotional. Justin wants to know,
4 when are you going to know what happened. Now, this
5 man goes to hundreds of crime scenes, and he thought
6 this was odd. He thought it was odd not just because
7 of the words but the way he said it and the way the guy
8 was acting. And he puts that in his report.

9 Engineer Evans: Jen was hysterical; Justin, no
10 emotion.

11 Robin Taylor, who talked a little bit about the
12 DNA. There's no big surprises with the DNA. ~~VICTIM'S~~
13 DNA is on ~~VICTIM'S~~ pajamas, and there is another
14 contributor that we're not -- there's not enough DNA
15 there to know who it is. It could be Jen, it could be
16 Justin, it could be Serena, it could be Leonard.
17 Eric's DNA is on his own door. Is it blood, is it
18 sweat, is it food? Nobody knows. There's an
19 unidentified female contributor, and that's probably
20 his girlfriend Brandi. They were both in the room, in
21 and out of the room. It would not be surprising that
22 their DNA would be on their own door.

23 Betty Butler: no blood. Not surprising.

24 The paint-roller handle: interesting. We don't
25 know what he hit the child with. Says he hit him with

1 an open hand. Not likely. Maybe a couple of the
2 times. Did he hit him with the paint roller? We may
3 never know. But the paint roller was on the floor.
4 I'm glad they collected it. There was no blood or hair
5 on it, but that's not surprising because the skull is
6 not fractured. So if he were hit with the paint
7 roller, there wouldn't be -- you wouldn't expect to see
8 any blood or hair on it.

9 Detective Sharp: this man was Mirandized three
10 separate times over -- and in between he went home and
11 came back. It wasn't like they kept him in a room. I
12 mean, Mr. Bosnak makes it sound like they just
13 interrogated him for twenty hours straight. The first
14 time, you know, they questioned him. He went back home
15 and came back two days later. He drives all the way
16 out to the Dorchester Sheriff's department, then he
17 drives back to Summerville. You know, he's got plenty
18 of time to think about this. He knows exactly what's
19 going on.

20 Changes his story a little more each time.
21 Again, look at the statements. I want to get my
22 version out; the press is portraying me as a monster; I
23 gave the true statement Thursday, 2/18/08. He says
24 that in the tape when he's talking to Jennifer. Now I
25 can sleep at night. Wasn't that nice.

1 Dr. Batalis: closed-head injury, no blood from
2 head and face injuries. As we just said, blood was
3 from the mouth and purged from the body as the child
4 was dying. He said it was blunt-force trauma to the
5 head, homicide. Twelve different bruises on the face
6 and neck, two cuts on the inner lip but those could
7 come from one hit to the mouth. The ear injuries are
8 non-accidental. Both the doctors told you this. It's
9 very, very hard to get those kinds of injuries unless
10 someone inflicts them. Nine points of impact on the
11 head. And he came and he showed you on the thing.
12 Retinal hemorrhaging from shaking. What did we learn
13 today from Detective Dixon? I might have shaken him a
14 little bit. Still minimizing, but giving you very
15 valuable information. Subdural bleeding in the brain.
16 Subarachnoid bleeding in the brain. Fresh blood around
17 the brain. These are very traumatic brain injuries.
18 Several axonal brain injury. The symptoms would have
19 been pretty close to after the brain injury was
20 inflicted. And what that tells you is there wasn't a
21 lot of screaming going on from this kid. Once his
22 brain is injured, he would have been lethargic, he
23 would have been sort of wobbly, he wouldn't have been
24 able to function like he normally functioned.

25 Dr. Amaya, our last witness: normal, healthy

1 twenty-two-month old with mild asthma and eczema. You
2 know, Mr. Bosnak showed you all those pictures of
3 bruising all over his body. We had to be honest with
4 you. Those were not bruises. You know, I would have
5 loved to have told you more about some more beatings
6 that Mr. Hillerby did, but I have to tell the truth and
7 the truth is that those are not bruises. The only
8 bruises are around the head and neck. And we know that
9 because Dr. Batalis told you the procedure he went
10 through to determine if those were bruises, and there
11 was no bleeding under the skin. Non-accidental
12 injuries: she was sure about that. Forceful shaking:
13 I might have shaken him a little bit. He would have
14 been wobbly, sleepy, hard to move. Again, look at the
15 defendant's statements. He unwittingly describes brain
16 injury to a T. And at that point he doesn't even
17 realize that that hurts him because he doesn't know
18 anything about brain injury. I guess he's watched CSI
19 but he hasn't paid attention to some of the medical
20 stuff because when he's describing how the child is
21 acting, he doesn't realize that those are classic
22 symptoms of brain injury. The injuries looked fresh.
23 Dr. Batalis said they all looked like they were about
24 the same age. Angular acceleration: it's just from
25 shaking. Physical pool of subdural blood at autopsy:

1 traumatic brain injury. Could not have behaved
2 normally after the brain injury. He's not running
3 around anymore. He's not screaming.

4 Now, when he gave his final true statement, what
5 did he tell Detective Sharp? I can finally get some
6 sleep. You know, one of the witnesses up here, I think
7 it was Eric Riggins, said, when I close my eyes at
8 night, I see that, I see that picture. I hope that
9 doesn't happen to any of you-all because those were
10 very disturbing pictures. But I suspect, based on the
11 reaction and the demeanor of the witnesses that you've
12 heard, that many of them close their eyes at night and
13 they see those pictures, those horrible pictures, of
14 ~~UCDM~~, the way he looked in the crib, the way he looked
15 at autopsy. And I'm not going to show you anymore of
16 those pictures. You're welcome to look at them if you
17 need to look at them. But I don't want you to forget
18 that before he beat this child, this is what this baby
19 looked like. That's what this case is about.

20 We have sat here and talked for hours about this
21 man, Justin Hillerby. Justin Hillerby. Do not forget,
22 ladies and gentlemen, because that is what this child
23 looked like before he got his hands on him. Thank you.

24 - - -

25 - - -

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, I remind you that during this trial you and I have had certain duties to perform. As the trial judge it is my responsibility to preside over the trial in this case, and I also have the duty to rule on the admissibility of the evidence that has been offered during this trial. You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record, you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand, any exhibits which have been made part of the record in this case, as well as any stipulations of counsel.

I have the additional duty to charge you on the law applicable to this case. As the presiding judge, I am the sole judge of the law of this case, and it is your duty as jurors to accept and apply the law as I state it to you now. If you already have any idea as to what the law is or what the law ought to be and it does not agree with what I'm about to tell you, you must abandon your own idea and apply the law as I state it to you now under your oath as jurors.

In every case tried in this Court before a jury, the jury becomes the sole and exclusive judge of the

1 facts in a case. A trial judge cannot state, comment
2 on, or make any statement regarding the facts in this
3 case. You, the jury, are the sole judge of the facts
4 in this case. Do not think that anything that I have
5 said during the charge on the law, or throughout the
6 trial in this case, that I have any opinion about the
7 facts in this case. I do not. The law does not allow
8 me to have an opinion regarding the facts in this case.
9 This is a matter solely for you, the jury, to
10 determine. As jurors it is your duty to determine the
11 effect, value, and weight and the truth of the evidence
12 that has been presented during this trial.

13 The indictment charges the defendant with
14 homicide by child abuse. I remind you that the fact
15 the defendant was arrested, charged, and indicted in
16 this case is not evidence in this case and cannot be
17 considered by you as evidence of guilt in this case,
18 nor does it create any presumption or inference of
19 guilt. This document is simply the formal written
20 instrument which contains the charges made against the
21 defendant. It is the formal document by which this
22 case is brought into this court. The defendant has
23 pled not guilty to this indictment, and that plea puts
24 the burden on the State to prove the defendant guilty.

25 A person charged with committing a criminal

1 offense in South Carolina is never required to prove
2 himself innocent. I charge you it is an important rule
3 of law that the defendant in a criminal trial, no
4 matter what the seriousness of the charge may be, will
5 always be presumed to be innocent of the crime for
6 which the indictment was issued unless guilt has been
7 proven by evidence satisfying you of that guilt beyond
8 a reasonable doubt. This presumption of innocence does
9 not end when you begin your deliberations. It
10 accompanies the defendant throughout the trial until
11 you reach a verdict of guilt based upon evidence
12 satisfying you of that guilt beyond a reasonable doubt.

13 The presumption of innocence is like a robe of
14 righteousness placed about the shoulders of the
15 defendant, which remains with the defendant until it
16 has been stripped of him by evidence satisfying you of
17 the defendant's guilt beyond a reasonable doubt. The
18 presumption of innocence is not mere legal theory. It
19 is not just a legal phrase. It is a substantial right
20 to which every defendant is entitled unless you, the
21 jury, are satisfied from the evidence of the
22 defendant's guilt beyond a reasonable doubt.

23 The State has the burden of proving the
24 defendant guilty beyond a reasonable doubt. Some of
25 you may have served as jurors before where you were

1 told that it was only necessary to prove that a fact is
2 more likely true than not true, such as by the greater
3 weight or the preponderance of the evidence. In
4 criminal cases the State's proof must be more powerful
5 than that. It must be beyond a reasonable doubt.
6 Proof beyond a reasonable doubt is doubt that leaves
7 you firmly convinced of the defendant's guilt. There
8 are very few things in this world that we know with
9 absolute certainty, and in criminal cases the law does
10 not require proof that overcomes every possible doubt.
11 If based upon your consideration of the evidence you
12 are firmly convinced that the defendant is guilty of
13 the crime charged, you must find the defendant guilty.
14 If, on the other hand, you think there is a real
15 possibility that the defendant is not guilty, you must
16 give the defendant the benefit of the doubt and find
17 him not guilty.

18 There are two types of evidence which are
19 generally presented during a trial: direct evidence
20 and circumstantial evidence. Direct evidence is the
21 testimony of a person who claims to have actual
22 knowledge of a fact, such as an eyewitness. It is
23 evidence which immediately establishes the main fact to
24 be proved. Circumstantial evidence is proof of a chain
25 of facts and circumstances indicating the existence of

1 a fact. It is evidence which immediately establishes
2 collateral facts from which the main fact may be
3 inferred. Circumstantial evidence is based on
4 inference and not on personal knowledge or observation.
5 The law makes absolutely no distinction between the
6 weight or value to be given to either direct or
7 circumstantial evidence, nor is a greater degree of
8 certainty required of circumstantial evidence than that
9 of direct evidence. You should weigh all of the
10 evidence in this case and after weighing all the
11 evidence if you are not convinced of the guilt of the
12 defendant beyond a reasonable doubt, you must find the
13 defendant not guilty.

14 Necessarily, you must determine the credibility
15 of the witnesses who have testified in this case.
16 Credibility simply means believability. It becomes
17 your duty as jurors to analyze and to evaluate the
18 evidence and determine which evidence convinces you of
19 its truth. In determining the believability of
20 witnesses who have testified in this case, you may
21 believe one witness over several witnesses or several
22 witnesses over one witness. You may believe part of
23 the testimony of a witness and reject the remaining
24 part of the testimony of that same witness. You may
25 believe the testimony of a witness in its entirety, or

1 reject the testimony of a witness in its entirety. You
2 may also consider whether a witness has exhibited to
3 you any interest, bias, prejudice, or other motive in
4 this case. You may also consider the appearance and
5 the manner of a witness while he or she was on the
6 witness stand.

7 The rules of evidence ordinarily do not permit
8 witnesses to testify to opinions or to conclusions. An
9 exception to this rule exists for witnesses we call
10 expert witnesses. A witness who by education and
11 experience has become expert in some art, science,
12 profession, or calling, may state an opinion as to the
13 relevant and material matter in which the witness
14 claims to be an expert and may also state the reasons
15 for that opinion. You should consider any expert
16 opinion received in evidence in this case and, like any
17 other evidence, give it the weight you think it
18 deserves. If you decide that the opinion of an expert
19 witness is not based on sufficient education and
20 experience, or if you conclude that the reasons given
21 in support of the opinion are not sound, or that the
22 opinion is outweighed by other evidence, you may
23 disregard the opinion entirely. An expert witness'
24 testimony is to be given no greater weight than that of
25 any other witness simply because the witness is an

1 expert. Further, you are not required to accept an
2 expert's opinion, even though it is not contradicted.

3 In order to establish criminal liability,
4 criminal intent is required. For example, the mental
5 state required to be proven by the State for a
6 particular crime might be purpose, intent, knowledge,
7 recklessness, or criminal negligence. Criminal intent
8 must be proven by the State beyond a reasonable doubt.
9 Criminal intent is always a matter that must be
10 determined by the jury from the circumstances
11 surrounding the situation. There is no way to prove
12 intent to a mathematical certainty. The law says that
13 criminal intent may be inferred from the circumstances
14 shown to have existed. This is how you make a
15 determination of whether or not the element requiring
16 intent was present. It is not necessary to establish
17 intent by direct or positive evidence, but intent may
18 be established by inference in the same way as any
19 other fact, by taking into consideration the acts of
20 the parties and all the facts and circumstances of this
21 case. Criminal intent is a mental state, a conscious
22 wrongdoing. It is up to you to determine what the
23 defendant intended to do, based upon the circumstances
24 shown to have existed. Criminal intent can arise from
25 action or a failure to act. It may arise from

1 reckless, negligence, or an indifference to duty or
2 to consequences that is considered by the law to be the
3 equivalent of criminal intent.

4 A statement alleged to have been made by the
5 defendant has been admitted into evidence in this case.
6 While the Court has determined that the statement is
7 admissible, I instruct you that you, the jury, make the
8 ultimate decision of whether or not the defendant made
9 the statement. If the defendant did make the
10 statement, you must determine whether the statement was
11 made by the defendant voluntarily and of his own free
12 will. This means that the statement was not caused by
13 pressure, force, fear, threats, coercion, intimidation,
14 or by hope or a promise of leniency or reward of any
15 kind. In determining whether the statement was
16 voluntary, you should consider both the characteristics
17 of the defendant and the details of the questioning.
18 Some of the factors that you must consider are the age
19 of the defendant, the defendant's education or lack of
20 education, the defendant's mental ability or capacity,
21 the defendant's IQ or intelligence, the place, length
22 of detention, the defendant's background and
23 environment, the nature of the questioning, the advice
24 or lack thereof to the defendant of his constitutional
25 rights including but not limited to the right to remain

1 silent, that any statement could be used against him in
2 a court of law, the right to have a lawyer present,
3 that if he could not afford a lawyer a lawyer would be
4 appointed to represent him without any cost, and that
5 he could stop making a statement at any time. You must
6 carefully consider all of the surrounding circumstances
7 before you give any weight to an alleged statement.

8 The State has the burden of proving beyond a
9 reasonable doubt that the alleged statement was
10 voluntary. If you determine it was, you may give the
11 statement any further consideration that you deem
12 proper. You must decide what weight, if any, should be
13 given to the alleged statement. If you determine the
14 alleged statement was not the free and voluntary
15 statement of the defendant, you should not consider the
16 statement at all.

17 The defendant is charged with homicide by child
18 abuse. The State must prove beyond a reasonable doubt
19 that the defendant caused the death of a child under
20 the age of eleven while committing child abuse or
21 neglect. Child abuse or neglect is an act or failure
22 to act which causes harm to the child's physical health
23 or welfare. Harm to the child's physical health or
24 welfare means the defendant either inflicted or allowed
25 to be inflicted on the child physical injury or failed

1 to supply the child with adequate food, clothing,
2 shelter, or health care, and this failure caused a
3 physical injury or condition which caused death, or
4 abandoned the child, causing the child's death. The
5 State must also prove beyond a reasonable doubt that
6 the death occurred under circumstances showing an
7 extreme indifference to human life.

8 Insanity caused by the use of drugs or alcohol
9 may be a defense if the insanity is permanent and
10 destroys the defendant's ability to know right from
11 wrong. However, when voluntary intoxication has not
12 produced permanent insanity, it is not a defense to a
13 crime. A person who voluntarily becomes intoxicated is
14 just as responsible for the acts committed while
15 intoxicated as when the person is not intoxicated.

16 Ladies and gentlemen, there are two possible
17 verdicts in this case. There is no particular order in
18 the way that I read them. It's simply one must go on
19 the verdict form first.

20 Madam -- excuse me -- Mr. Foreman, you are
21 responsible for signing the verdict form.

22 In the Court of General Sessions, docket 2008-
23 GS-08-2594, the State of South Carolina versus Justin
24 Ryan Hillerby, verdict form: we, the jury, find the
25 defendant guilty [sic]; or, we, the jury, find the

1 defendant guilty of homicide by child abuse.

2 Mr. Foreperson, you must sign the verdict form,
3 indicating that the decision is the unanimous decision
4 of the jury.

5 All twelve of you must agree on the verdict.
6 After you have reached a unanimous decision, you will
7 sign and date the verdict form and knock on the jury
8 room door, indicating to the bailiff that you have
9 reached a verdict.

10 Ladies and gentlemen, this will be the last time
11 that I make this statement to you. Do not begin your
12 deliberations until you are told to do so. We will be
13 gathering the verdict form and the exhibits that have
14 been admitted into evidence. They will go back to you
15 for your review. Do not begin your deliberations until
16 you are told to do so by the bailiff.

17 Madam Alternate, you have completed your service
18 to the jury. I will have you remain with us for just a
19 few moments. Do not discuss this case with anyone.
20 You will be placed in a separate room away from the
21 twelve jurors, but it is important that you not discuss
22 this case or begin any deliberations amongst -- with
23 yourself. All right?

24 Please rise for the jury.

25 THE ALTERNATE: Do you want me to stay?

1 THE COURT: You will be escorted out and they'll
2 put you somewhere else. Thank you.

3 [Whereupon, the jury exits the courtroom at
4 2:47 p.m.]

5 THE COURT: Thank you. Be seated.

6 Any objections to the charge as read? From the
7 State?

8 MS. WILLIAMS: None from the State, Your Honor.

9 MR. BOSNAK: Nothing from the defense, Your
10 Honor.

11 THE COURT: And I'm assuming that you have taken
12 the time and we -- all the exhibits that are ready to
13 go back are boxed up and ready to go? From the State?

14 MS. WILLIAMS: Mia has organized them
15 beautifully, Your Honor. They're in good shape. We
16 just need -- all the paper evidence in the case are
17 organized over here. I think this is everything that
18 has been introduced. If we want to put it back in the
19 box, that might be the easiest way to take care of it.

20 MR. BOSNAK: Yes, Your Honor.

21 THE COURT: Mr. Bosnak, if you would please make
22 sure.

23 I show Defense 1 through 10 has been admitted.
24 State's 1 through 23 have been admitted, 24 through 29,
25 36 through 41. 38 through 41.

MIA PERRON, CCR, CVR-CM

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1 MS. WILLIAMS: We did not introduce State's 36,
2 and we are not sending it back.

3 THE COURT: It was 38, not 36. I apologize.

4 MS. BIAGIANTI: Do you want to include some
5 gloves? Do you want to include some gloves, Your
6 Honor, since it's biohazardous?

7 THE COURT: Put all the evidence, and then we'll
8 send some gloves back if they needed it. Do you have a
9 box of gloves?

10 Any objection to a box of gloves going back, Mr.
11 Bosnak?

12 MR. BOSNAK: No, Your Honor.

13 [Off the record momentarily]

14 THE COURT: All right. Madam Bailiff, you have
15 all of the evidence, as well as the verdict form; is
16 that correct?

17 THE BAILIFF: I've got what they gave me.

18 THE COURT: All right. Do you have the verdict
19 form?

20 THE BAILIFF: Yes, ma'am.

21 THE COURT: They may begin their deliberations.
22 Thank you.

23 [Whereupon, the evidence and verdict form goes
24 to the jury at 2:51 p.m.]

25 THE COURT: Anything from the State?

1 MS. WILLIAMS: Nothing from the State.

2 THE COURT: Anything from the defendant?

3 MR. BOSNAK: Nothing from the defense, Your
4 Honor.

5 THE COURT: All right. We'll be at ease.

6 [Whereupon, a recess is taken from 2:52 p.m. to
7 3:13 p.m.]

