

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 MICHAEL LEE,

) No. 66963
)

4 Appellant,

5 v.
6)

7 THE STATE OF NEVADA,

8 Respondent.
9 _____)

Electronically Filed
Sep 09 2015 08:36 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

10 **APPELLANT'S APPENDIX VOLUME VI PAGES 1110-1323**

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6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 MICHAEL LEE,

12 Defendant.
13

CASE NO. C277650-1

DEPT. XXIII

14 BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

15 FRIDAY, AUGUST 8, 2014

16
17 **TRANSCRIPT OF PROCEEDINGS**

18 **JURY TRIAL - DAY 5**

19 **APPEARANCES:**

20 For the State:

DAVID STANTON, ESQ.

Chief District Attorney

JOHN L. GIORDANI, III, ESQ.

District Attorney

21
22
23 For the Defendant:

NADIA VON MAGDENKO, ESQ.

STEVEN M. ALTIG, ESQ.

24
25 RECORDED BY: MARIA GARIBAY, COURT RECORDER

-1-

GAL FRIDAY REPORTING & TRANSCRIPTION
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FOR THE STATE:

(None)

FOR THE DEFENDANT:

(None)

1 Friday, August 8, 2014 at 9:39 a.m.

2
3 [Outside the presence of the jury]

4 THE COURT: Hi.

5 MS. VON MAGDENKO: Good morning, Your Honor.

6 THE MARSHAL: Come to order and be seated (indiscernible) --

7 THE COURT: Okay. Is there anything we need to address before we bring
8 the jury in?

9 MR. STANTON: Just one matter, briefly, Your Honor on behalf of the State.
10 With the assistance of your bailiff, I don't know if you've -- I'm pretty sure you've
11 encountered this before. I couldn't remember the statute but the next two witnesses
12 are Danny Fico and Jennifer Lee and I think you -- Court knows the relationship to
13 the defendant. We would ask permission of the Court to examine both of those
14 witnesses pursuant to 50.115 Subsection (4) as an adverse party.

15 THE COURT: You know what, let me look at that statute.

16 MR. STANTON: It's right behind -- or to your far right, Judge.

17 THE COURT: Oh, thanks. You know, the reason is, is there's always a
18 question whether they have to actually be demonstrated to be hostile before they
19 can be led.

20 MR. STANTON: Yeah. And I would submit that the statute and the case law
21 indicates that the only thing you have to show both in civil and criminal cases is that
22 the party is adverse to the position of the State, not that they develop some sort of
23 adverse position during examination.

24 MR. ALTIG: And I'd like to review the statute as well. I'll see if I can't pull it up
25 on my phone.

1 THE COURT: You can look at my book soon as I look at it.

2 MR. ALTIG: Okay. Thank you.

3 THE COURT: That's fine. Okay. Yeah. Our statute doesn't seem to require
4 that a showing first be made.

5 MR. STANTON: And, Judge, I would add one other thing for the record. As
6 this Court has previously admonished these witnesses, there is subject matter that
7 is third rail type stuff and therefore the need beyond what the statute contemplates
8 in the natural course of an adverse witness, but the need to be direct in questions I
9 think is heightened in this case based upon the facts of their relationship with the
10 defendant and the subject matter that is not proper for this jury to hear.

11 THE COURT: Okay. Do you think we need with them again briefly or?

12 MR. ALTIG: I know that you did admonish them. I don't --

13 THE COURT: I did.

14 MR. ALTIG: I don't know if they need to be admonished again. If we -- if they
15 do, I'd ask they be admonished outside the presence of the jury first.