8 THE COURT: Please be seated.

9 Mr. Bosnak, your client is not here. Do you
10 waive his presence for this?

11 MR. BOSNAK: No, no. He should be here. We
12 should have him out here.

13 I mean, what's the issue, Your Honor? Maybe we
14 won't need him.

15 THE COURT: We have a note, Mr. Bosnak.

16 MR. BOSNAK: Okay. Let's bring him out, please.

17 THE COURT: While we're waiting: Ms. Williams,
18 I understand that the jail phone -- the recorded
19 conversations on the CD, there is more than one?

20 MS. WILLIAMS: Yes, Your Honor. We did not
21 alter or change the CD. The way that they get it from
22 the Evercom system, it can't be altered. But the way
23 it works is each phone call is a separate track. And
24 we only authenticated track one. Actually, track two,
25 three, four, five and six is a different inmate who

1 stole the defendant's phone card.

2 The State would request that for that reason,
3 that technical problem, and because that tape is so
4 difficult to understand, that the jury just be able to
5 hear the evidence again the same way they heard it at
6 trial, which is that we played it in the courtroom with
7 the assistance of the transcript. And we'll be very
8 careful, like we were in trial, just to let them hear
9 that one track. I don't think it's very long.

10 THE COURT: What is the difficulty in recording
11 on the track on a separate CD --

12 MS. WILLIAMS: Because one of the issues with
13 authentication of that particular call was that it
14 can't be altered in any way because of the system that
15 the jail has. It's a company called Evercom. And the
16 only thing that they can do is download all the calls,
17 and they download as many as can fit onto a CD. So
18 when we get the CDs from the jail, we don't change
19 them, we don't alter them, we just have each individual
20 track. And we were only able to authenticate the one
21 track because that's the only one that has --

22 THE COURT: So you were unable to make a copy of
23 the one track that you played for the jury?

24 MS. WILLIAMS: Right. It's just all on one
25 tape. And because at one point, before we knew that we

1 could authenticate it with a person that's on the tape,
2 we were going to have to do it with a jail person. She
3 was just going to have to testify that she did nothing
4 to change the tape.

5 [Whereupon, Mr. Hillerby enters the courtroom at
6 3:16 p.m.]

7 THE COURT: All right. The jury wants a CD
8 player, the jail call, the jail phone-call transcripts,
9 and letters to Jen and Melissa.

10 MS. WILLIAMS: Our position is that we would ask
11 for the Court's indulgence and let them listen to that
12 evidence the same way they heard it at trial, which is
13 to play the tape with them, go through the
14 demonstrative aid --

15 THE COURT: Well, Ms. Williams, at this point I
16 really don't have an option because if I send a CD
17 player back there, there's no guarantee that they are
18 only going to listen to what was admitted; is that
19 correct?

20 MS. WILLIAMS: I'm sorry about that, Your Honor.
21 I've very sorry about that.

22 THE COURT: And my understanding is the letters
23 to Jen and Melissa were not admitted into evidence; is
24 that correct?

25 MS. WILLIAMS: They were not. But there is

1 testimony where the letters are read. I mean, we could
2 just advise them that if they want to listen to the
3 testimony of Justin Hillerby, that's the testimony that
4 those letters -- you know, the substance of those
5 letters were discussed. And they may not want to. But
6 they can't have the actual letters.

7 THE COURT: Mr. Bosnak?

8 MR. BOSNAK: Your Honor, if the letters have not
9 been entered into evidence, they certainly can't go
10 back.

11 THE COURT: What is your position about sending
12 a CD player back to the jury?

13 MR. BOSNAK: Well, Your Honor, I'm very
14 concerned, because they've got different calls on
15 there.

16 THE COURT: All right. Let's bring in the jury.

17 Do you have the transcripts available, Ms.
18 Williams?

19 MS. WILLIAMS: Yes, we do, Your Honor.

20 [Whereupon, the jury enters the courtroom at
21 3:18 p.m.]

22 THE COURT: Thank you. Be seated.

23 Mr. Foreman, I have received a copy of your
24 note. Based upon the -- some procedural issues, I have
25 brought the entire jury back into the courtroom. We

1 will play the jail phone call. You will be provided a
2 copy of the transcript, just as you were given when it
3 was initially played throughout the trial.

4 Your request to see the letters to Jen and
5 Melissa: those were not admitted into evidence; thus,
6 those will not go back to the jury room.

7 MS. WILLIAMS: The CD is in evidence, the actual
8 tape --

9 THE BAILIFF: They need the CD from the
10 evidence?

11 THE COURT: Yes, ma'am.

12 MS. WILLIAMS: It should say jail tapes. It's
13 Number 20.

14 [Off the record momentarily]

15 [Whereupon, State's Exhibit Number 20 is played
16 for the jury from 3:21 p.m. to 3:30 p.m.]

17 THE COURT: Madam Bailiff, if you could please
18 collect the transcripts.

19 [Whereupon, the bailiff complies]

20 THE COURT: Madam Bailiff, are there twelve?

21 THE BAILIFF: [Indicates affirmatively]

22 THE COURT: And if you'll please take the CD
23 back into the jury room.

24 Ladies and gentlemen of the jury, you may retire
25 to your jury room to continue deliberation.

1 Please rise for the jury.

2 [Whereupon, the jury exits the courtroom at
3 3:31 p.m.]

4 THE COURT: Thank you. Be seated. We are at
5 ease.

6 [Whereupon, a recess is taken from 3:31 p.m. to
7 4:08 p.m.]

8 THE COURT: All right. Please bring in the
9 defendant, Mr. Hillerby.

10 [Whereupon, Mr. Hillerby enters the courtroom at
11 4:06 p.m.]

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VERDICT

THE COURT: Thank you. Be seated.

Ladies and gentlemen, we have a verdict. Ladies and gentlemen, I caution you when the verdict is read -- I want to commend everyone. This is an emotional -- has been a very emotional trial on both sides. But let me caution you there will be no toleration of any outbursts from anyone in the audience.

Please bring in the jury.

Please rise for the jury.

[Whereupon, the jury enters the courtroom at 4:08 p.m.]

THE COURT: Thank you. Be seated.

Mr. Foreman, I understand that the jury has reached a verdict. If you will please hand the verdict form to the bailiff.

[Whereupon, the foreman proffers documents to the bailiff. The bailiff proffers documents to the Court]

THE COURT: Mr. Hillerby, please rise.

[Whereupon, the Court proffers documents to the clerk of court]

THE COURT: Madam Clerk, please read the verdict.

1 THE CLERK OF COURT: State of South Carolina,
2 County of Berkeley, versus Justin Ryan Hillerby,
3 indictment number 2008-GS-08-2594, we, the jury, find
4 the defendant guilty of homicide by child abuse, signed
5 Roger Gourdine, foreperson.

6 Mr. Foreperson and ladies and gentlemen of the
7 jury, if this is your verdict, signify by raising your
8 right hand at this time.

9 [Whereupon, jurors comply]

10 THE COURT: Thank you. The record will reflect
11 that all twelve have raised their right hand.

12 Anything further requested of the jury? From
13 the defendant?

14 MR. BOSNAK: Nothing, Your Honor.

15 THE COURT: Thank you. You may be seated.

16 Ms. Williams, anything further requested of the
17 jury at this time?

18 MS. WILLIAMS: Nothing further from the State.

19 THE COURT: Are you prepared to do sentencing at
20 this time, Ms. Williams?

21 MS. WILLIAMS: Yes. It is on the way.

22 THE COURT: Mr. Bosnak?

23 MR. BOSNAK: Yes, Your Honor.

24 THE COURT: Ladies and gentlemen of the jury,
25 this completes your service to this case. Please go

1 retire to your jury room. I will be there in just a
2 few moments to release you.

3 Please rise for the jury.

4 [Whereupon, the jury exits the courtroom at
5 4:11 p.m.]

6 THE COURT: Thank you. Be seated.

7 Anything from the defendant outside of the
8 presence of the jury?

9 MR. BOSNAK: Nothing, Your Honor.

10 MS. WILLIAMS: Nothing, Your Honor. We're just
11 waiting for the sentencing sheets.

12 THE COURT: We'll be at ease. Please let me
13 know when the sentencing sheet -- I am going to release
14 the jury, unless there is any objection. Ms. Williams?

15 MS. WILLIAMS: No objection from the State.

16 MR. BOSNAK: Nothing from the defense, Your
17 Honor.

18 THE COURT: Thank you. We will be at ease.

19 [Whereupon, a recess is taken from 4:11 p.m. to
20 4:16 p.m.]

21 THE COURT: Thank you. Be seated.

22 Is the State ready to proceed with sentencing?

23 MS. WILLIAMS: Yes, Your Honor, the State is
24 ready.

25 THE COURT: Mr. Bosnak --

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MR. BOSNAK: Your Honor, I --

THE COURT: -- is Mr. Hillerby prepared to proceed with sentencing?

MR. BOSNAK: Yes, Your Honor. And just for precaution, renew all motions.

THE COURT: The record will reflect that you have renewed all motions. The Court's previous rulings as to all previous motions are the same, but I will note your renewal for the record.

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SENTENCING

1
2 THE COURT: Are you prepared to go forward with
3 sentencing, Mr. Bosnak?

4 MR. BOSNAK: Yes, Your Honor.

5 THE COURT: All right. Ms. Williams, I will be
6 happy to hear from you.

7 I don't have the sentencing sheet.

8 MS. WILLIAMS: Mr. Bosnak is looking at them,
9 Your Honor.

10 MR. BOSNAK: Ms. Williams.

11 [Whereupon, Mr. Bosnak proffers documents to Ms.
12 Williams]

13 MS. WILLIAMS: I'm just going to hand this up.

14 [Whereupon, Ms. Williams proffers documents to
15 the Court]

16 THE COURT: Whenever you are ready, Ms.
17 Williams.

18 MS. WILLIAMS: Thank you, Your Honor.

19 I'm not going to go over a lot of the facts of
20 the trial. Obviously, you've been here all week and
21 you've heard them.

22 The Court has heard about how heinous this crime
23 was: eleven points of impact to the skull, twenty-
24 three separate injuries, a twenty-two-month-old child
25 just beaten to death. This family has suffered

1 greatly. This child was very loved. And there's just
2 no telling how much pain he endured before he died as
3 he laid there in that crib.

4 The State would just ask that -- Mr. Hillerby
5 told the victims' mother that he wanted to spend the
6 rest of his life making it up to her, and the State
7 would ask that you give him that opportunity and give
8 him the maximum and let him spend the rest of his life
9 in the Department of Corrections making it up to her.

10 At this time, the grandfather of the victim,
11 Leonard S. , would like to address the Court.

12 THE COURT: Ms. Williams, the possible
13 punishment is twenty to life; is that correct?

14 MS. WILLIAMS: That is correct, Your Honor.

15 MR. S : Your Honor, I'm here to represent
16 my family. My wife and I are sixty-four years old. We
17 came down to retire here with Jennifer and Serena and
18 ~~victim~~.

19 And as I got older, I wanted to go ahead and
20 sort of grow younger with ~~victim~~ and teach him a lot of
21 things, because he didn't have a real father figure.
22 And we took care of him a lot, those two children a
23 lot, and I love all of my grandchildren.

24 And I would like to go ahead and ask you, since
25 his life was taken away, that Justin serves -- Justin

1 Hillerby serves in jail for the rest of his life.

2 That's really all I've got to say. Plus, I
3 would like to thank the jury.

4 THE COURT: Thank you, Mr. S.

5 MR. S : Thank you.

6 THE COURT: Is there anything else from the
7 State?

8 MS. WILLIAMS: Nothing further from the State,
9 Your Honor.

10 THE COURT: Ms. Williams, Mr. Hillerby's prior
11 convictions, if any?

12 MS. WILLIAMS: Your Honor, he has several
13 speeding violations. The Court's indulgence for
14 just a second.

15 THE COURT: Yes, ma'am.

16 [Whereupon, Ms. Williams reviews documents]

17 MS. WILLIAMS: He has a disorderly conduct in
18 1999; he has a DUI in 2003; he has another public
19 intoxication in 2006; he has a possession of twenty-
20 eight grams or less of marijuana in 2007; he has a
21 public drunk charge in 2007; he has public disorderly
22 conduct, 2008. And then he has several charges
23 pending, but that completes his convictions.

24 THE COURT: Thank you.

25 Mr. Bosnak, I'll be happy to hear from anyone on

1 behalf of Mr. Hillerby before I impose sentence.

2 MR. BOSNAK: Yes, Your Honor.

3 Stand up.

4 [Whereupon, Ms. Vicky Williams complies]

5 MS. TAYLOR: His mother would like to speak,
6 Your Honor. She's from Homeland Security. She's
7 stationed at Guantanamo Bay. She just came up to his
8 trial, and she would like to speak on behalf of the
9 family.

10 THE COURT: Mr. Bosnak, I'll be happy to hear
11 from any of the members of the family, in addition to
12 Mr. Hillerby.

13 Ma'am, if you'll please come forward. Please
14 come forward to one of the microphones. State your
15 name for the record, and spell your last name.

16 MS. VICKY WILLIAMS: Yes, ma'am. My name is
17 Vicky Williams. W-I-L-L-I-A-M-S.

18 THE COURT: Yes, ma'am.

19 MS. VICKY WILLIAMS: Basically, I want to say on
20 behalf of my family that we're terribly sorry for the
21 loss, but my son did not do this. I can say that I'm
22 in law enforcement, and I believe in it wholeheartedly
23 and I would never come to my son's defense if I thought
24 that he was guilty of this. I would never. They
25 brought forth so many people that talked bad about

1 Justin. And we've never said our son was perfect, but
2 he's never been involved in anything violent, never
3 before.

4 THE COURT: Ms. Williams, I need you to address
5 the Court, not the jury.

6 MS. VICKY WILLIAMS: I'm sorry, ma'am.

7 THE COURT: They have already --

8 MS. VICKY WILLIAMS: I'm sorry, ma'am.

9 THE COURT: -- issued their verdict.

10 MS. VICKY WILLIAMS: But my son was never, ever
11 violent. And they could have brought just as many
12 people in that would have testified that they would
13 trust their children with him at any time. Children
14 love my son. They beg to go to the pool with him, and
15 go fishing.

16 He's innocent of everything they've charged him
17 with, and I don't understand. But they need to
18 understand that he has a good heart and he has done so
19 many things for so many people, and helped people, and
20 that this just is not my son. He would never have done
21 that. That's all.

22 THE COURT: Thank you, Ms. Williams.

23 MR. BOSNAK: Anybody else --

24 Your Honor, I would ask in this case to show
25 mercy. Please do not hold it against Mr. Hillerby for

1 wanting to come to trial. I know you won't do that.

2 But he's a young man at twenty-seven years old.
3 He has a long, long life ahead of him, and I would just
4 ask that you not impose life without parole on him,
5 Your Honor. That would be our only wish, to please
6 take mercy on him. He can be rehabilitated. He's
7 going to miss seeing his children grow up. He's got a
8 son, and he's going to miss seeing his child grow up.
9 And I would just ask you not to give him life without
10 parole where at sometime in the way, way future,
11 possibly he could see his son again. Please, Your
12 Honor.

13 THE COURT: Mr. Hillerby, anything you wish to
14 tell the Court?

15 MR. HILLERBY: ~~VICTA~~ was a good kid. He never
16 caused no problems for nobody. He was just like my
17 boy. I don't really know what happened that night.
18 And I know my statements are probably what convicted
19 me.

20 THE COURT: Mr. Hillerby, I ask that also you
21 address the Court and not the jury.

22 MR. HILLERBY: It's just I didn't do this. I
23 don't even have the mentality for something like that.
24 I just ask for your mercy. That's it.

25 THE COURT: Anything further, Mr. Bosnak?

1 MR. BOSNAK: Nothing, Your Honor.

2 THE COURT: Anything further from the State?

3 MS. WILLIAMS: Nothing from the State, Your
4 Honor.

5 THE COURT: Mr. Bosnak, you agree that the
6 possible punishment is twenty to life?

7 MR. BOSNAK: Yes, Your Honor.

8 THE COURT: Mr. Hillerby, I have sat here since
9 Monday and I have heard the facts of your case. I wish
10 that I had something profound to say, but the facts
11 speak for themselves. You have been afforded a trial.
12 The jury has spoken.

13 It is the order of the Court on indictment
14 2008-GS-08-2594 that you be committed to the State
15 Department of Corrections for the term of the rest of
16 your natural life. Thank you, sir.

17 We're in recess. First of all, the defendant's
18 family needs to be excused first.

19 And wait.

20 Mr. Hillerby, you need to be advised that you
21 have ten days to appeal the Court's imposition of the
22 sentence, as well as the trial.

23 This is also considered a violent and a most
24 serious offense. I am sure that Mr. Bosnak has
25 explained to you what those two classifications mean.

1 MR. HILLERBY: Yes, he has.
2 THE COURT: Mr. Hillerby, good luck to you.
3 Mr. Bosnak, on behalf of the Court, I appreciate
4 your professional and zealous representation of Mr.
5 Hillerby.
6 On behalf of the State, I appreciate your
7 representation on behalf of the victim's family.
8 I appreciate everyone's professionalism and
9 courtesy here in court. Let's please make sure that we
10 leave here in a dignified fashion and show respect for
11 this courtroom.
12 Ladies and gentlemen of the jury, if you would
13 please go to your jury deliberation room for just a
14 moment.
15 Thank you. We are at ease.
16 [Whereupon, Court's Exhibit Number 4 is marked
17 by the court reporter]
18 [JURY TRIAL CONCLUDES AT 4:27 P.M.]
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C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the jury trial held before the Honorable Kristi L. Harrington, on Thursday, February 25, 2010.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 21st day of August, 2010.

Mia Perron
Mia Perron, CCR, CVR-CM
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CCR, CVR-CM

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COPY

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi L. Harrington, Circuit Court Judge
Appellate Case No.: 2010-165126

THE STATE,

RESPONDENT,

v.

JUSTIN RYAN HILLERBY,

APPELLANT.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED BY FAILING TO SUPPRESS THE STATEMENTS ATTRIBUTED TO APPELLANT.
- II. WHETHER THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF TWO WITNESSES OVER COUNSEL'S OBJECTION THAT THE TESTIMONY WAS INADMISSIBLE PRIOR BAD ACT TESTIMONY PURSUANT TO RULE 404(B), SCRE, AND STATE V. LYLE, 125 S.C. 406, 118 S.E. 803 (1923).
- III. WHETHER THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF MS. GEORGOULIS OVER COUNSEL'S OBJECTIONS THAT THE TESTIMONY WAS NOT RELEVANT.

STATEMENT OF THE CASE

During the December 2008 term of the Berkeley County Grand Jury, Appellant was indicted for Homicide by Child Abuse (Indictment No.: 2008-GS-08-2594). On October 21, 2009, a pre-trial motion hearing was held in front of the Honorable Kristi L. Harrington at the Berkeley County Courthouse. Appellant was present and represented by J. Michael Bosnak, Esquire.¹ The State was represented by Anne Williams, Assistant Solicitor for Berkeley County.

On February 22-25, 2010, a jury trial was held in front of the Honorable Kristi L. Harrington and a jury at the Berkeley County Courthouse. Appellant was represented by J. Michael Bosnak, Esquire. The State was represented by Anne Williams, Assistant Solicitor. At the close of the trial, the jury found Appellant guilty as indicted for Homicide by Child Abuse (Indictment No.: 2008-GS-08-2594). The Honorable Kristi L. Harrington sentenced Appellant to life pursuant to S.C. Code § 16-3-85(A)(1)(2010).

On February 26, 2010, Appellant, through counsel, filed a timely Motion for Reconsideration of Sentence. The State filed a response and a hearing was conducted on April 29, 2010 in front of the Honorable Kristi L. Harrington at the Berkeley County Courthouse. Appellant was represented by J. Michael Bosnak, Esquire. The State was represented by Anne Williams, Assistant Solicitor. By written order dated April 29, 2010, the Honorable Kristi L. Harrington affirmed Appellant's sentence.

A timely Notice of Intent to Appeal was submitted and Appellant's case was transferred to the South Carolina Commission on Indigent Defense. On June 2, 2011, Tricia A. Blanchette, undersigned counsel, filed a Motion for Substitution of Counsel. By Order dated June 8, 2011,

¹ In an attempt to locate additional pre-trial motion hearing transcripts, Appellant's counsel did the following: 1) reviewed the Berkeley County Clerk of Court's file and consulted with the Clerk assigned to the case, 2) contacted South Carolina Court Administration, Anne Williams, Assistant Solicitor, and J. Michael Bosnak, Esquire, and 3) contacted several court reporters involved in the case. No additional transcripts were located in connection with Appellant's case in the Court of General Sessions.

Tricia A. Blanchette, Esquire, was substituted in as counsel and Tristan Shaffer, Appellate Defender, was relieved as counsel. This Brief follows.

ARGUMENT

I. The Trial Court Erred By Failing to Suppress the Statements Attributed to Appellant.

A. How the Issue Was Raised at Trial

At the beginning of trial, defense counsel requested a ruling on three statements attributed to Appellant, and the trial court conducted a Jackson v. Denno hearing. R. p. 9. The State clarified that there were three statements attributed to Appellant, which were dated September 15, 2008, September 17, 2008, and September 18, 2008, and a verbal statement given to Officer Raymond Dixson on September 18, 2008. R. p. 102. During the Jackson v. Denno hearing, the State called Detective Shannon Sharp, Officer Richard Darling, and Detective Raymond Dixson, and their testimony is summarized as follows:

Detective Shannon Sharp explained that he had been trained in the REID technique for interviews and interrogation, and he obtained three statements from Appellant dated September 15th, 17th and 18th. R. pp. 11-12, 23. He explained that he gave Appellant his Miranda rights and had him execute a written Miranda and waiver of rights form on each occasion, but it was not policy to video or audio record interviews. R. pp. 12-13, 18-19. He also explained that Appellant wanted to talk with him and did not want an attorney. R. pp. 20-1.

Regarding their first meeting on September 15, 2008, he testified that Appellant was present voluntarily. R. pp. 28. He recalled smelling alcohol on Appellant, but he concluded that Appellant was not intoxicated. R. pp. 31. As the interview was concluding, he had to call emergency services since Appellant was suffering from chest pains and dizziness. R. pp. 29-30, 55-6.

On September 17, 2008, he met with Appellant again since a polygraph had been set up for Appellant with Detective Dixson. R. p. 33. Detective Sharp explained that Appellant backed

out of the polygraph exam but asked to talk to him. R. pp. 33-4. When they talked, Appellant was not in custody but was arrested due to the written statement Appellant gave Detective Sharp. R. pp. 35-6, 53. He acknowledged that Appellant only had a ninth grade education and the statement was written in one continual sentence. R. pp. 39-40. On cross-examination, he admitted that he may have informed Appellant that the victim's death was possibly an accident, and he confirmed that it was possible that he told Appellant no one would get in trouble for an accident. R. pp. 54-5.

Detective Dixon testified that he set up a polygraph interview with Appellant for September 17, 2008 and Appellant was not under arrest when he arrived. R. pp. 84-6. He acknowledged that Detective Sharp was present in the room. R. pp. 95. Prior to the administration of the test, Appellant admitted that he had some beers and had taken sleeping pills, but he was not feeling the effects of the drugs or alcohol. R. p. 88. After completing the Miranda waiver, he asked several preliminary questions, but Appellant withdrew from the test before answering the first question about the victim's death. He explained Appellant terminated the test, but he did not terminate the interview. R. p. 96. He recounted several admissions supposedly made by Appellant, and he stated that Appellant never asked for an attorney. R. pp. 98-9.

Officer Darling recalled transporting Appellant to and from his bond hearing on September 18, 2008. R. pp. 63, 78. He explained that he did not induce Appellant to talk, and the video was not working in his patrol car. R. pp. 64, 81. He further explained that Appellant started asking him about why he was not charged with a lesser offense. R. pp. 64. He recalled warning him about his right to remain silent, but he admitted that he told Appellant the following: 1) The truth would be revealed in the autopsy and it would show if Appellant was not

telling the truth; 2) He spoke with him about the media coverage and told him that the truth would set him free; and 3) He told him that God helps those that helps themselves. R. 67, 72-7. Thereafter, Appellant asked to be transported to talk with Detective Sharp. R. p. 77. He recounted taking Appellant to speak with Detective Sharp and being informed that Appellant had spoken with a female public defender while waiting to meet with the detective, which was confirmed by the detention sergeant at Berkeley County Detention Center. R. pp. 66, 79. On the return trip, Appellant told him that he could finally sleep. R. p. 68.

During the testimony of Officer Darling, the State introduced a copy of the bond proceedings, Appellant's request for an attorney dated September 23, 2008, notice of appointment of counsel on October 3, 2008, and substitution of attorney dated October 23, 2008. R. p. 69. The State argued that the three written and one oral statement were admissible and that Applicant never asked for counsel nor was counsel appointed until September 23, 2008. R. pp. 102-4. The State did acknowledge that Appellant met with a public defender but argued that Appellant willingly talked to the transport officer and detectives. R. pp. 103-4. Regarding Officer Darling, the State concluded: "And even if the Court were to think he was trying to trick him, which we contend he wasn't, there is case law that says even if police officers make misrepresentations, that it doesn't necessarily make the statement inadmissible." R. 112-13, Ins. 23-25,

In response, defense counsel argued that the court must apply a four part test when determining the admissibility of the statements attributed to Appellant. R. pp. 107-8. Defense counsel explained the first question was whether Appellant made the statements, and he stated: "And of course he made the statements." R. pp. 107-8, Ins. 1-2. He said the second question dealt with Miranda warnings, and he acknowledged that Appellant was given his Miranda

warnings. R. p. 108, Ins. 3-5. He continued that the third question looked at whether Appellant understood his Miranda rights, and he concluded: "And I would say under the circumstances, having a GED, ninth grade, telling the officers that he did understand those, that he did understand his Miranda rights." R. p. 108, Ins. 6-12. Yet, counsel acknowledged that it was for the trial court to rule on that issue. R. p. 108, Ins. 12-13. Counsel further explained that the problem was in the fourth question of whether the statements were freely and voluntarily given under the totality of the circumstances. R. p. 108. Counsel concluded that the statement given on September 15th was not incriminating, but the statements given on September 17th and 18th were both incriminating and coerced. R. pp. 108-9, 111, 113-114. Regarding the statement on September 17th, counsel highlighted the officers' awareness that Appellant had drunk alcohol and taken sleeping pills and argued that the State had no probable cause until the statement was given. R. pp. 110, 113. Additionally, counsel argued that the officers made promises to Appellant in order to convince him that they were "buddy-buddy" and going to help him. R. p. 113. Counsel concluded that the statements should be suppressed under the totality of the circumstances. R. pp. 110-11.

After hearing the arguments, the trial court acknowledged that he must consider the totality of the circumstances and he concluded that under the totality of the circumstances the statements were voluntarily, knowingly and intelligently given. R. pp. 114-15. The court further held, as follows:

The Court finds that there was no coercion by any of the officers in any of the statements given by Mr. Hillerby. The Court considered whether Mr. Hillerby had been drinking. The odor of alcohol, but none of the officers indicated that impacted Mr. Hillerby's understanding of the right.

R. pp. 115-16, Ins. 25, 1-5.

During the trial, the State admitted Appellant's three written statements through Detective Sharp. R. pp. 471, 478, 484-492. The State also called Officer Dixon in reply and he recounted the verbal admissions attributed to Appellant. R. p. 740.

B. Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006), State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt. State v. Washington, 296 S.C. 54, 55-6, 370 S.E.2d 611, 612 (1988).

Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless such conclusions are erroneous and amount to an abuse of discretion." Baccus, 367 S.C. at 48, 625 S.E.2d at 220, State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001), State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998), State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996). "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." Saltz, 346 S.C. at 136, 551 S.E.2d at 252.

C. Argument

A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 377, 84 S.Ct. 1774 (1964)).

Questioning suspects "is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths." Culombe v. Connecticut, 367 U.S. 568, 571, 81 S.Ct. 1860 (1961).

Under Jackson v. Denno, a defendant is entitled to a "reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence." State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976); See Miller, 375 S.C. at 381, 652 S.E.2d at 450. "In South Carolina, the judge makes this initial determination of voluntariness required by Jackson v. Denno." Fortner, 266 S.C. at 226, 222 S.E.2d at 510.

In determining whether a statement was given "voluntarily," the court must consider the totality of the circumstances surrounding the statement. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041 (1973). See also Arizona v. Fulminante, 499 U.S. 279, 279, 111 S. Ct. 1246 (1991) (applying totality of the circumstances test to determine confession's voluntariness), State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) ("The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances.") (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). Multiple factors are considered when deciding whether a

statement was made voluntarily. In South Carolina, the courts have recognized that appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency. See State v. Childs, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989) (background, experience, and conduct of the accused), In re Williams, 265 S.C. 295, 217 S.E.2d 719 (1975) (age), State v. Jennings, 280 S.C. 62, 309 S.E.2d 759 (1983) (length of custody), State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980) (police misrepresentations), State v. Smith, 268 S.C. 349, 355, 234 S.E.2d 19, 21 (1977) (isolation of minor), State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (threats of violence and promises of leniency), State v. Cannon, 260 S.C. 537, 544, 197 S.E.2d 678, 680-81 (1973) (age, education level, manner of police questioning).

In the instant case, Appellant submits that the incriminating statements obtained on September 17th and 18th were obtained through misrepresentations and coercion by law enforcement, while he was admittedly under the influence of alcohol and sleeping pills, and after he had invoked his right to counsel; thus, rendering the statements inadmissible. In State v. Parker, 381 S.C. 68, 77-8, 671 S.E.2d 619, 623-4 (Ct. App. 2008), defense counsel extensively questioned the agent regarding his use of the Reid technique of interrogation, which this Court summarized feigned sympathy and rationalization. The agent would not concede that he used the Reid technique, and this Court was not convinced that the statement was inadmissible due to the agent's alleged minimization of Parker's sense of responsibility in getting him to confess. Id. at 78, 88, 671 S.E.2d 619 at 623-4, 629. Here, Detective Sharp admitted to the use of the Reid technique while obtaining Appellant's three written statements. R. pp. 11-12, 23. He testified that it was not policy to video or audio interviews, so the lower court was unable to view his

techniques. R. pp. 12-13, 18-19. He acknowledged that Appellant received emergency medical care after giving a non-incriminatory statement on September 15th. R. pp. 29-30, 55-6. He also admitted that prior to obtaining Appellant's statement on September 17th he may have told Appellant that the victim's death was possibly an accident and that no one would get in trouble for an accident. R. pp. 54-5.

Additionally, Officer Dixson admitted that as he transported Appellant to speak with detectives he told him that the truth would be revealed in the autopsy and it would show if Appellant was not telling the truth about the situation. R. pp. 67, 72-7. He also spoke with him about the media coverage and told him that the truth would set him free. R. pp. 67, 72-7. He told Appellant that God helps those that help themselves. R. pp. 67, 72-7.

In Miller v. Fenton, 796 F.2d 598, 604-05 (3d Cir. 1986), the Third Circuit Court of Appeals reasoned:

Few criminals feel impelled to confess to the police purely of their own accord without any questioning at all Thus, it can almost always be said that the interrogation caused the confession It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.

The Court further reasoned:

Excessive friendliness on the part of an interrogator can be deceptive. In some instances, in combination with other tactics, it might create an atmosphere in which a suspect forgets that his questioner is in an adversarial role, and thereby prompt admissions that the suspect would ordinarily only make to a friend, not to the police."

Id. at 604. Ultimately, the lower court must determine if the defendant's will was overcome by law enforcement. Here, Appellant gave a non-incriminating statement on September 15th, which ended in emergency care for chest pains and dizziness. Clearly, his physical will was

overborne and broken down by law enforcement. Thereafter, Appellant appeared voluntarily for a polygraph exam attended by Detective Sharpe, where he candidly admitted that he had drank alcohol and had taken sleeping pills. Despite Appellant's clear admissions and refusal to continue with the polygraph exam, Detective Sharpe convinced Appellant to speak with him and assured Appellant with his comments about it being an accident and that no one would get in trouble for an accident. As a result, the Appellant gave the statement on September 17th that resulted in his arrest. In continuation of the coercion and misrepresentations by law enforcement, Officer Dixon again made assurances to Appellant that led to a second incriminating statement. Clearly, from the time of his physical breakdown following his first statement to the procurement of the third statement, Appellant's will was overborne by law enforcement, he was unable to consider his options and voluntarily waive his Miranda rights before deciding to give an incriminating statement to law enforcement that resulted in his arrest.

Furthermore, defense counsel argued and law enforcement testified that Appellant had been to bond proceeding and spoken with a public defender prior to his uncounseled statement on September 18, 2008. The Fifth Amendment's privilege against self-incrimination provides an individual who has been accused of a crime the right to consult with an attorney and to have an attorney present during custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S.Ct. 1602 (1966). This privilege has been extended to the States via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6, 84 S.Ct. 1489 (1964) ("[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."). Once an accused has invoked his right to have an attorney present during custodial interrogation, he may not be subjected to further police interrogation "unless the

accused himself initiates further communication, exchanges, or conversations with the police."

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880 (1981).

In contrast, "[t]he Sixth Amendment right to counsel 'attaches only at or after the initiation of adversary judicial proceedings against the defendant.'" State v. Stahlnecker, 386 S.C. 609, 620, 690 S.E.2d 565, 571 (2010) (quoting United States v. Gouveia, 467 U.S. 180, 187, 104 S.Ct. 2292 (1984)). "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." Stahlnecker, 386 S.C. at 620, 690 S.E.2d at 571 (quoting Rothgery v. Gillespie Cnty., 554 U.S. 191, 128 S.Ct. 2578, 2592 (2008)).

Here, the State argued that law enforcement's conduct complied with Montejo v. Louisiana, 556 U.S. 778, 129 S.Ct. 2079 (2009), but the fact remains that law enforcement was fully aware that judicial proceedings had been initiated against Appellant and that he had spoken with a public defender. Transcript, Vol. 1, pp. 102-3. Yet, no one protected Appellant's right to have an attorney present during law enforcement's interrogations that resulted in incriminating statements. Instead of being present with counsel, Appellant, who was under the influence of drugs and alcohol, was subjected to unrecorded interrogations that were the result of coercion and clear misrepresentation by law enforcement. Therefore, Appellant urges this Court to find that the incriminating statements obtained on September 17th and 18th were the product of misrepresentations and coercion by law enforcement, while he was admittedly under the influence of alcohol and sleeping pills, and after he had invoked his right to counsel; thus, rendering the statements inadmissible.

II. The Lower Court Erred by Admitting the Testimony of Two Witnesses over Counsel's Objection that the Testimony was Inadmissible Prior Bad Act Testimony Pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

A. How the Issue was Raised at Trial

On February 18, 2010, defense counsel filed a Motion to Reveal Rule 404(b), State v.

Lyle Evidence. During pre-trial motions, defense counsel informed the court:

Just one last thing, and I don't know if the prosecution plants to use it or not. Prior to the death of this child, noon until about six o'clock, they were at a swimming pool. Mr. Hillerby, the victim's mother, her two children, and a group of people were at a swimming pool. There were some complaints and statements made at the pool about drinking, Mr. Hillerby and Ms. S the victim's mother, drinking, cursing – not fighting, but using bad language – the children not being looked after properly. I would like to be addressed on that issue, Your Honor. I don't think that it is relevant to bring up the issue.

R. p. 7, lns. 9-21. At the conclusion of the Jackson v. Denno hearing, the court took up defense counsel's motion in limine.

When asked for the basis for his motion in limine, defense counsel responded that he was not sure if the evidence at issue was prior bad act or character evidence. R.p. 117. He surmised that the State would be going into it to "show my client was doing a bad act, which clearly the statute in State v. Lyle prohibits." R. pp. 117, lns. 25, 118, lns. 1-2 Thereafter, defense counsel mentioned the exceptions to the general prohibition and concluded that none of the exceptions were present in the instant case. R. p. 118.

After the trial court inquired about witnesses or evidence in support of the motion, defense counsel informed the court that he had not been provided the state's witness list. R. p. 118. He explained that the State likely had witnesses and statements on the issue, but he was not aware of what they had or intended to use. R. p. 118. Therefore, he was raising the motion to determine what or who the State intended to use regarding the pool incident. R. p. 118.

The State responded that they intended to call two brief witnesses from the pool, and their testimony "goes to the theory of the State's case." R. p. 119. The State further explained: "And these are just two witnesses that are going to testify to things they observed directly, behavior by the defendant toward the victim that day." R. p. 119, lns. 22-25.

In response, trial counsel argued that the testimony was clearly bad act evidence and an attempt by the State to make the Appellant "look like a bad guy." R. p. 120, lns. 2-4. Trial counsel also argued that it was "far reaching" to interpret the alleged conduct at the pool as "some type of intent or some type of motive." R. p. 120, lns. 14-17.

The State explained:

Your Honor, what these witnesses observed goes to motive, goes to intent. It just goes to the demeanor of the defendant that day. And, you know, they're fact witnesses. What they're -- what they observed is that the child was falling into the pool repeatedly and aggravating the defendant. And the things that he says to the child just hours before the child's death are highly relevant. They're more probative than they are prejudicial. It goes to lack of accident. Because in one of the statements the defendant says himself that he bumped his head at the pool, indicating it could have happened at the pool. So, that's already out there.

In addition to that, it's his demeanor toward this child. And we would just argue that it's *res gestae* and it goes to motive, intent, and it's highly probative evidence. And we would limit it to two witnesses. There's eight witnesses that came forward about the way that he treated this kid at the pool. And I think it's highly probative of the motive and frame of mind that his defendant was in just hours before he killed this child.

R. p. 121, lns. 17-25, p. 122, lns. 1-15. When asked, trial counsel explained that the defense did not intend to argue that an injury or accident occurred at the pool that contributed to the victim's death. R. pp. 120-1. Trial counsel also argued that no report was made to law enforcement, that considering the timing and the potential testimony it was tenuous to allege intent, and that the testimony was being used to simply show that Appellant was "a bad guy". R. pp. 122-3.

After hearing argument from both sides, the trial court ruled:

I find based upon what the State has indicated that the two witnesses will testify to, I do find that will be admissible to prove intent in the absence of accident. Based upon what has been presented here today in the context, I am denying the motion in limine. I do find that the evidence of the actions of Mr. Hillerby is more probative than prejudicial to Mr. Hillerby.

R. p. 123, lns. 19-25, 124, lns. 1-2.

During trial, defense counsel renewed his objection when the State called Brandon H. to the stand. R. p. 229. Brandon H. recalled being at Weatherstone neighborhood pool with Courtney T. and two other teenagers on September 14, 2008. R. pp. 229-30. He further recalled that someone in the group knew Jennifer S. (victim's mother), and he recalled seeing Appellant, Ms. Spoerl and the victim. R. p. 230. He remembered the victim acting "like a normal little kid would act." R. p. 231. He testified that he did not see Appellant or Ms. S. drinking. R. p. 234. Specifically, he remembered Ms. S. running towards him as he was exiting the pool yelling: "No, my baby." R. p. 231, lns. 11-13. He turned around, saw the victim's head under water, pulled him out and gave him to his mother. R. p. 231. When asked about Appellant's response, he testified that Appellant stated: "You should have left him in the pool." R. p. 232, lns. 3-4. He recalled Appellant being loud with the victim and telling him to go stand in the corner "because no one cares about you." R. p. 232, lns. 13-18. He also recalled Appellant yanking the victim's arm a couple of times. R. p. 234. He explained that he was bothered "a little bit" by the treatment of the victim but he would have called the police if something really bad had happened. R. pp. 232-5. On cross-examination, he explained that Ms. S. was not looking after either of her children. R. pp. 233-4.

After Brandon H.'s testimony, the State called Courtney T. to the stand. R. p. 235. Courtney T. recalled being at the pool in her neighborhood (Weatherstone) with Brandon H. and two other friends on September 14, 2008. R. p. 237. She indicated that Ms. S. introduced

herself, Appellant and the victim when she asked her to babysit sometime. R. p. 238. She remembered pulling the victim out of the pool when he kept jumping in the deep end without his swim floats. R. p. 239. After several jumps, she remembered Appellant and Ms. F coming over and getting the victim. R. p. 239. She testified that Appellant called the victim a "pussy" and Appellant told the victim "to go ahead and cry because no one wanted him." Transcript, R. 239, lns. 15-19. She explained that Ms. S was not watching the children and she was in the corner drinking and listening to loud music with Appellant. R. p. 241. She acknowledged that she did not make any comments towards Ms. S or Appellant regarding their conduct with the children. R. p. 242.

B. Standard of Review

In State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), the South Carolina Supreme Court articulated the appropriate standard of review on appeal in determining the admissibility of bad act evidence, which is the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). Additionally, the South Carolina Supreme Court explained that a circuit court's determination regarding whether evidence offered pursuant to Rule 404(b) is clear and convincing is reviewed under the "any evidence" standard. Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829 (reversing the court of appeals for not applying the any evidence standard in reviewing a circuit court's determination that Rule 404(b) evidence was clear and convincing).

C. Argument

Appellant submits that the testimony of Brandon H. and Courtney T. was inadmissible prior bad act testimony and was improperly admitted pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a

common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), Lyle, 125 S.C. 406, 118 S.E. 803.

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. Peeler v. Spartan Radiocasting, 324 S.C. 261, 478 S.E.2d 282, 283 (1996).

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Finally, the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007), State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990).

Recently, in State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011), this Court upheld the defendant's conviction for aiding and abetting homicide by child abuse. This Court examined the lower court's admission of evidence of an injury to the victim on the grounds of

motive and absence of an accident. This Court addressed the exceptions under rule 404(b),

SCRCE, and explained:

In order to introduce evidence of some other act of the defendant under one of these exceptions, the State must lay the proper foundation. First, unless the act is the subject of a criminal conviction, the State must prove by clear and convincing evidence that the defendant committed the act. Fletcher, 379 S.C. at 23, 664 S.E.2d at 483.

The second element of the foundation requires the State to articulate the logical connection between the other act and at least one of the five purposes listed as exceptions in the rule. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). In order to meet this element, the State must explain how evidence of the other act will assist the judge or the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Stated differently, evidence which is logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." (internal citations omitted)).

If the trial judge finds the State has met the first two elements, the judge must consider Rule 403, SCRE. State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). Under Rule 403, the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice. If the trial judge determines not to exclude the evidence under this Rule 403 analysis, then the State may admit it.

Id. at 361-3, 709 S.E.2d 491, 495-6.

In the instant case, the State failed to lay the proper foundation and establish by clear and convincing evidence that Appellant committed the act in question. As is detailed above, the State informed the court: "And these are just two witnesses that are going to testify to things they observed directly, behavior by the defendant toward the victim that day." R. p. 119, lns. 22-25. The State's description of the alleged prior bad act, first calls into question what was the act.

Also, the State readily admits that they are calling witnesses to go into Appellant's behavior, and it is apparent that the purported "things" and "observations" fall short of a specific act. Despite the clear requirement that the State establish a proper foundation, the record is void of the trial court's analysis on whether the act or in this case "things" were proven by clear and convincing evidence since such "things" were not the subject of a prior conviction. The lower court did not conduct an in camera hearing nor did he make a specific ruling that the State had established the degree of proof which produced in his mind a firm belief as to the allegations sought to be established. Essentially, the State only informed the court that they intended to call two witnesses about "things" at the pool. When the witnesses were later called in front of the jury, their testimony was inconsistent and vague at best.

Appellant submits that the lower court erred by failing to properly examine the foundation of the evidence and merely accepting the State's assertion that the witnesses testimony would establish "things." Additionally, the lower court erred by failing to make a ruling that the State had established by clear and convincing evidence the act or in this case behavior. It is apparent that the lower court committed a reversible error of law by admitting the testimony of Brandon H. and Courtney T. without conducting the proper analysis under the above detailed case law.

Appellant also submits that the lower court committed reversible error in admitting the testimony of Brandon H. and Courtney T. since the State failed to establish a logical connection between the testimony about their observations at the pool and the charge of homicide by child abuse. As argued above, the lower court did not conduct an in camera hearing to evaluate the testimony but accepted the State's assertions regarding what the testimony would

establish. As stated in Smith, the State must adequately explain "how the evidence of the other act logically connects to an issue in the case." 391 S.C. at 361-2, 705 S.E.2d at 495.

Here, the State never clarified what the act was let alone established a logical connection. The State merely informed the lower court that the observations made at the pool would show "the demeanor of the defendant that day" and "things he says to the child just hours before the child's death." R. pp. 121-2. The State also submitted that the testimony went to lack of accident, *res gestae*, motive and intent but did not offer the testimony or demonstrate to the court how the evidence logically connected to any exception under Rule 404(b), SCRCE. The State only informed the court that the evidence would show "motive and frame of mind that this defendant was in just hours before he killed this child". Despite this assertion, the court did not hear the testimony of the witnesses until trial when both admitted they observed Appellant and victim at the pool for approximately one hour on the day before his death. As was argued by trial counsel, Appellant submits that any logical connection between the observations made at the pool and victim's death are tenuous at best. Unfortunately, the lower court failed to conduct the proper analysis and failed to ensure that the evidence was logically related to an issue in the case.

Furthermore, in the court's limited ruling, he held that the evidence was admissible to show "absence of an accident." Interestingly, defense counsel readily admitted that the defense intended to make no argument regarding the possibility of an accident at the pool. Based upon the limited information considered by the court before making his ruling, defense counsel negated the possibility of the evidence having any logical connection to the exception cited by the court.

After the court's finding that the evidence was admissible to show "absence of an accident," the court further found that the evidence was "more probative than prejudicial." R.

pp. 123-4. Again, the lower court made this ruling based upon the State's limited explanation of what the testimony would be since the court failed to conduct an in camera hearing to evaluate the testimony of the witnesses. The court also failed to provide the basis for his ruling. Appellant submits that the lower court's ruling to admit the testimony was in error since he suffered unfair prejudice which was not outweighed by the limited probative value.

Since the lower court failed to examine the testimony in camera, the trial testimony of the witnesses must be examined to consider the probative versus prejudicial value. Brandon H.'s testimony is detailed above and summarized as follows: 1) He saw Appellant, Ms. S and the victim at a neighborhood pool for approximately one hour the day before the victim's death; 2) He did not see Ms. S or Appellant drinking and the victim was acting "normal"; 3) He pulled the victim out of the water for Ms. S; 4) He recalled Appellant making two comments to the victim and placing him in the corner; 5) He saw Appellant yank victim's arm; and 6) Ms. S was not watching either of her children. R. pp. 230-34. Courtney T.'s testimony is also detailed above and summarized as follows: 1) She saw Appellant, Ms. S and the victim at a neighborhood pool for approximately one hour the day before the victim's death; 2) She pulled victim out of the deep end when he repeatedly jumped in; 3) She heard Appellant call the victim a name and heard him speak negatively towards the victim; 4) Ms. S was not watching her children and was in the corner drinking and listening to loud music with Appellant. R. pp. 237-42.

Even though the witnesses were at the pool together, they provided testimony regarding two separate incidents and were inconsistent when asked if Appellant and Ms. S were drinking and acting unruly. The one detail they both testified to was that Ms. S was negligent in her care for her children and that the conduct they witnessed did not rise to the level

that needed to be reported. Interestingly, the very conduct the lower court found to be more probative than prejudicial was not even deemed important enough to report by the eyewitnesses. Appellant submits that the lower court's acceptance of the State's explanation of the testimony failed to take into account the limited probative value and the resulting unfair prejudice. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000), and unfair prejudice is all that could have resulted from the testimony of Brandon H. and Courtney T., which was clearly elicited to show that Appellant was a "bad guy." Therefore, Appellant submits that the lower court erred by admitting the testimony of these witnesses since it was not established by clear and convincing evidence nor was it logically connected to an issue in the case. Furthermore, even after examining the testimony offered to the jury it is far reaching to find any evidence in the record to support the lower court's ruling that the evidence was more probative than prejudicial.

III. The Lower Court Erred by Admitting the Testimony of Ms. Georgoulis over Counsel's Objections that the Testimony was not Relevant.

A. How the Issue Was Raised at Trial

During trial, the State called Melissa Georgoulis to the stand. R. p. 330. Ms. Georgoulis explained that Appellant is the father of her son. R. p. 330. After admitting that she saw Appellant the evening of September 13, 2008, defense counsel interjected:

Defense counsel: I'm going to object, on relevancy, any further line of questioning about what happened the day before.

Court: I overrule your objection. I'm going to allow it.

R. p. 331, lns. 3-7. After counsel's objection, Ms. Georgoulis testified that Appellant spent the night on September 13th and left the following morning around 10:00 a.m. R. p. 331.

When she was asked about Appellant's mood when he left, defense counsel objected. Defense counsel argued: "Again, I don't see any relevance of what his mood was at ten o'clock the day before." R. p. 331, lns. 22-23. The court overruled defense counsel's objection, and Ms. Georgoulis responded that Appellant was upset.² R. p. 331, ln. 24-25. The State repeatedly asked her why Appellant was upset and she responded that she did not recall. R. pp. 332-5. After being provided her statement to refresh her memory, Ms. Georgoulis explained that Appellant was upset because a friend had come over and accused her of sleeping with her husband. R. pp. 332-34. The State also asked if Appellant had attempted to "get back together" with her that morning. R. p. 334, lns. 14-15. After reviewing her statement again, Ms. Georgoulis answered "yes." R. p. 334, lns. 16-22.

On direct, the State also asked Ms. Georgoulis who was staying with her in her home or if she had any houseguests. R. p. 332. Before she gave a clear answer, defense counsel objected on the basis of relevance. R. p. 332, lns. 20-21. The State responded that the question went to

² This answer was repeated three times by the witness. R. pp. 331-2.

bias and the court conducted a bench conference off the record. R. p. 332, ln. 22. Thereafter, the State proceeded with their question, and Ms. Georgoulis testified that Appellant's mother was staying in her home. On cross-examination, she explained that Appellant's mother had only stayed at her house for one night since she was in for Appellant's trial from Guantanamo Bay, where she was currently stationed. R. p. 336. She also agreed that Appellant's mother was staying with her, so she could see her grandchild. R. p. 337.

During cross-examination, Ms. Georgoulis admitted that she was mad with Appellant that morning. R. p. 337. She explained that she was mad because he was leaving that morning to be with Ms. S. R. pp. 337-8.

At the conclusion of Appellant's case, the State called Ms. Georgoulis as a reply witness. R. p. 715. On direct, the State asked her the following about her son with Appellant:

State: And has he ever called (minor) any names?

Witness: He never called him a name like pussy. No, he didn't.

State: Okay. Would it refresh your memory to look at your statement?

Witness: I know what my statement says.

State: Would it refresh your memory to see what you said in your statement?

Witness: If you will.

R. p. 716, lns. 15-25. While insisting that she was telling the truth, the State repeatedly attempted to get her to acknowledge that her statement indicated that Appellant had called their son a pussy and attempted to get her to admit that he called their son names and hit him. R. pp. 717-20. After continually being questioned by the State, Ms. Georgoulis unequivocally stated: "He didn't call him a pussy." R. p. 719, ln. 17. She also stated: "He has never hit my children. He never laid a hand on my thirteen-year or my ten-year old. He never beat my son like the first time we spoke

in here with his bond reduction. He never beat (minor)." R. p. 720, lns. 7-10. Following further questioning on the subject, Ms. Georgoulis stated: "He hit him on his bottom... I wouldn't call it a hit." R. p. 721, lns. 19-21. On cross examination, she explained that she spanked her children if they got out of line, but Appellant did not spank them. R. p. 722, lns. 15-20.

B. Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict. Id.

C. Argument

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE; State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004). Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In

re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003); See also State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). Yet, even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of under delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

During the testimony of Ms. Georgoulis, trial counsel made three objections on the grounds of relevancy. First, counsel objected to "any further line of questioning about what happened the day before." In response, the lower court did not provide any analysis and simply stated, "I'm going to allow it." R. p. 331, lns. 3-7. Secondly, defense counsel objected when Ms. Georgoulis was asked about Appellant's mood the day before. R. p. 331, lns. 22-23. Again, the court overruled defense counsel's objection without any form of analysis or reasoning. R. p. 331, ln. 24-25. Finally, defense counsel objected when Ms. Georgoulis was asked about Appellant's mother staying with her, and the court allowed the State to proceed with the line of questioning.

Pursuant to South Carolina Code § 16-3-85 (2010), the offense of homicide by child abuse is defined as follows: "A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven. Specifically, Appellant was indicted under S.C. Code § 16-35-85(A)(1) (2010) for causing the death of the victim, between

the dates of September 14-15, 2008. On September 15, 2008, Appellant called 911 and reported that the victim was found in his crib, stiff and with blood on his face. Upon arrival, emergency services pronounced the victim deceased. At trial, the State alleged that Appellant inflicted life ending blunt force trauma to the victim between the time when Ms. S left to go out with friends at 6:00 p.m. on September 14th and returned at 2:00 a.m. on September 15th. The State also qualified Dr. Batalis as an expert in forensic pathology and he testified about his participation in the autopsy of the victim on September 16, 2008. R. p. 521. As far as providing an exact time of death, the best Dr. Batalis could conclude was that it was "within hours of when he was found." R. p. 523, Ins. 4-8.

As detailed above, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE. Here, the matter in controversy was the death of the twenty-two month old victim on September 15, 2008 due to blunt force trauma. Without explanation, the lower court found relevant the testimony of Ms. Georgoulis regarding Appellant's mood the day before when a friend came over and accused her of sleeping with her friend's husband. R. pp. 332-4. Additionally, the court allowed, over objection, testimony that Appellant's mother was staying with Ms. Georgoulis during the trial. Interestingly, the State provided no argument after counsel made his objections on the ground of relevancy nor did the lower court provide any reasoning, so the record is void regarding how this testimony made more or less probable the matter in controversy. Upon review of the testimony and its bearing on the allegations in the case, Appellant urges this Court to find that the testimony is absolutely irrelevant and counsel's objection should have been sustained.

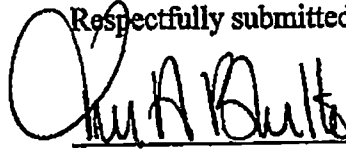
Even if this Court finds that the lower court's ruling on relevance was not in error, the testimony was clearly more prejudicial than probative. It is well established that the lower court

is to conduct a balancing test to determine if the testimony, even if relevant, is more probative than prejudicial. Pursuant to Rule 403, SCRE, relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of under delay, waste of time, or needless presentation of cumulative evidence." Looking at the testimony of Ms. Georgoulis, it established that Appellant spent the night at her home on September 13th, Appellant wanted to "get back together" with her, Appellant was upset about her friend's accusations and Ms. Georgoulis was upset when Appellant left. The question the State was not required to answer nor did the lower court address was what probative value this testimony had to the death of the victim the following day in a home in which Ms. Georgoulis was not an occupant. Furthermore, the only viable purpose of the State eliciting this testimony was a character assault on Appellant since the testimony established that Appellant was in a relationship with two women at the same time and stayed with one on September 13th and the other on September 14th. The prejudicial impact on the jury is simply undeniable; whereas, the probative value is questionable at best. Therefore, Appellant submits that the lower court was in error for failing to conduct a balancing test and for admitting the highly prejudicial testimony of Ms. Georgoulis.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court
reverse the above-mentioned findings of the lower court and remand the case for a new trial.

Respectfully submitted,



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February 18, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi L. Harrington, Circuit Court Judge
Appellate Case No.: 2010-165126

THE STATE,

RESPONDENT,

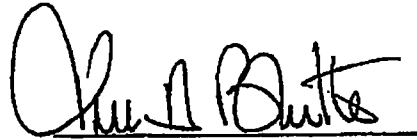
v.

JUSTIN RYAN HILLERBY,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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February 18, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2010-165126

THE STATE,

Respondent,

vs.

JUSTIN RYAN HILLERBY,

Appellant.

FINAL BRIEF OF RESPONDENT

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II. Any issue with the trial judge's failure to conduct a pre-trial hearing on the admissibility of the prior bad evidence or to rule on whether the prior bad acts were proven by clear and convincing evidence was not properly preserved for appellate review because Appellant never raised any arguments on those grounds to the trial judge. Regardless, the trial judge did not abuse her discretion in admitting the prior bad act evidence because it was admissible under the <u>res gestae</u> theory and admissible to prove intent and absence of mistake or accident. Furthermore, even if the trial judge erred in admitting the prior bad act evidence, any error was harmless in light of the cumulative nature of the evidence and in light of the other overwhelming evidence of guilt, which included statements by Appellant to law enforcement and to the victim's mother admitting he struck the victim prior to the victim's death.	
III. The trial judge did not abuse her discretion in overruling Appellant's objections to Georgoulis' testimony because the challenged testimony was relevant to the context of the events leading up to Victim's death, the credibility of Appellant, and the bias of Georgoulis. Furthermore, any error in the admission of the challenged testimony was entirely harmless in light of the other overwhelming evidence of guilt and the lack of prejudice that resulted from the admission of the testimony.	
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STATEMENT OF ISSUES ON APPEAL

I.

Any issue with the admission of Appellant's pre-trial statements to law enforcement was not properly preserved for appellate review because defense counsel indicated he had no objection to the statements when they were offered into evidence during trial. However, even if the issue was properly preserved, the trial judge correctly determined Appellant's statements were made knowingly, voluntarily, freely, and without coercion after Appellant had been informed of his rights and waived his rights, and her ruling was supported by the evidence.

II.

Any issue with the trial judge's failure to conduct a pre-trial hearing on the admissibility of the prior bad evidence or to rule on whether the prior bad acts were proven by clear and convincing evidence was not properly preserved for appellate review because Appellant never raised any arguments on those grounds to the trial judge. Regardless, the trial judge did not abuse her discretion in admitting the prior bad act evidence because it was admissible under the res gestae theory and admissible to prove intent and absence of mistake or accident. Furthermore, even if the trial judge erred in admitting the prior bad act evidence, any error was harmless in light of the cumulative nature of the evidence and in light of the other overwhelming evidence of guilt, which included statements by Appellant to law enforcement and to the victim's mother admitting he struck the victim prior to the victim's death.

III.

The trial judge did not abuse her discretion in overruling Appellant's objections to Georgoulis' testimony because the challenged testimony was relevant to the context of the events leading up to Victim's death, the credibility of Appellant, and the bias of Georgoulis. Furthermore, any error in the admission of the challenged testimony was entirely harmless in light of the other overwhelming evidence of guilt and the lack of prejudice that resulted from the admission of the testimony.

STATEMENT OF THE CASE

In September of 2008, Appellant Justin R. Hillerby was arrested following an investigation into the death of a twenty-two-month-old child. In December of 2008, the Berkeley County grand jury indicted Appellant for one count of homicide by child abuse. On February 22, 2010, a jury trial was commenced in the Berkeley County court of general sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to life imprisonment without the possibility of parole. On February 26, 2010, Appellant filed a motion seeking reconsideration of his sentence, and a hearing was conducted on the motion on April 27, 2010, with Judge Harrington again presiding. Thereafter, the trial judge issued an order affirming Appellant's sentence. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

In September of 2008, Jennifer S. and her twenty-two-month-old son, VICTIM ("Victim"), lived in Summerville, South Carolina, with S.'s eight-year-old daughter, Serena S., S.'s roommates, Eric Riggins and Brandi Mihill, and Appellant Justin R. Hillerby, who had been dating S. for approximately one year. (R. pp. 253-254; p. 276; pp. 295-296; p. 316; p. 572). Around 6:15 a.m. on the morning of September 15, 2008, S. got up, left Appellant in bed, sent her daughter to school, and then returned to bed and went back to sleep. (R. p. 303). At approximately 10:45 a.m., S. got back out of bed and went to check on Victim because she had not yet heard him awaken for the day, and Appellant followed her to Victim's bedroom. (R. p. 224; p. 304). When S. opened Victim's bedroom door, Appellant stated Victim was still asleep and advised her to let Victim keep doing so but to leave the door open so he could wake up naturally. (R. p. 304). S. started to close the door but noticed something on Victim's face. (R. p. 304). She then walked over to Victim's crib, discovered he was cold to the touch, rolled him over, and observed blood coming from his mouth and nose. (R. pp. 304-305).

After discovering Victim's condition, S. became hysterical. (R. p. 224; p. 306). Appellant then called 911 and reported: "He's bleeding. His face is bleeding. He's not moving. He's hard as a rock. He's fucking dead." (R. p. 224; p. 882). Shortly thereafter, Leonard S. ("Grandfather"), S.'s father and Victim's grandfather, responded to the scene after his wife received a call from S. about Victim and found S. sitting outside of the house crying. (R. pp. 211-212; p. 306). After speaking with S., Grandfather ran into the house, went to check on Victim, and discovered he was not breathing. (R. p. 212; p. 306). Grandfather then picked up Victim to try and

resuscitate him but immediately realized Victim was deceased because Victim was stiff and cold to the touch. (R. pp. 212-213). A few minutes later, firefighters and paramedics from the Summerville Fire Department arrived at the residence, but they also were unable to revive Victim and confirmed he was deceased. (R. p. 306; p. 396; pp. 399-401).

Thereafter, law enforcement officers began arriving on the scene and secured the residence while Appellant, S[REDACTED], S[REDACTED]'s parents, Mihill, and Riggins all waited outside. (R. p. 213; pp. 339-340; p. 342; pp. 345-346). While they did so, Appellant did not exhibit any outward signs of an emotional response but repeatedly told S[REDACTED] he was sorry. (R. p. 213; p. 397; pp. 402-403). As they continued to wait, Appellant approached Captain George Ploth of the Summerville Fire Department and asked when they would know what had happened.¹ (R. p. 403).

Subsequently, S[REDACTED], Appellant, Mihill, and Riggins were taken to the police department and separately interviewed. (R. pp. 282-283; p. 308). During his interview, Appellant spoke with Detective Shannon Sharp and Sergeant Cassandra Williams of the Summerville Police Department in an open area for approximately two hours. (R. pp. 10-11; p. 25; pp. 28-29; p. 459-461). At the outset of the interview, Detective Sharp noted Appellant appeared to be suffering from a hangover and smelled slightly of alcohol, but Appellant did not appear to be intoxicated to the officer. (R. p. 31; p. 462). Prior to any questioning, Appellant was advised of his constitutional rights, indicated he understood those rights, and signed a waiver form indicating he wished to waive his rights. (R. p. 30; p. 462; pp. 464-467; p. 863; p. 866). Appellant was then verbally interviewed by

¹ During trial, Captain Ploth testified he perceived Appellant's question and demeanor to be unusual. (R. p. 407).

Detective Sharp before taking a cigarette break when he stated he did not feel well.² (R. p. 468). When he returned, Appellant stated he felt fine and wrote the following statement:

Went to pick up Rory stopped by Melissas first to see my son me and her argued a little went to Rorys picked him up came home first grabbed blaise to go to the pool I drove Jenn walked stayed at the pool all day about 2 or 3 noticed a bruze on his face figured he hit his head on the pool some how came home I started to feed the kids fed blaise first the Serena I told Serena to go to bed I let blaise stay up with me he spilt my drink on the table I grabbed him and pointed to the corner for 10 minutes I let him out he played for awhile still. I didnt have any milk so I gave him some corn dog bites he started to bob his head. I tried to get him to stand up but he wouldnt so I put him to bed. he was fine then. We woke up this morning to check on him and it looked like he was sleeping Jenn tried to shake him but he didnt move she rolled him over and he was already gone. I called 911 and tried to keep her away

(R. p. 468; pp. 471-472; p. 863; p. 866). After Appellant wrote his statement, he said he felt dizzy and was having chest pains, and he terminated the interview. (R. pp. 29-31; p. 42; pp. 472-473). Appellant was then examined by paramedics and medically cleared, and he left the police department. (R. p. 29; p. 473).

After leaving the police department, Appellant and S stopped by S's parent's house and then returned home. (R. p. 218; p. 249; p. 264; p. 308). After arriving home, Appellant behaved in a nervous manner, appeared to be angry instead of upset, and researched secondary drowning with S as the possible cause of Victim's death. (R. pp. 249-250; p. 264; p. 283; p. 308). Additionally, he informed his roommates he was waiting for law enforcement officers to come arrest him because he believed boyfriends were always blamed in situations like Victim's death. (R. p. 264; p. 283).

² Earlier, Appellant had stated he was feeling sick and dizzy while he was waiting with the others outside of S's residence, and he fell to his knees while standing in the driveway. (R. pp. 213-214; pp. 248-249). However, afterwards, he indicated he did not need any medical assistance. (R. pp. 213-214).

On September 16, 2008, Dr. Nicholas Batalis, a forensic pathologist and an expert in forensic pathology, performed an autopsy on Victim. (R. p. 518; p. 521). During the autopsy, he discovered Victim had suffered fourteen facial injuries, including numerous fresh bruises, along with nine skull injuries. (R. p. 524; p. 528; p. 548). Additionally, he located subdural hemorrhages and subarachnoid hemorrhages in Victim's brain, a bruise inside of Victim's ear cavity, and retinal hemorrhages in Victim's eyes. (R. p. 533; pp. 538-539). Due to the severity and number of the injuries, he determined Victim's injuries were caused by a significant amount of force and were not consistent with an accident. (R. p. 524; pp. 526-527; p. 530; p. 533). Based on his findings, he concluded Victim would have displayed immediate symptoms after sustaining the injuries, would likely have appeared unsteady or groggy, and died at some point between 9:00 p.m. on September 14, 2008, and 9:00 a.m. on September 15, 2008.³ (R. p. 524; pp. 542-543; pp. 564-565). Ultimately, Dr. Batalis determined Victim's death was a non-accidental homicide resulting from blunt head trauma. (R. pp. 523-524).

On the following morning, Appellant, S. , Mihill, and Riggins drove themselves to the Dorchester County Sheriff's Office in order to take polygraph examinations in regards to Victim's death. (R. pp. 32-34; p. 45; p. 473; p. 496). After they arrived, Sergeant Raymond Dixon, a polygraph examiner with the Dorchester County Sheriff's Office, met with Appellant and discussed the polygraph examination with him. (R. pp. 87-88; p. 495). At the outset of the interview, he questioned Appellant to ensure that he was not under the influence of alcohol or drugs. (R. p. 88; pp. 496-497; p. 505). In response to his questions, Appellant informed the officer he drank a few beers

³ Consistent with Dr. Batalis' findings, Dr. Michelle Amaya, an expert in forensic pediatrics, testified during trial that Victim's brain injuries would have prevented him from speaking, yelling, walking, or holding his head up, and she opined he would not have been able to function normally after the brain injury was inflicted. (R. pp. 566-567; p. 571; pp. 581-583).

and took sleeping pills on the preceding night but was not still under the influence of alcohol. (R. p. 88; pp. 496-497; p. 505). Sergeant Dixon then advised Appellant of his rights, and Appellant signed a waiver form indicating he understood his rights and wanted to make a statement without the assistance of an attorney. (R. pp. 89-92; pp. 497-501; pp. 503-504; p. 873). Sergeant Dixon then conducted a pre-polygraph examination interview and asked Appellant if he inflicted any injury to Victim that would have caused his death. (R. pp. 92-94; pp. 506-507). Upon hearing the question, Appellant declined to take the polygraph examination and indicated he only wished to speak with the officer.⁴ (R. p. 34; p. 94; p. 96; pp. 506-507; p. 510). Appellant then informed Sergeant Dixon he hit Victim with his knee and also admitted he may have grabbed Victim and shaken him a little. (R. p. 94; p. 511).

Thereafter, Appellant asked to speak with Detective Sharp and was transported to the Summerville Police Department for another interview. (R. pp. 34-35; p. 60). At the outset of the interview, Appellant was advised of his rights and again waived his rights by signing a waiver form. (R. p. 35; p. 59; p. 474; pp. 845-850; p. 865). Appellant was then interviewed for approximately an hour and a half to an hour and forty-five minutes and wrote the following statement about Victim's death:

I ran out of my Room and he was running towards me I caught his head with my knee he was a little groggy and I was getting tired I tried to feed him but he kept nodding off I may have clipped his head on the way to his crib and maybe again on his crib I believe he hit his head at the pool early that day and probably the corner where I caught him all these together I believe is what caused it.

I was in my bedroom I grab the door jam to swing out into the hallway quicker and he was running into the hallway I caught the top of his head hard enough to throw his head down and his feet up. He moved slowly so I helped him up and went back into the room when I came out he was on the

⁴ Unlike Appellant, S and her roommates took polygraph examinations. (R. p. 33; p. 46).

futon so I tried to feed him but he got more tired on the way to the bedroom I believe I clipped his head in the hallway and maybe the crib too I was intoxicated and tried to memory that everything that happened when I put him to sleep and the last time I saw him alive.

(R. pp. 845-850; p. 865). After Appellant wrote his statement, Detective Sharp asked Appellant several follow-up questions, and Appellant admitted he grabbed Victim's shoulder and neck after Victim spilled a drink. (R. pp. 478-480; pp. 845-850; p. 865). Following his admissions, Appellant was arrested for homicide by child abuse and incarcerated. (R. p. 53; p. 483).

On the following day, Appellant was transported back to the Summerville Police Department for a bond hearing and was denied bond. (R. pp. 483-484; p. 501; pp. 853-854). After the hearing, Officer Richard Darling of the Dorchester County Sheriff's Office transported Appellant to the Berkeley County Detention Center. (R. pp. 62-63). During the drive, Appellant initiated a conversation with the officer, began discussing his case, claimed Victim ran into his knee, and indicated he believed he should have been charged with a less serious offense. (R. pp. 63-64; p. 72; p. 76). In response, Officer Darling reminded Appellant of his right to remain silent, and Appellant stated he was aware of that right. (R. p. 64). Officer Darling then indicated to Appellant that the autopsy results and physical evidence would reveal if he had been truthful. (R. pp. 72-73). Thereafter, Appellant asked the officer what he thought would happen to him, and Officer Darling told him he did not know but that God and the criminal justice system generally help people who help themselves. (R. pp. 76-77). Appellant then told him he wanted to speak to the detectives again. (R. p. 77).

After arriving at the detention center, Officer Darling dropped Appellant off and contacted one of the detectives with the Summerville Police Department to let them know

Appellant wished to speak with them again. (R. pp. 78). The detective then asked Officer Darling to bring Appellant back, so he went to retrieve Appellant. (R. p. 66). When he did so, he discovered Appellant had encountered a public defender at the detention center, and he verified with Appellant that he still wanted to go back and speak with the detectives. (R. pp. 66-67; pp. 78-79). Appellant confirmed that he did, so Officer Darling transported him back to the police department. (R. p. 63; pp. 65-66; p. 484).

Once back at the police department, Appellant met with Detective Sharp again, and Detective Sharp advised Appellant of his rights one more time. (R. p. 484). Detective Sharp also asked Appellant if he wanted to make a statement even though he had spoken with a public defender, and Appellant confirmed that he did. (R. pp. 484-485). Thereafter, Appellant indicated he wished to tell the truth and stated he wanted to get his side of the story out because he believed he was being portrayed unfairly by the media. (R. pp. 487-488). Appellant then wrote the following statement after signing a waiver form:

He split my drink I called him in the kitchen I knelt down and said what is wrong with you I smacked him open handed a couple of times the last time his head hit the floor I went and cleaned up the mess when I came back he was still laying there with his eyes open. I put him on the futon and made another glass of tea. When I looked at him he looked like he was falling asleep. I then put him to bed.

(R. pp. 867-872). Following the statement, Detective Sharp asked Appellant a series of questions about the incident, and Appellant indicated he hit Victim all over the head. (R. pp. 867-872). Appellant further confirmed his previous statements were untruthful and wrote he was sorry he waited so long to tell the truth. (R. p. 867-872).

Subsequently, Appellant was indicted for homicide by child abuse, and he proceeded to trial. (R. pp. 129-130; pp. 877-878). At the outset of trial, defense counsel requested a hearing on the admissibility of Appellant's statements, and the trial judge conducted a pre-trial hearing on the matter. (R. p. 6; p. 10). During the hearing, Detective Sharp testified he took three statements from Appellant. (R. p. 11). At the time those statements were given, Detective Sharp confirmed Appellant had not been threatened, coerced, or promised anything, Appellant was not handcuffed, Appellant did not appear to be under the influence of alcohol or drugs, Appellant had been advised of his rights, and Appellant voluntarily waived his rights and agreed to make the statements. (R. pp. 13-14; pp. 17-21; pp. 30-31; p. 35; p. 60). Additionally, Officer Darling testified Appellant initiated a conversation with him while he was transporting Appellant to the detention center, indicated he knew he had a right not to speak to him, and requested to speak with the detectives investigating his case. (R. pp. 63-66; p. 77; pp. 78-79). Finally, Sergeant Dixon testified he interviewed Appellant and attempted to conduct a polygraph examination of Appellant after Appellant agreed to submit to the test. (R. pp. 84-85). Sergeant Dixon noted Appellant was not handcuffed, did not appear to be under the influence of alcohol or drugs, was advised of his rights, and waived his rights. (R. pp. 86-92). He further stated Appellant chose to stop the polygraph examination but indicated he still wished to speak with him. (R. pp. 94-96). Following the officers' testimony, Appellant did not testify and did not offer any evidence in regards to his statements. (R. p. 101).

Thereafter, the solicitor argued each of Appellant's statements was knowingly, voluntarily, and intelligently made. (R. pp. 101-102). In support of that position, the solicitor asserted Appellant was repeatedly advised of his rights, waived those rights, and

never requested to speak with an attorney. (R. p. 102). The solicitor further noted that Appellant had not been appointed an attorney before making any of the statements and, regardless, was the person who initiated contact with the officers before making the statements.⁵ (R. pp. 102-105). In response, defense counsel argued Appellant made the statements, was advised of his rights, and understood his rights. (R. pp. 107-108). However, he argued the officers' comments about the potential for the death to have been an accident, comments about the accuracy of forensic evidence, and remarks about religion coupled with the fact Appellant smelled of alcohol and had been drinking and taking sleeping pills "the night before" one of the statements rendered the September 18th statement coerced under the totality of the circumstances. (R. pp. 108-111). Responding to defense counsel's argument, the solicitor noted Appellant had substantial prior experience with the criminal justice system, Appellant initiated the conversations with the officers, and Appellant was not intoxicated before his statements. (R. pp. 111-113). Finally, defense counsel contended the "buddy-buddy" nature of Detective Sharp's question and the officer's representations that Appellant would not get in trouble if Victim's death was simply an accident were promises or "inferred promises" and a form of coercion. (R. p. 113). After considering the arguments of counsel, the trial judge found the statements were knowingly, voluntarily, and intelligently made under the totality of the circumstances, Appellant had been informed of and understood his rights, there was no coercion on the part of the police officers, and Appellant was not under the influence of alcohol to an extent where his understanding of his rights had been impaired. (R. pp. 115-116).

⁵ During the pre-trial hearing, documentation was presented confirming Appellant was again advised of his right to counsel during the bond hearing, filed an application for appointed counsel on September 23, 2008, and was appointed a public defender on October 3, 2008. (R. pp. 851-852; pp. 855-857).

Following the trial judge's ruling, defense counsel moved to prohibit the introduction of any evidence related to Appellant's behavior at the pool on September 14, 2008, because he contended such testimony would constitute inadmissible prior bad act evidence and because he had no responsibility to watch over the children at the pool. (R. pp. 117-118). In response, the solicitor indicated she intended to introduce the testimony of two witnesses as to their observations of Appellant's statements and actions toward Victim at the pool and asserted the evidence was admissible to establish Victim's death was not the result of an accident at the pool and to show Appellant's behavior towards Victim hours before the time period in which Victim died. (R. pp. 118-119). Following the solicitor's argument, defense counsel asserted the substance of that testimony was "clearly a prior bad act" and that Appellant's statements and behavior at the pool did not establish intent or motive. (R. p. 120). He further asserted he did not intend to introduce testimony establishing Victim was injured at the pool. (R. pp. 120-121). In rebuttal, the solicitor asserted the testimony was highly probative and was admissible to establish motive, intent, and absence of mistake or accident and was also admissible under the res gestae theory. (R. pp. 121-122). After considering the arguments of counsel, the trial judge denied Appellant's motion to suppress the evidence and ruled the testimony was admissible to prove intent and the absence of an accident and was also more probative than prejudicial. (R. pp. 123-124).

Subsequently, during trial, Brandon H. ("Brandon"), a sixteen-year-old high school student, testified that he went to a neighborhood pool with several friends, including a sixteen-year-old friend named Courtney T. ("Courtney"), on September 14,

2008.⁶ (R. pp. 229-230; p. 237). Brandon stated Appellant, S , and Victim were also at the pool that day. (R. p. 230). While they were there, Brandon indicated Appellant yelled at Victim, told him to stand in the corner because no one cared about him, and yanked Victim by the arm a few times. (R. p. 232; p. 234). Furthermore, Brandon testified he personally pulled Victim from the pool one time after his head went underwater and heard Appellant state that he should have kept Victim in there. (R. p. 231). Brandon further stated he was bothered by the way Victim was treated that day but did not believe he needed to report the behavior to the police at the time. (R. p. 232; pp. 234-235).

Likewise, Courtney testified she went to the pool with Brandon and several other friends on September 14, 2008, and encountered S , Appellant, and Victim there. (R. pp. 237-239). While at the pool, Courtney stated she observed Victim repeatedly jump into the deep end of the pool, and she and Brandon pulled him out several times while Appellant and S drank, listened to music, and paid no attention to Victim. (R. pp. 238-239; p. 241). However, on the last occasion Victim jumped into the pool, Courtney indicated Appellant and S came over to get him, Appellant called him a "pussy" and told him to go ahead and cry because no one wanted him, and then Appellant dragged Victim away by his arm. (R. p. 239; p. 242).

In addition to Brandon's and Courtney's testimony, S testified about the events leading up to Victim's death and stated Appellant called Victim a "pussy" at the pool on September 14, 2008. (R. p. 296). She further testified Appellant told her he hit Victim but he did not believe it was what killed him. (R. p. 307; p. 313). She also

⁶ Prior to Brandon's testimony, an off-the-record bench conference was conducted. (R. p. 228). Following the bench conference, defense counsel renewed an unspecified objection, and the objection was noted. (R. p. 228).

acknowledged Appellant called her several times from jail, and a recording of a call Appellant placed to S on September 26, 2008, was played for the jury. (R. p. 307).

In the recording, Appellant told S--

Baby, I smacked him, I didn't smack him that hard, but when he hit the floor is when, I guess, it started. And, I didn't notice it because I was drunk, I guess. And, I put him on the futon. I gave a true statement on Thursday, the day I got fucking jumped, and I guess they put it on the news that night, and when everyone saw it, that was it.⁷

(R. p. 313; p. 892).

Following S's testimony, the solicitor called Melissa Georgoulis, the mother of Appellant's child, to the stand. (R. pp. 330-331). At the outset of her testimony, the solicitor asked Georgoulis if she saw Appellant on the evening of September 13, 2008, and defense counsel objected to the relevancy of the question and "any further line of questioning about what happened the day before."⁸ (R. pp. 330-331). However, the trial judge overruled the objection, and Georgoulis testified Appellant spent the night with her on that date and left around 10:00 a.m. the next morning. (R. p. 331). The solicitor then asked Georgoulis what Appellant's mood was when he left the house, and defense counsel objected, asserting: "I don't see any relevance of what his mood was at ten o'clock the day before." (R. p. 331). The trial judge again overruled the objection, and Georgoulis testified Appellant was upset. (R. p. 331). Thereafter, the solicitor asked Georgoulis if she had any houseguests at the time of trial, and defense counsel objected, asserting: "I don't see what relevance that has about who is staying in the home now." (R. p. 332). The solicitor responded the question related to bias, and the trial judge

⁷ The day Appellant and S took Victim to the pool was Sunday, September 14, 2008. (R. p. 298). Thereafter, Appellant gave his final written statement to law enforcement four days later on September 18, 2008, which was a Thursday. (R. pp. 795-796).

⁸ Earlier during trial, S testified Appellant told her he spent the night of September 13, 2008, at the location of a house party he attended as opposed to Georgoulis' house. (R. p. 297).

conducted an off-the-record bench conference. (R. pp. 332-333). Following the bench conference, the solicitor repeated the question, and Georgoulis confirmed Appellant's mother was currently staying with her. (R. p. 333). Georgoulis then testified Appellant was upset with her on the morning he left her home because a former friend accused her of sleeping with her husband. (R. p. 334). Georgoulis further stated Appellant tried to get back together with her that morning. (R. p. 334). Subsequently, on cross-examination, Georgoulis reaffirmed Appellant's mother was staying with her at the time of trial and stated she was doing so because she was stationed overseas. (R. pp. 336-337). She further testified she and Appellant were both mad at each other at the time Appellant left her home. (R. pp. 337-338).

Subsequently, Detective Sharp testified about his investigation into Victim's death and about the statements Appellant made to him. (R. pp. 460-461). During his testimony, the solicitor introduced each of Appellant's written statements, defense counsel indicated he had no objection to their admission, and the trial judge admitted the statements without objection. (R. p. 469; p. 477; p. 487). Thereafter, on cross-examination, defense counsel asked Detective Sharp if he was trained in the Reid technique of interrogation, and he confirmed that he was. (R. p. 494). However, Detective Sharp never testified he used the Reid technique or any other techniques in interviewing Appellant about Victim's death. (R. pp. 459-515).

Following Detective Sharp's testimony, the State presented the testimony of Dr. Batalis and Dr. Amaya in regards to Victim's injuries and cause of death before resting its case. (R. pp. 523-524; p. 579; p. 586). Thereafter, Appellant testified in his own defense and offered his own account of what happened around the time of Victim's

death.⁹ (R. p. 624). At the outset of his testimony, defense counsel asked Appellant if he hit Victim, and Appellant responded that he had no reason to hurt Victim. (R. p. 624). He then recounted his version of what happened on the night of September 14, 2008, admitted he punished Victim for spilling a drink, stated he grabbed Victim's arm but did not put his hands on him, and claimed he collided with Victim after leaving him in a room unattended. (R. pp. 631-636). However, he testified Victim was fine after the collision and he later put Victim to bed when he started to appear tired. (R. pp. 636-642). On the following day, Appellant stated they discovered Victim was deceased and he called 911. (R. pp. 645-646). He then indicated he went to the police department, was not there for a long period of time, wrote a statement accurately reflecting the majority of what happened on the night before they found Victim, and went home. (R. pp. 655-657). Thereafter, Appellant stated he agreed to take a polygraph examination on September 17, 2008, but claimed the officers never hooked him up to a machine. (R. p. 658). He further asserted they wrongly accused him of refusing to take the examination when he told them he did not know what happened to Victim. (R. p. 658). After the officers told him Victim died of blunt force trauma, Appellant claimed the officers told him it looked like an accident, stated no one gets in trouble for an accident, and advised him to tell them about it. (R. p. 660). At that point, Appellant claimed he told the officers about running into Victim and then included in his statement that he bumped Victim's head on the door and crib after he was asked about that by one of the officers. (R. pp. 660-661). Following his statement, he indicated he was arrested and subsequently denied bond. (R.

⁹ In addition to his own testimony, Appellant offered the testimony of his stepfather, John Williams. (R. p. 604). Williams testified Appellant was dating both S and Georgoulis during the same time period and would go from one to the other. (R. pp. 606-607). Williams' testimony was consistent with the earlier testimony of Riggins and Mihill, who confirmed Appellant occasionally left S's home to move in with his ex-girlfriend. (R. p. 254; p. 276).

pp. 662-663). After his bond hearing, Appellant stated he was transported to the detention center and informed "they're going to fry [his] ass" if his story did not match what happened. (R. pp. 664-665). Thereafter, Appellant acknowledged he asked to speak with the detectives again, claimed he was repeatedly placed in and out of a cell and questioned, and asserted he agreed to write he hit Victim because he was told the forensic evidence had to match his statement. (R. pp. 667-668). However, he denied hurting Victim and insisted he had no reason to do so. (R. p. 672).

Subsequently, on cross-examination, Appellant acknowledged he bounced back and forth between S. and Georgoulis on a weekly basis. (R. p. 675). He further denied hitting Victim and denied ever calling any child a "pussy." (R. p. 675; p. 677). However, he admitted he called S. after being incarcerated and told her he smacked Victim to the floor. (R. p. 680). He also stated he wrote numerous letters to S. and Georgoulis from jail in which he told Melissa he was done with S. and told S. he was only dating Georgoulis to see his child. (R. pp. 682-683). He also acknowledged he wrote letters stating he knocked Victim over, he "popped" Victim in the head "no harder than we have smacked his hands," and he was going to "beat" his charge. (R. p. 685; pp. 687-688; p. 708). He further admitted he requested the interview with Detective Sharp but claimed he wrote his apology about waiting to tell the truth in his final statement because he was promised doing so would get him bond. (R. p. 705). Additionally, he claimed he was told people do not get in trouble for accidents but conceded what happened to Victim was not accidental. (R. p. 709).

Thereafter, the defense rested, and the State called several witnesses in rebuttal. (R. p. 712; p. 716; p. 724). Initially, Georgoulis was recalled to the stand and testified Appellant never called her son a "pussy." (R. p. 716). However, she subsequently

admitted Appellant did, in fact, call her son a "pussy" but stated "[h]e wasn't directly talking about him being a pussy." (R. p. 719). Georgoulis further testified Appellant never "laid a hand" on her other children and never beat her son. (R. p. 720). However, she admitted she told the police that Appellant "popped" her son on the butt after he spilled a beer on one occasion. (R. p. 721). Additionally, Sergeant Dixson testified about the polygraph examination he was scheduled to perform on Appellant on September 17, 2008, and noted Appellant refused to take the exam when asked if he purposefully did anything to Victim that could have caused his death. (R. pp. 724-725; pp. 739-740).

Subsequently, the State again rested its case, and the trial judge instructed the jury on the applicable law, including on its duty to determine if Appellant made the statements attributed to him and if those statements were voluntarily made by Appellant of his own free will. (R. p. 745; pp. 820-821). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 833). Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of life without the possibility of parole. (R. p. 842).

ARGUMENT

I.

Any issue with the admission of Appellant's pre-trial statements to law enforcement was not properly preserved for appellate review because defense counsel indicated he had no objection to the statements when they were offered into evidence during trial. However, even if the issue was properly preserved, the trial judge correctly determined Appellant's statements were made knowingly, voluntarily, freely, and without coercion after Appellant had been informed of his rights and waived his rights, and her ruling was supported by the evidence.

Appellant contends the trial judge erred in failing to suppress the statements he made to law enforcement both before and after his arrest. Appellant maintains the statements were involuntary and inadmissible because they were allegedly the product of misrepresentations and coercion on the part of the police, were made while he was under the influence of alcohol and sleeping pills, and were made after he invoked his right to counsel. Initially, any issue with the trial judge's ruling on the admissibility of the statements is not preserved for appellate review because defense counsel specifically indicated he had no objection to the admission of the statements when they were offered into evidence during trial. Regardless, the testimony and evidence presented during trial established Appellant voluntarily made each of his statements to law enforcement after being informed of his rights and waiving his rights, and no testimony was presented suggesting Appellant's will was overborne during the interview process. Therefore, the trial judge properly admitted Appellant's statements during trial, and her ruling was supported by the evidence. Appellant's conviction should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v.

Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Generally, a motion in limine seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993).

In the case at bar, any issue with the admission into evidence of Appellant's statements to law enforcement was not properly preserved for appellate review. At the outset of trial, defense counsel challenged the admissibility of Appellant's statements, and the trial judge conducted a pre-trial hearing before preliminarily ruling those statements were knowingly, voluntarily, and intelligently made and would be admissible during trial. Thereafter, when the solicitor moved to introduce the first and second statements into evidence during trial, defense counsel indicated he had no objection to the admission of the statements, and the trial judge admitted the statements without objection. Cf. State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue

Dicapua had with the videotape.”). Subsequently, when the solicitor moved to introduce the third statement into evidence, defense counsel again indicated he had no objection to the admission of the statement while noting he had made objections earlier, and the trial judge admitted the statement into evidence “without objection.”¹⁰ (R. p. 487).

Accordingly, because the statements were admitted into evidence without objection and because no contemporaneous objections to the admission of the statements were raised during trial, Appellant’s pre-trial objection to the admission of the statements was expressly waived, and the issue cannot properly be raised or reviewed on appeal. See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) (“When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.”); see also State v. Johnson, 298 S.C. 496, 497-498, 391 S.E.2d 732, 733 (1989) (“Appellant stated that he had no objection to the second order Since appellant expressly consented to admission of the second order, he has waived his right to raise the issue on appeal.”); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”); State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) (“This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal.”). Appellant’s conviction should be affirmed.

B. Voluntariness and Admissibility of Appellant’s Statements

¹⁰ Specifically, defense counsel stated: “Your Honor, without objection. We’ve already made these objections earlier.” (R. p. 487). Significantly, defense counsel simply noted his earlier objections without renewing those objections. (R. p. 487).

“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”

Miranda v. Arizona, 384 U.S. 436, 444 (1966). Prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, he has a right to an attorney, and an attorney will be appointed to him prior to any questioning if he desires one and cannot afford one. Id. at 479. Once those warnings are given to a suspect and the suspect is afforded an opportunity to exercise his rights, the suspect may knowingly and intelligently waive those rights and make a statement. Id.

However, a confession or statement by a defendant is not admissible unless voluntarily made. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). If a defendant is advised of his constitutional rights and then chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence the defendant voluntarily waived his rights. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990). “The process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury.” State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). Pursuant to the bifurcated process, the trial judge must first determine in an evidentiary hearing whether the State proved the statement was voluntarily made by a preponderance of the evidence and then, if the trial judge finds the State met its burden, the statement is submitted to the jury where its voluntariness must be proven beyond a reasonable doubt. Id.

The critical factor in an evaluation of the voluntariness of a defendant’s statements is whether the defendant’s will was overborne when he confessed. State v. Von Dohlen, 322 S.C. 234, 244, 471 S.E.2d 689, 695 (1996); see also Miller v. Fenton,

796 F.2d 598, 604 (3rd Cir. 1986) ("We emphasize that the test for voluntariness is not a but-for test: we do not ask whether the confession would have been made in the absence of the interrogation. Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all."). "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

When considering the voluntariness and admissibility of a defendant's statements, the trial judge should examine the totality of the circumstances under which the statements were made, including the characteristics of the accused and the details of the interrogation, to determine whether the State has met its burden of proof. State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980). Factors to be considered in the totality of the circumstances analysis include: (1) the age of the accused; (2) the educational level and intelligence of the accused; (3) the accused's knowledge of his constitutional rights; (4) the length of the accused's detention; (5) the nature of the questioning and whether it was repeated and prolonged; and (6) the presence or absence of the use of punishment, including deprivation of food or sleep. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

On appeal, the trial judge's decision as to the voluntariness of a statement will not be reversed unless the ruling was so erroneous it constituted an abuse of discretion. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). "When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of

the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." Saltz, 346 S.C. at 136, 551 S.E.2d at 252 (emphasis added).

In the case sub judice, the trial judge did not abuse her discretion in ruling Appellant's statements were admissible during trial. During the pre-trial hearing, testimony was presented establishing Appellant voluntarily made several statements after repeatedly being informed of his rights. The officers who testified during the hearing confirmed Appellant waived his rights and voluntarily agreed to speak with them, was not handcuffed during the interviews, was not threatened in any way, was not promised anything in exchange for his statements, was not deprived of food or any other personal liberties during the interview process, was not coerced into making the statements, never invoked his right to counsel, and was not interviewed for a continuous or extended period of time. In fact, illustrating the voluntary nature of the interview process, Appellant was not prevented from terminating the interviews, which was demonstrated by the fact he chose to stop the first interview and go home, or from declining to take the polygraph examination, and Appellant voluntarily came in for the second interview two days after Victim's death after he had previously terminated an interview when he was not feeling well on September 15, 2008. Additionally, regarding the circumstances related to Appellant himself, Appellant was an employed adult who had previously had several prior experiences with the criminal justice system, and he was able to personally write and sign each of his statements.¹¹ Accordingly, when viewed in their totality, the circumstances surrounding Appellant's statements demonstrated Appellant made his statements knowingly, voluntarily, and freely after being informed of his rights and

¹¹ During trial, Appellant stated he self-employed in the roofing industry. (R. p. 645).

waiving those rights. Cf. Von Dohlen, 322 S.C. at 245, 471 S.E.2d at 696 ("[Von Dohlen] was repeatedly read his Miranda rights, was questioned from approximately 7:00 to 10:00 p.m., was permitted to use the phone, bathroom, etc., and was not threatened or coerced. Accordingly, the trial court properly admitted his statement to police. It was then within the province of the jury to determine the voluntariness of the statement."). Therefore, the trial judge did not abuse her discretion in admitting Appellant's statements and submitting the question of their voluntariness to the jury.

In arguing the trial judge abused her discretion in admitting the statements, Appellant first contends the statements were inadmissible because the law enforcement officers used impermissible coercive tactics and misrepresentations during the interview process and broke down his physical will. In support of that position, Appellant points to several factors allegedly establishing his statements were coerced. First, Appellant contends Detective Sharp admitted to using the Reid technique of interrogation on Appellant. However, no such testimony was presented during Appellant's trial. Instead, Detective Sharp simply admitted he was trained in the Reid technique but did not indicate he used or needed to use any techniques on Appellant during the interview process. Regardless, had the officer used the Reid technique, such a method of interrogation does not automatically render a confession involuntary unless the suspect's will is overborne by the interrogation process, and no evidence was presented suggesting Appellant's will was overborne by the officers or their method of questioning him. See Myers, 359 S.C. at 47, 596 S.E.2d at 492 (finding Myers' confession was properly admitted into evidence even though the officers who interviewed Myer used the Reid technique of interrogation where the totality of the circumstances supported a finding Myers' will was not overborne, including that Myers was free to leave the interview if he chose, Myers was

repeatedly advised of his rights, and none of the interviews lasted more than a few hours). Next, Appellant contends his will was clearly overborne because he ended his first interview after feeling poorly. However, notwithstanding the fact Appellant manifested symptoms of feeling poorly well before the interview began when he stated he was feeling dizzy while waiting outside of S's residence, no testimony was presented at any point during the pre-trial hearing or during trial linking Appellant's dizziness or chest pains at the end of the first interview to anything the officers said or did, including from Appellant himself when he testified during trial. Accordingly, the fact Appellant stopped the first interview based on how he was feeling at the time did not establish Appellant's will was overborne during that interview or any of the subsequent interviews. Finally, Appellant contends the statements were coerced because the officer suggested Victim's death could have resulted from an accident and informed him no one would get in trouble if the death was an accident. However, the officer's comments to Appellant regarding accidental deaths merely constituted an accurate statement of the law and were not a misrepresentation in any way. See State v. Brown, 205 S.C. 514, 521, 32 S.E.2d 825, 828 (1945) ("Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. If it be shown that the killing was unintentional; that it was done while the perpetrator was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused on the score of accident."). Additionally, the officer's act of reviewing what potentially could have caused Victim's death with Appellant was an appropriate interview method that simply offered Appellant an opportunity to reveal the details of what occurred, and it did not constitute a coercive inducement or promise of some reward to Appellant in any way. See People v. Carrington, 47 Cal. 4th 145, 171, 211 P.3d 617,

P.3d 617, 640 (Cal. 2009) ("Defendant also contends that Detective Lindsay's assurances that the police merely were attempting to understand defendant's motivation in committing the crimes impermissibly coerced her to confess. To the contrary, Detective Lindsay's suggestions that the Gleason homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible." (citations omitted and emphasis added)); see also State v. Parker, 381 S.C. 68, 91, 671 S.E.2d 619, 631 (Ct. App. 2008) ("Here, there is no indication Parker's will was overborne by Agent Boykin's congenial and rationalizing interview."); see, e.g., Miller, 796 F.2d at 605 ("[I]t is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. For example, the interrogator may play on the suspect's sympathies or explain that honesty might be the best policy for a criminal who hopes for leniency from the state These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." (citations omitted)). Accordingly, the trial judge properly determined Appellant's statements were not coerced, and her ruling was supported by the evidence.

Appellant next appears to contend his statements should not have been admitted because they were made while he was under the influence of drugs and alcohol. However, during the pre-trial hearing, no testimony was presented suggesting Appellant was under the influence of any substances at the time of the interviews or was too impaired to be able to comprehend what he was saying to law enforcement. Instead, regarding Appellant's first statement, the testimony presented during the pre-trial hearing

admittedly did on the day before but was not still under the influence at the time of the statement. Regarding Appellant's statements on September 17, 2008, the testimony established Appellant was not impaired but had been drinking and using sleeping pills the night before instead of immediately prior to the interview.¹² Finally, regarding Appellant's final statement on September 18, 2008, no testimony was presented suggesting Appellant, who had been incarcerated since giving his last statement on the preceding day, was intoxicated or under the influence of any substance at the time of the interview. Therefore, the unchallenged testimony presented during the pre-trial hearing established that Appellant, if impaired at all, was not impaired to such a degree that his statements were rendered involuntary at the time any of his statements were made, and Appellant did not even imply to the jury during his trial testimony that he was intoxicated at the time his statements were made. See, e.g., State v. Saxon, 261 S.C. 523, 528, 201 S.E.2d 114, 117 (1973) ("The fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words. Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying."). Accordingly, the trial judge did not abuse her discretion in declining to exclude Appellant's statements due to alleged intoxication. Cf. State v. Collins, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976) ("The evidence, including the condition of the defendant, presented a factual situation which the judge determined unfavorably to the defendant. We cannot say that he erred.").

¹² Notably, regarding the sobering effects that naturally result from the passage of time, Appellant testified: "Anybody that drinks beer knows that eight, nine hours later you're not still going to be drunk." (R. p. 470).

Finally, Appellant appears to contend his statements were inadmissible because they were made after he invoked his right to counsel. Initially, Appellant never raised such an argument during trial and, thus, is precluded from raising such an argument for the first time on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). ("Appellant is limited to the grounds raised at trial."). However, even if that particular argument had been properly preserved for appellate review, no testimony was presented during trial suggesting Appellant ever invoked his right to counsel prior to making any of his statements to law enforcement. Instead, each of the officers who spoke to Appellant testified he was repeatedly informed of his right to counsel and waived that right before making each of his statements, and Appellant confirmed that fact through his signature on the waiver form associated with each of his statements. See Montejo v. Louisiana, 556 U.S. 778, 786 (2009) ("Our precedents also place beyond a doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. And when a defendant is read his Miranda rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the Miranda rights purportedly have their source in the *Fifth* Amendment." (citations omitted and italics in original)). Therefore, none of Appellant's statements resulted from the denial of his right to counsel, and nothing presented during trial would support such a finding.

When viewing the totality of the circumstances surrounding Appellant's statements to law enforcement, the evidence presented to the trial judge during the pre-trial hearing established each of Appellant's statements was made freely, knowingly, and

voluntarily after Appellant was informed of his rights and waived those rights. Furthermore, no evidence was presented during the hearing suggesting Appellant made his statements involuntarily or after his will had been overborne by any improper actions on the part of the officers who interviewed him. See, e.g., Breeze, 379 S.C. at 545, 665 S.E.2d at 251 ("Conversely, Breeze did not contradict [the officer]'s testimony with respect to the issue of whether the statement was voluntary. . . . Faced with [the officer]'s undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement. Based on [the officer]'s testimony, we cannot conclude the trial court's ruling is unsupported by any evidence."). Accordingly, regardless of any issue preservation concerns, the trial judge did not err in ruling Appellant's statements were voluntary and admissible, and her ruling was supported by the evidence. See Arrowood, 375 S.C. at 369, 652 S.E.2d at 443 ("The trial judge's determination is not in error if there is any evidence in the record to support it."). Appellant's conviction should be affirmed.

II.

Any issue with the trial judge's failure to conduct a pre-trial hearing on the admissibility of the prior bad evidence or to rule on whether the prior bad acts were proven by clear and convincing evidence was not properly preserved for appellate review because Appellant never raised any arguments on those grounds to the trial judge. Regardless, the trial judge did not abuse her discretion in admitting the prior bad act evidence because it was admissible under the res gestae theory and admissible to prove intent and absence of mistake or accident. Furthermore, even if the trial judge erred in admitting the prior bad act evidence, any error was harmless in light of the cumulative nature of the evidence and in light of the other overwhelming evidence of guilt, which included statements by Appellant to law enforcement and to the victim's mother admitting he struck the victim prior to the victim's death.

Appellant asserts the trial judge erred in admitting prior bad act evidence related to his behavior and actions at the pool on the afternoon before Victim was killed.

Appellant contends the evidence should not have been admitted because no pre-trial hearing was conducted on its admissibility, a proper foundation was not presented for the evidence, the evidence was not established by clear and convincing evidence, the evidence did not have a clear and logical connection to the charged crimes, and the evidence's probative value was substantially outweighed by its prejudicial effect.

Initially, any issues related to the lack of a pre-trial hearing, the lack of a proper foundation for the evidence, and the lack of proof by clear and convincing evidence were not preserved for appellate review because those issues were not raised to the trial judge. Regardless, the trial judge properly admitted the prior bad act under the res gestae theory and to establish intent and lack of accident or mistake. Furthermore, even if the trial judge erred in admitting the prior bad act evidence, any error was entirely harmless in light of the cumulative nature of the evidence and in light of the other overwhelming evidence of guilt, which included admissions by Appellant to both law enforcement officers and Victim's mother. Therefore, Appellant's conviction should be affirmed.

A. Issue Preservation

“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.” In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues that were not presented to or passed upon by the trial judge. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments.” l’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) (emphasis added).

An issue must be raised in a sufficiently specific manner to call attention to the exact error to the trial court. Johnson, 363 S.C. at 58, 609 S.E.2d at 523; see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (“[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.”). “Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review.” State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991).

“A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). A defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003)

("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."). Instead, an appellant is limited on appeal solely to the grounds raised to the trial judge. Patterson, 324 S.C. at 19, 482 S.E.2d at 767.

In Appellant's case, defense counsel moved prior to trial to exclude any testimony related to Appellant's behavior at the pool several hours before Victim's death as improper prior bad act evidence, arguing Appellant's prior bad acts at the pool did not establish motive or intent in regards to the homicide by child abuse charge.

Subsequently, in challenging the admission of the prior bad act evidence on appeal, Appellant contends the trial judge erred in admitting the prior bad act evidence for several reasons never previously raised during trial, now arguing the trial judge erred because no pre-trial hearing was conducted on the issue, the foundation of the evidence was not properly examined, and no ruling was made on whether the prior bad acts were proven by clear and convincing evidence. However, none of those arguments were raised to the trial judge during trial, and, as a result, the trial judge did not have an opportunity to respond to or address those particular contentions. See I'On, 338 S.C. at 422, 526 S.E.2d at 725 ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."). Accordingly, because the grounds Appellant is now raising on appeal were not presented to the trial judge, those grounds cannot properly be considered or addressed on appeal. See Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial."); see also Dunbar, 356 S.C. at 142, 587 S.E.2d at 694 ("An issue

that was not preserved for review should not be addressed by the Court of Appeals[.]”).

Appellant’s conviction should be affirmed.

B. Admissibility of the Testimony Regarding Appellant’s Behavior Towards Victim at the Pool

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). “A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.” State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). “Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury’s verdict.” State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Generally, evidence of prior bad acts is not admissible to prove a defendant’s guilt for the charged crime. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). “This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts.” State v. Hough, 319 S.C. 104, 107, 459 S.E.2d 863, 865 (Ct. App. 1995). However, pursuant to Rule 404(b), SCRE, evidence of prior bad acts may be admissible “to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807

(1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) common scheme or plan; or (5) identity).

Additionally, evidence of a defendant's prior crimes or bad acts may also properly be admitted if those acts form part of the res gestae of the charged offense. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). The res gestae theory recognizes that evidence of other bad acts may be an integral part of a charged crime or may be necessary to aid the fact finder in understanding the context in which the crime occurred. State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). To constitute part of the res gestae of an offense, it is important that the prior bad acts have a close temporal proximity to the charged crime. State v. Martucci, 380 S.C. 232, 258, 669 S.E.2d 598, 612 (Ct. App. 2008).

In State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996), the Supreme Court explained the res gestae theory:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . ' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

(citations omitted and alteration in original). Thus, where a prior bad act is "inextricably intertwined" with a charged offense, the evidence of the prior bad act is admissible as part of the res gestae of the crime. Id. at 122, 470 S.E.2d at 371.

In the case at bar, Appellant was charged with homicide by child abuse, which meant the State was required to prove that Appellant "cause[d] the death of a child under the age of eleven while committing child abuse or neglect, and the death occur[red] under circumstances manifesting an extreme indifference to human life[.]" S.C. Code Ann. § 16-3-85(A)(1). Extreme indifference in the context of the homicide by child abuse statute "is a mental state akin to intent characterized by a deliberate act culminating in death." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 366 (Ct. App. 2002). Thus, it was necessary for the State to establish Appellant's state of mind at and around the time of Victim's death in order to establish Victim's death occurred under circumstances manifesting an extreme indifference to human life.

Significantly, due to the necessity of establishing Appellant's mental state and intent in order to prove the required elements of homicide by child abuse, Appellant's behavior and actions shortly before Victim's death were highly relevant and probative in demonstrating Appellant acted with extreme indifference towards Victim. See id. at 98, 564 S.E.2d at 366 ("We find the events of the day of the baby's death to be the most significant to our analysis regarding Jarrell's extreme indifference."). In order to demonstrate that behavior and those actions, the State offered the testimony of Brandon, who stated Appellant told him he should have left Victim in the pool after he pulled Victim up from underneath the water, Appellant yelled at Victim, Appellant told Victim no one cared about him, and Appellant yanked Victim by the arm several times on the afternoon before Victim was killed. Likewise, the State also offered the testimony of Courtney, who testified Appellant paid no attention to Victim at the pool while Victim repeatedly jumped in, Appellant called Victim a "pussy," Appellant told Victim to go ahead and cry because no one wanted him, and Appellant dragged Victim by his arm

during the same time period. Critically, that testimony established Appellant behaved in an indifferent, cruel, and hostile manner towards Victim shortly before Victim's death, which was relevant towards establishing Appellant's mental state and intent in regards to Victim. Cf. Martucci, 380 S.C. at 252, 669 S.E.2d at 609 (finding abuse or neglect that occurred weeks before the child's death was relevant and admissible to show Martucci's state of mind in a homicide by child abuse case). Therefore, Appellant's prior actions at the pool possessed a clear and logical connection to the indicted offense of homicide by child abuse by constituting evidence of Appellant's intent towards Victim, which was necessary to establish Victim's death occurred under circumstances manifesting extreme indifference towards his life, and also by refuting any potential claim that Victim's death was the result of some accident that occurred at the pool as Appellant suggested in one of his statements to law enforcement.¹³ See id. at 254, 669 S.E.2d at 609-610 ("The prior abuse or neglect at issue was so close in time to the infliction of the fatal injuries that the evidence was relevant and probative to refute their claims and demonstrate Martucci intended to hurt Child."). Furthermore, Brandon and Courtney's testimony was also admissible to establish the context in which the incident occurred and to allow for a full presentation of the events leading up to Victim's death under the res gestae theory. See

¹³ On appeal, Appellant argues the trial judge erred in admitting the prior bad act evidence to show an absence of accident or mistake due to the fact defense counsel asserted he did not intend to argue Victim's death resulted from an accident at the pool. However, regardless of whether defense counsel intended to argue Victim's death was accidental or not, the State was required to prove each element of the indicted offense of homicide by child abuse, including that Victim's death occurred under circumstances manifesting extreme indifference towards his well-being as opposed to accidental circumstances. See Estelle v. McGuire, 502 U.S. 62, 69-70 (1991) ("By eliminating the possibility of accident, the evidence regarding battered child syndrome was clearly probative of that essential element, especially in light of the fact that McGuire had claimed prior to trial that Tori had injured herself by falling from the couch. The Court of Appeals, however, ruled that the evidence should have been excluded because McGuire did not raise the defense of accidental death at trial. But the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. . . . The evidence of battered child syndrome was relevant to show intent, and nothing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point."). Accordingly, the trial judge did not err in finding the prior bad act evidence was admissible to show the absence of an accident.

id. at 258, 669 S.E.2d at 612 (“The overall view of the facts provides the context in which the crime occurred and demonstrates the culminating impact on Child. The incidents were relevant to establishing Martucci's state of mind and whether or not he manifested an extreme indifference to human life. The alleged child abuse occurred in the month and a half to several weeks before the fatal trauma was inflicted. The evidence was necessary to establish the crime charged. Its admission was essential and relevant to a full presentation of the evidence in this case. The testimony regarding the prior bad acts was relevant to show the complete, whole story relating to the charge of homicide by child abuse.”). For those reasons, the trial judge did not abuse her discretion in admitting the prior bad act evidence or in finding the probative value of the evidence outweighed the potential prejudicial effect the might have resulted from its admission. See State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.”), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see also State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (“ ‘Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.’ ” (citations omitted)). Accordingly, Appellant’s conviction should be affirmed.

C. Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. Baccus, 367 S.C. at 55,

625 S.E.2d at 223. Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” Bailey, 298 S.C. at 5, 377 S.E.2d at 584. Thus, when overwhelming evidence of guilt has been presented or when erroneously admitted evidence is merely cumulative to other properly admitted evidence, any trial error may be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant’s guilt, we hold any error harmless beyond a reasonable doubt.”); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (“Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.”).

In the case sub judice, even assuming the trial judge erred in admitting the testimony of Brandon and Courtney, any error was entirely harmless in light of the cumulative nature of the evidence and in light of the insignificance of the testimony when considered in relation to the other overwhelming evidence of Appellant’s guilt.

Regarding the cumulative nature of the testimony, S. testified in a manner consistent with Courtney without objection and stated Appellant called Victim a “pussy” at the pool prior to his death, which constituted cumulative evidence of Appellant’s cruel,

indifferent, and hostile behavior towards Victim shortly before Victim's death. See State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) ("Immediately prior to the testimony of the victim's mother and aunt the victim's cousin testified *without objection* as to what the victim related to her about the incident. It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." (italics in original)). Furthermore, regarding the relationship of the prior bad act evidence to the other evidence presented during trial, the testimony regarding Appellant's statements to S. and to law enforcement constituted overwhelming evidence of guilt and rendered any error in the admission of the prior bad act evidence entirely harmless. Notably, Appellant admitted to repeatedly striking Victim in his final written statement and confessed to striking Victim in a recorded phone call to Spoerl from the detention center. In the recorded phone call, Appellant candidly admitted to Spoerl that his final statement to law enforcement in which he admitted his guilt was a truthful account of what caused Victim's death. Accordingly, in light of Appellant's candid admissions to Victim's mother and to the law enforcement officers he spoke with, the prior bad act evidence, even if improperly admitted, could not have impacted the verdict and was harmless.¹⁴ See Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Accordingly, Appellant's conviction should be affirmed.

¹⁴ Following his conviction, Appellant acknowledged the importance of his statements to the verdict, commenting: "And I know my statements are probable what convicted me." (R. p. 841).

The trial judge did not abuse her discretion in overruling Appellant's objections to Georgoulis' testimony because the challenged testimony was relevant to the context of the events leading up to Victim's death, the credibility of Appellant, and the bias of Georgoulis. Furthermore, any error in the admission of the challenged testimony was entirely harmless in light of the other overwhelming evidence of guilt and the lack of prejudice that resulted from the admission of the testimony.

Appellant contends the trial judge erred in admitting the testimony of his ex-girlfriend, Georgoulis, regarding his whereabouts on the night before Victim's death, his mood when he left Georgoulis' house before taking Victim to the pool, and his mother's living arrangements at the time of trial. Appellant contends the evidence was irrelevant to the matter in controversy and its probative value was substantially outweighed by its prejudicial effect.¹⁵ To the contrary, the trial judge properly admitted Georgoulis' testimony because the objected-to portions of her testimony were relevant towards establishing the full context of the events leading up to Victim's death and were relevant towards the credibility of Appellant and the bias of Georgoulis. However, even if the trial judge erred in admitting Georgoulis' challenged testimony, any error was harmless in light of the other overwhelming evidence of guilt and the lack of prejudice that resulted from the admission of the testimony. Appellant's conviction should be affirmed.

A. Admissibility and Relevancy of the Challenged Testimony

The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32

¹⁵ During trial, Appellant solely objected to the testimony of Georgoulis on the basis of relevancy and did not allege the prejudicial effect of the testimony substantially outweighed its probative value. (R. pp. 331-332). Accordingly, any issue regarding the comparative probative value and prejudicial effect of Georgoulis' testimony was not preserved for appellate review. See Thomason, 355 S.C. at 288, 584 S.E.2d at 148 ("[A] party cannot argue one theory at trial and a different theory on appeal."); Adams, 354 S.C. at 380, 580 S.E.2d at 795 ("[A] defendant may not argue one ground below and another on appeal."); see also Patterson, 324 S.C. at 19, 482 S.E.2d at 767 ("Appellant is limited to the grounds raised at trial.").

(1980). A trial judge's ruling on the admission or exclusion of evidence will not be reversed on appeal unless that ruling constituted "a **manifest abuse of discretion** accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) (emphasis added). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." Byers, 392 S.C. at 444, 710 S.E.2d at 58. On appeal, an appellate court will give "great deference" to the trial judge when reviewing a ruling on the admissibility of evidence. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010).

Only relevant evidence should be admitted at trial. Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ' "). Evidence which could assist the jury in arriving at the truth of an issue is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

"Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. Regarding evidence of bias, the United States Supreme Court has instructed:

Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant

because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.

United States v. Abel, 469 U.S. 45, 52 (1984) (emphasis added). Thus, any evidence tending to shed light on the accuracy, truthfulness, or sincerity of a witness can be presented during trial and considered by the jury in evaluating the credibility or weight to be given to a witness' testimony. State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001).

In Appellant's case, the trial judge did not err in overruling Appellant's objections to the relevancy of Georgoulis' testimony. First, Appellant contended Georgoulis should not have been permitted to testify about whether he was at her home on the night before Victim was killed. However, that testimony was relevant and admissible to provide a full account of the circumstances leading up to Victim's death and was also highly relevant in regards to Appellant's credibility, which was one of the most pivotal issues in Appellant's case. Significantly, prior to Georgoulis' testimony, S had testified Appellant told her he spent the night of September 13, 2008, at the location of a party he attended and not Georgoulis' house, but Georgoulis testified Appellant stayed with her when asked about Appellant's whereabouts on that night. For that reason, Georgoulis' testimony demonstrated Appellant had been untruthful to S , which was a significant fact for the jury to consider when attempting to determine not only the truthfulness of Appellant's statements to law enforcement and to S but also his testimony during trial. See State v. McMillian, 349 S.C. 17, 22, 561 S.E.2d 602, 604 (2002) (instructing the fact that a witness previously lied about an address was relevant to the witness' overall credibility). Next, Appellant contended Georgoulis should not have been permitted to testify about his mood when he left her home on September 14, 2008.

However, Appellant's mood directly before he went to pick up Victim was relevant to show the entire context of the circumstances leading up to Victim's death.¹⁶ See State v. Holder, 382 S.C. 278, 289, 676 S.E.2d 690, 696 (2009) (finding Holder's co-worker's testimony regarding changes in Holder's behavior and manner of dress several weeks prior to the victim's death was relevant and admissible to establish Holder manifested an extreme indifference towards the victim's well-being, which was an element of the indicted offense of homicide by child abuse). Finally, Appellant contended Georgoulis should not have been permitted to testify about the fact his mother was staying at her home at the time of trial. However, the fact Appellant's mother was staying with Georgoulis at that time was highly relevant on the issue of any bias Georgoulis might have had towards Appellant because it showed she still had some connection with or relationship to him. See State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 915 (2000) ("A witness' romantic relationship with a party is a source of potential bias of which the jury should be aware in order to fully evaluate the witness' testimony."). For the foregoing reasons, the trial judge did not err in overruling Appellant's objections to the relevancy of Georgoulis' testimony, and her ruling was not manifestly erroneous. See State v. McEachern, 399 S.C. 125, 140, 731 S.E.2d 604, 611 (Ct. App. 2012) ("The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice.").

¹⁶ Notably, defense counsel elicited cumulative testimony about Appellant's mood at the time he left Georgoulis' home on cross-examination. (R. pp. 337-338). Thus, Appellant waived any objection he had to the admission of that testimony during the direct examination of Georgoulis. See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) ("During the course of the trial certain testimony was admitted over the objection of [McKinney's] counsel. Thereafter, counsel for the appellant cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured.").

B. Harmless Error

Errors are considered to be harmless when they could not reasonably have affected the result of the trial. Adams, 354 S.C. at 380, 580 S.E.2d at 795. "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

In the case at bar, any error resulting from the admission of Georgoulis' testimony regarding Appellant's presence at her house on the night of September 13, 2008, Appellant's mood when he left her home the next morning, and Appellant's mother staying with her at the time of trial was entirely harmless when considered in the context of the entire record. In addition to Georgoulis' testimony, which simply established Appellant spent the night at her home on the night before Victim was killed, Appellant was angry when he left, and Appellant's mother was staying with Georgoulis at the time of trial, other highly damaging and overwhelming evidence of Appellant's guilt was presented during trial, including Appellant's signed statements to law enforcement admitting his role in Victim's death and a recording of Appellant's acknowledgement to S that he knocked Victim to the floor before he died. When considering the significance of the challenged testimony in relation to the other evidence presented during trial, it could not have impacted the verdict. Thus, its admission, even if

erroneous, was entirely harmless.¹⁷ See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484

("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). Accordingly, Appellant's conviction should be affirmed.

¹⁷ Notably, the only prejudice Appellant identified as resulting from the admission of Georgoulis' testimony was that the challenged testimony established "Appellant was in a relationship with two women at the same time and stayed with one on September 13th and the other on September 14th." (App. Br. p. 33). However, numerous other witnesses, including Appellant and his stepfather, testified to the fact Appellant was seeing Georgoulis and S. at the same time. Accordingly, any prejudice that resulted from the admission of the challenged testimony was merely cumulative to the prejudice that resulted from the other properly admitted testimony confirming the same allegedly-prejudicial fact. See State v. Garner, 389 S.C. 61, 68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence."); State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if it is merely cumulative to other evidence.").

CONCLUSION

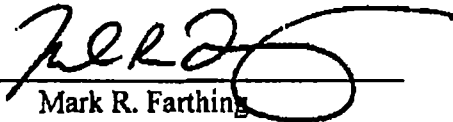
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 25, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2010-165126

THE STATE,

Respondent,

vs.

JUSTIN RYAN HILLERBY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 25th day of February, 2013.

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Justin Hillerby, Appellant.

Appellate Case No. 2010-165126

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2013-UP-300
Heard June 5, 2013 – Filed July 3, 2013

AFFIRMED

Tricia A. Blanchette, of Law Office of Tricia A.
Blanchette, LLC, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, for Respondent.

PER CURIAM: Justin Hillerby appeals his conviction and sentence for homicide by child abuse, arguing the trial court erred in (1) refusing to suppress statements

attributed to him, (2) admitting evidence of prior bad acts, and (3) admitting irrelevant testimony. We affirm.

A ruling admitting or excluding evidence is within the sound discretion of the trial court. *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). An appellate court will not disturb such a ruling absent "a manifest abuse of discretion accompanied by probable prejudice." *Id.* at 429, 632 S.E.2d at 848. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429-30, 632 S.E.2d at 848.

1. First, we find Hillerby failed to preserve for appellate review the issue of whether the trial court erred in admitting the statements he gave on September 17 and 18, 2008. A party who consents to the admission of evidence he challenged prior to trial waives "any direct challenge to the admission of the evidence." *State v. DiCapua*, 383 S.C. 394, 399, 680 S.E.2d 292, 294 (2009). Here, Hillerby affirmatively stated he did not object to the admission of the statements. By doing so, he waived his right to challenge the admission of the statements on appeal.

2. Next, Hillerby asserts the trial court erred in admitting Brandon's and Courtney's testimony concerning his behavior toward Victim during the afternoon before Victim's death. We find Hillerby failed to preserve the portion of his argument relating to improper procedure. As to the portion of Hillerby's argument that is preserved, we affirm.

Hillerby did not raise to the trial court his argument that it followed improper procedure by ruling Brandon's and Courtney's testimony was admissible without an adequate showing of the content of their testimony. A party may not argue one ground to the trial court and another ground on appeal. *State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). However, "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). An argument is preserved if it is "sufficiently specific to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the trial [court]." *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). Hillerby did not raise this procedural argument to the trial court. Consequently, it is not preserved for our review.

To the extent Hillerby argues the trial court erred in admitting Brandon's and Courtney's testimony despite the State's failure to prove a Rule 404(b) exception, we affirm. Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. However, it "may . . . be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *Id.* Evidence of prior bad acts for which the accused has not been convicted "must be clear and convincing," and the prior bad act must logically relate to the offense charged. *State v. Martucci*, 380 S.C. 232, 252, 669 S.E.2d 598, 608-09 (Ct. App. 2008). The State establishes this logical relation by demonstrating the accused perpetrated the prior bad act against the same child as in the present case. *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 483-84 (2008). Appellate courts considering whether such evidence is clear and convincing must affirm the trial court's findings unless those findings are clearly erroneous. *Martucci*, 380 S.C. at 252, 669 S.E.2d at 608.

A person commits homicide by child abuse when he "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." S.C. Code Ann. § 16-3-85(A)(1) (2003). "[I]n the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). The State may establish the mental state of extreme indifference using evidence of prior instances in which the accused either abused or neglected the victim. *See, e.g., Martucci*, 380 S.C. at 252-53, 669 S.E.2d at 609 (holding evidence of the accused's "hostility, cruelty, and abuse toward Child . . . during the weeks before he died" constituted "evidence of Martucci's state of mind to inflict the fatal injuries" and "was necessary to establish a material fact or element of the crime charged").

In the case at bar, the trial court admitted Brandon's and Courtney's testimony to show Hillerby's intent toward Victim. Brandon reported overhearing Hillerby comment that nobody cared about Victim and Mother should have left him in the swimming pool in water over his head. According to Courtney, Hillerby and Mother ignored Victim as he repeatedly jumped into the deep end of the swimming pool without his flotation devices. Courtney also heard Hillerby call Victim a "pussy" and tell him to "cry because nobody wanted him." We find this testimony demonstrated Hillerby neglected and verbally abused Victim hours before the child was left in Hillerby's care and less than a day before Victim was discovered dead.

Moreover, we find the abusive and neglectful acts the witnesses described logically related to homicide by child abuse. Therefore, the trial court did not err in admitting Brandon's and Courtney's testimony.

3. Finally, we find the trial court did not err in admitting Georgoulis's testimony. Generally, evidence must be relevant to be admissible. Rule 402, SCRE. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. Furthermore:

Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. Rule 608(c), SCRE, preserves South Carolina precedent holding that generally, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.

State v. McEachern, 399 S.C. 125, 140-41, 731 S.E.2d 604, 612 (Ct. App. 2012) (internal citations and quotation marks omitted).

Hillerby objected to questions concerning (1) whether Georgoulis saw Hillerby the night before Victim's death, (2) what Hillerby's mood was when he left her house the next morning, and (3) who was staying at Georgoulis's home during the trial. We find the answers to these questions were relevant to Hillerby's credibility and mental state and to Georgoulis's bias.

In response to the first two questions, Georgoulis testified Hillerby stayed with her the night before Victim's death, attempted to reunite with her, and left her home upset the next morning. Her testimony established Hillerby was untruthful when he told Mother he had stayed the night elsewhere, which diminished his credibility. Significantly, Georgoulis's testimony demonstrated Hillerby's affections had already shifted away from Mother and back to Georgoulis, the mother of his child,

before he agreed to babysit Victim and Sister. Thus, they were relevant both to credibility and to a determination of Hillerby's mental state in the hours preceding Victim's death.

Hillerby does not claim he suffered prejudice from Georgoulis's admission, in response to the third question, that his mother was staying with Georgoulis during the trial. This evidence had no bearing on the events leading up to Victim's death. However, it revealed the witness's bias in favor of Hillerby and, therefore, her motive not to truthfully answer the State's questions. Accordingly, Georgoulis's answer to this question was relevant to her credibility.

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

FEW, C.J., GEATHERS, J., and CURETON, A.J., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11628
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 19, 2013.

The Honorable Mary P. Brown
PO Box 219
Moncks Corner SC 29461-0219

RECEIVED

JUL 19 2013

REMITTITUR

ATTORNEY GENERAL

ME: [Signature]

Re: The State v. Hillerby, Justin
Lower Court Case No. 2008GS0802594
Appellate Case No. 2010-165126

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Tricia A. Blanchette
Mark Reynolds Farthing

COUNTY OF RICHLAND

JUSTIN RYAN HILLERBY, #339543

Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA

Defendant(s)

Submitted By: Jeremy A. Thompson, Esquire
 Address: Law Office of Jeremy A. Thompson, LLC
 P.O. Box 12891
 Columbia, SC 29211

CIVIL ACTION COVERSHEET

-CP-
2013-CP-08-2121

SC Bar #: 76091
 Telephone #: 803-779-2555
 Fax #: 803-779-2555
 Other:
 E-mail: jeremyatlaw@yahoo.com

MARY P. BROWN
 CLERK OF COURT
 RICHLAND COUNTY, SC

2013 SEP 19 PM 3:30

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -CP- - ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: September 19, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FO MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

JUSTIN RYAN HILLERBY, #339543
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

20 13 -CP-08-2121

APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence Berkeley County Court of General Sessions; 300 California Avenue, Moncks Corner, SC 29461
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-08-02594: Homicide by Child Abuse
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 2/25/10: Life Imprisonment
 - (b) _____
 - (c) _____

Revised 3/2003

6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. 7/3/13
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. 2013-UP-300
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel
 - (b) Ineffective Assistance of Appellate Counsel

Revised 3/2003

- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Defense counsel failed to conduct an adequate investigation into the Applicant's case.
- (b) Defense counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial.
- (c) Appellate counsel failed to raise all meritorious claims on appeal.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____

Revised 3/2003

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This Application for Post-Conviction Relief provides the first opportunity to present these issues.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

Revised 3/2003

- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. John Michael Bosnak, Esquire; Law Office of J. Michael Bosnak; 749 Johnnie Dodds Boulevard, Suite C, Mount Pleasant, SC 29464
- ii. Tricia A. Blanchette, Esquire; Law Office of Tricia A. Blanchette, LLC; P.O. Box 12725, Columbia, SC 29211
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial and sentencing
- ii. Appeal
- iii. _____
19. State clearly the relief you seek in filing this application:
- To vacate the Applicant's conviction and sentence and to remand for a new trial.
20. Are you now under sentence from any other court that you have not challenged?
- No

2013-CP-08-2121

STATE OF SOUTH CAROLINA)

County of Richland)

VERIFICATION

I, Jeremy A. Thompson, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 19th
day of Sept, 2013.

Mick Brown (L.S.)
Notary Public

My Commission Expires: 7/10/2022

FILED
DW
2013 SEP 19 PM 3:47
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

2013-CP-08-2121

Justin Ryan Hillerby, #339543,
Applicant,

v.

State of South Carolina,
Respondent.

RETURN

The Respondent, making its Return to the application for post-conviction relief (PCR) filed September 19, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the December 2008 term of the Berkeley County Grand Jury for homicide by child abuse (2008-GS-08-2594). The Applicant was represented by J. Michael Bosnak, Esquire.

On February 25, 2010, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for a period of life.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Tricia Blanchette, Esquire. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Hillerby, No. 2013-UP-300 (S.C. Ct. App. July 19, 2013). The Remittitur was issued on July 31, 2013.

Attached herewith and incorporated herein are the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
2. Ineffective assistance of appellate counsel.

III.

First, the Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether

Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Each and every allegation contained within the application not herein before either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: ALR
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

December 30, 2014

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

JUSTIN RYAN HILLERBY, #339543

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

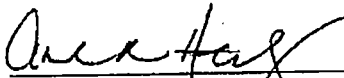
2013-CP-08-2121

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jeremy A. Thompson
Law Office of Jeremy A. Thompson LLC
PO Box 12891
Columbia, SC 29211

DATED this 30th day of December, 2014


Anne R. Henley, Legal Assistant
For Respondent

WITNESSES

C.E. WILLIAMS

Summerville Police Department

Act R J 240

AGENCY CASE NUMBER

08083843

ARREST WARRANT NUMBER

J093150

DATE OF ARREST

September 17, 2008

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

12-17-08

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 08GS082594

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

DECEMBER Term 2008

THE STATE

vs.

Justin Ryan Hillerby

DOB: [REDACTED]

W/M

Indictment for

HOMICIDE BY CHILD ABUSE

2009 DEC 17 PM 2:37

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on December 17, 2008 the Grand Jurors of Berkeley County
present upon their oath:

HOMICIDE BY CHILD ABUSE

That Justin Ryan Hillerby did in Berkeley County on or about the dates of
9-13-2008 through 9-15-2008 cause the death of) *VICTIM* (DOB)

.... The death occurred as the defendant was committing child abuse
and/or neglect and the underlying circumstances show extreme indifference to
human life this is in violation of 16-3-85 A (1).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ANNE WILLIAMS
ASSISTANT SOLICITOR

SOUTH CAROLINA

OF

Berkeley

VS.

Justin Ryan Hillerby

W

Sex: M

Age: 28

DOB:

SS:

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Homicide by Child Abuse

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 08GS082594

A/W#: 1093150

Date of Offense: 9/14/2008

S.C. Code §: 16-03-0085(A)(1)(B)(1)

CDR Code #: 2356

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0085(A)(1)(B)(1) of the S.C. Code of Laws, bearing CDR Code # 2356

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Williams, Anne

SC Bar# 76463

Defendant

Attorney for Defendant

SC Bar# 67666 S.C.

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of Life days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 20 KH☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:	\$	
§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
§ 47.12 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$100	\$ 25.00
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$
§ 90.7 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter: Mia Peterson

SCCA/217 (11/2009)

PTUP

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender FundOther:

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2151Sentence Date: 9/25/10

Amg



ALAN WILSON
ATTORNEY GENERAL

October 3, 2013

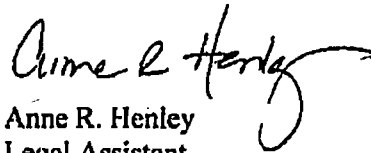
Ms. Janice Kenealy
Office of Inmate Records
SC Department of Corrections
Post Office Box 21787
Columbia SC 29221

Justin Ryan Hillerby, #339543

Dear Ms. Kenealy:

Please forward us a copy of the Department of Corrections records for the above individual(s). Thank you for your assistance.

Sincerely,


Anne R. Henley
Legal Assistant

2013 OCT -7 AM 11:17

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 10/10/13
OMCOMITA RELEASE DATE SCREEN C023981

SCDC# > 339543 LOC: BROAD RIVER
HILLERBY, JUSTIN R SCDC CLASSIFICATION...: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: N
PREA DECISION...:

CURRENT SENTENCE: CONSECUTIVE SENTENCE ...
LIFE CURRENT SENT START DATE: 09/17/2008
PROJECTED COMPLETION DATES
MAXOUT DATE: 99/99/9999 CURRENT EWC ..
YOA SIX YEAR DATE: CURRENT EEC ..
INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000000 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 00/00/00
TOTAL SERVICE TIME EARNED ...: 000000 ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES
4-© 1 Sess-1 167.7.50.33 SCDC1411 3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 10/10/13

C0239

HILLERBY, JUSTIN R FBI # 744091LB0 SID# SC01279368 SCDC # 339543

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ... BROAD RIVER CORR. INST.

SECURITY/CUST.: 3 MINIMUM IN

CURR INCARC SENT...: 999 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #... [REDACTED]

DORM.....: WA0211A

RACE....:W SEX...:M

PROJ MAXOUT DATE: 99/99/9999

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: FOOD SERVICE AIDE

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

ASSIGNMENT...: CAFETERIA

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 32 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES

HOMICIDE BY CHILD ABUSE

PRIOR COMMITMENTS OVER 90 DAYS:

MISSING PRIORS DATA

DETAINERS (HOLD, WANTED, NOTIFY):

NO DETAINERS

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES WHILE IN CUSTODY

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

4/17/13 POSSESSION OF CONTRABAND CONVICTED

ADMIN

1/17/13 POSS. OR/ATTEMPT TO POSS CONVICTED

MAJOR

4/ 8/12 POSSESSION OF CONTRABAND CONVICTED

MAJOR

1/ 6/12 POSS. OR/ATTEMPT TO POSS DROPPED

MAJOR

10/13/11 POSS. OR/ATTEMPT TO POSS CONVICTED

MAJOR

HISTORY OF MOVEMENTS:

7/10/13 BROAD RIVER

INCARCERATED

LOCKUP-ADJUSTMENT COMM.

7/ 6/10 LEE

INCARCERATED

ADMINISTRATIVE

4/30/10 LIEBER

INCARCERATED

RETURN FROM COURT

4/28/10 BERKELEY CO

AUTH ABSENCE (AWL)

TO COURT

4/12/10 LIEBER

INCARCERATED

ADMINISTRATIVE

3/ 4/10 KIRKLAND

INCARCERATED

R&E PROCESSING

3/ 4/10 LIEBER

INCARCERATED

NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB	START	END	TERMINATION	JOB
DESCRIPTION	DATE	DATE	REASON	LVL
FOOD SERVICE AIDE	07/30/13	0/ 0/ 0		3F5
CONSTRUCTION TRAINEE	07/01/10	7/ 6/10	INSTIT TRANSFER	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON

NO SCHOOL ASSIGNMENTS

***** END OF REPORT *****

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Berkeley

VS.

Justin Ryan Hillerby

AKA:

Race: W

Sex: M

Age: 28

DOB: [REDACTED]

SSN: [REDACTED]

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Homicide by Child Abuse

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 08GS082594

A/W#: J093150

Date of Offense: 9/14/2008

S.C. Code §: 16-03-0085(A)(1)(B)(1)

CDR Code #: 2356

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0085(A)(1)(B)(1) of the S.C. Code of Laws, bearing CDR Code # 2356

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Williams, Anne

76463

SC Bar#

Defendant

Attorney for Defendant

68664 SC

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of Life days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. See VIF☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

PTUP

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date:

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

§ 47-12 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-14 (DUI Breath Test Fee)

§ 56-5-2912(1) (Vehicle Assessment)

§ 90.7 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

Clerk of Court/ Deputy Clerk

Court Reporter

SCCA 217 (11/2009)

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
JUSTIN R. HILLERBY, #339543,)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-08-2121

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

FILED
2015 AUG 31 PM 1:34
CLERK OF COURT
BERKELEY COUNTY, S.C.

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving to amend his Application for Post-Conviction Relief. In general, the Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. The Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:

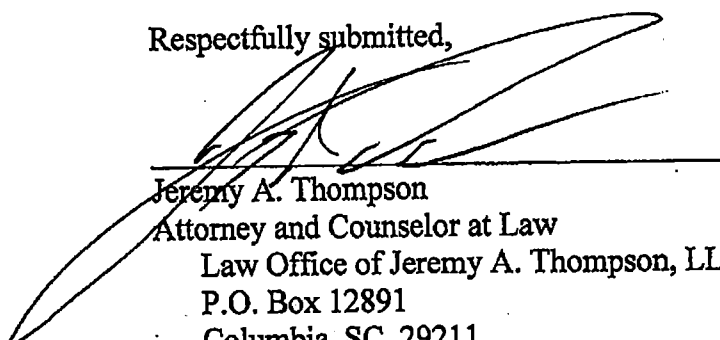
1. Trial counsel was ineffective for failing to consult with a forensic pathologist prior to trial and for failing to present the testimony of a forensic pathologist at trial.
2. Trial counsel was ineffective for failing to question the forensic pathologist at trial regarding his qualifications and his lack of experience in conducting autopsies at the time he conducted the victim's autopsy.
3. Trial counsel was ineffective for failing to investigate and to present a defense that an individual other than the Applicant killed the victim.
4. Trial counsel was ineffective for admitting prejudicial photographs of the deceased victim into evidence (p. 544, lines 2-25).¹
5. Trial counsel was ineffective for failing to object to the trial court's instruction to the jury that they had two options on the verdict form and that both were guilty (p. 822, line 22-p. 823, line 1).

¹ All citations are to the Record on Appeal.

6. Trial counsel was ineffective for failing to renew his objection to the admission of the Applicant's statements into evidence.

The Applicant asks that the above-referenced allegations be considered in addition to those allegations previously raised in his original Application for Post-Conviction Relief.

Respectfully submitted,



Jeremy A. Thompson
Attorney and Counselor at Law
Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com
Attorney for the Applicant.

This 27th day of August, 2015.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
JUSTIN R. HILLERBY, #339543,)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-08-2121

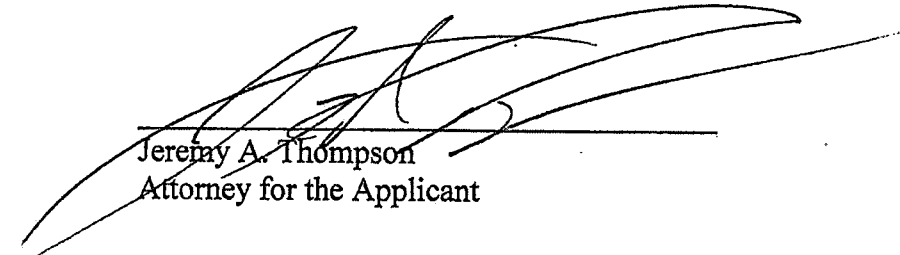
CERTIFICATE OF SERVICE

FILED
AUG 31 PM 1:00
CLERK OF COURT
BERKELEY COUNTY, SC

The undersigned hereby certifies that a true copy of the Amended Application for Post-Conviction Relief in the above matter has been served on opposing counsel this 27th day of August, 2015, by mailing in an envelope properly addressed with postage prepaid to:

J. Rutledge Johnson, Assistant Deputy Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Berkeley County Clerk of Court for filing.


Jeremy A. Thompson
Attorney for the Applicant

SWORN TO BEFORE ME this 27th day of
August, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/10/2022

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF BERKELEY) CASE NO. 2013-CP-08-2121
3 JUSTIN R. HILLERBY,)
4 Plaintiff,) Transcript of Record
5 vs.)
6 STATE OF SOUTH) Date: September 8, 2015
7 CAROLINA,)
8 Defendant.)

* * * * *

10 B E F O R E:
11 THE HONORABLE LARRY HYMAN
12

ORIGINAL

16 * * * * *

17
18 Denise J. Lauder, RPR
19 Ninth Judicial Circuit
20
21
22
23
24
25

A P P E A R A N C E S

REPRESENTING THE PLAINTIFF:

JEREMY A. THOMPSON, ESQUIRE

Law Office of Jeremy A. Thompson, LLC

P. O. Box 12891

Columbia, SC 29211

REPRESENTING THE DEFENDANT:

RUTLEDGE JOHNSON, ESQUIRE

OFFICE OF THE ATTORNEY GENERAL

Rembert C. Dennis Building

Columbia, SC 29211-1549