16 THE COURT: Absolutely. Absolutely.

17 MR. ALTIG: I don't think Mr. Stanton is suggesting that you admonish them in
18 front of the jury, but --

19 THE COURT: No, I don't think he is either. That's fine. Who -- do we have
20 them here?

21 MR. ALTIG: I'm not sure but I'll go out and see.

22 MR. STANTON: They should be here, Your Honor.

23 MS. VON MAGDENKO: They're here. I saw them.

24 THE MARSHAL: Who are we looking for?

25 THE COURT: Yeah. I'm just going to tell them briefly to make sure they --

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1 MR. GIORDANI: Jennifer Lee --

2 THE COURT: -- listen to the questions asked --

3 MR. GIORDANI: -- and Danny Fico.

4 THE COURT: -- and only --

5 MR. ALTIG: Yes, Your Honor.

6 THE COURT: Mr. Altig?

7 MR. ALTIG: Yes.

8 THE COURT: You speak sometimes very fast --

9 MR. ALTIG: Okay.

10 THE COURT: -- and a couple of the jurors have asked if you could slow it
11 down a notch.

12 MR. ALTIG: Yes. Your bailiff talked to me -- or marshal talked to me about
13 that yesterday.

14 THE COURT: I did that too in court, so I understand.

15 MR. ALTIG: Yeah. That's how I am. I get excited and things start rolling out.

16 THE COURT: I know. I do that too. I fly sometimes. Okay. If that's it, then
17 can you see if those witnesses are here and --

18 THE MARSHAL: Yes, ma'am.

19 THE COURT: -- just bring them in very briefly?

20 THE MARSHAL: You said Jennifer Lee and?

21 MR. GIORDANI: Danny Fico or Fico?

22 MR. STANTON: And, Judge, one other thing besides what you previously
23 had done. Mr. Giordani brought it to my attention that they obviously know that the
24 defendant has been in custody since his arrest, so they shouldn't be -- comment
25 about his custody status.

1 THE COURT: Hi. I just -- I know that we chatted a few days ago about a
2 couple things. You're going to be called to testify today and I want to make sure that
3 when you're testifying both for the State and the defense counsel that you listen very
4 closely to the question asked of you and only answer those questions, okay? And
5 again, it's important that you don't just blurt anything out, especially the fact that you
6 know the defendant's been in custody. That cannot be brought up in front of the
7 jury. You know, whether he's ever been in custody before, any other prior criminal
8 charges, so make sure you really steer clear of that, okay? The way the questions
9 should be asked by both the State and the defense you won't go anywhere near that
10 topic.

11 UNIDENTIFIED SPEAKER: Okay.

12 MR. FICO: Okay.

13 THE COURT: So if you'd go back out and we'll call you in to testify in shortly.

14 MR. FICO: Okay.

15 MS. LEE: Okay.

16 THE COURT: All right. Can we get the jury in now?

17 MR. ALTIG: May I review the statute?

18 THE COURT: Oh, I'm sorry, Mr. Altig. You did say that.

19 MR. ALTIG: Thank you.

20 THE COURT: And I said you could.

21 MR. ALTIG: Thank you.

22 [Colloquy between the Court and the clerk]

23 MR. ALTIG: Thank you.

24 THE COURT: All right. Is there anything else on this matter before we bring
25 the jury in?

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1 MR. ALTIG: No --

2 MR. STANTON: Not on behalf of the State, Your Honor.

3 THE COURT: All right. So based upon the information provided to me, the
4 State would be allowed to lead the next -- I believe there are three witnesses
5 pursuant to 50.115 on the basis that they are an adverse party. And also the Court
6 notes that without leading, the Court's concerned they'll be -- accidentally go into
7 areas that are certainly impermissible.

8 MR. ALTIG: Right. I understand and I agree with the Court's interpretation of
9 the statute. However, there are two witnesses that are associated with the adverse
10 party. The third witness I believe they intend to call is the actual detective and I'd
11 ask that --

12 THE COURT: Oh, no, that --

13 MR. ALTIG: -- he not be led.

14 THE COURT: -- that wouldn't be adverse.

15 MR. ALTIG: Right.

16 THE COURT: I thought it was three. But it's -- I guess two then. I misspoke.

17 MR. STANTON: That's okay.

18 MR. ALTIG: Thank you.

19 MR. STANTON: I understood your ruling, Your Honor. Thank you.

20 THE COURT: Okay. Can you bring the jury in, please?

21 THE MARSHAL: Absolutely.

22 [Pause]

23 THE MARSHAL: All rise for the entering jury, please.

24 [Jury in at 9:47 a.m.]

25 THE MARSHAL: Thank you. You may be seated.

1 THE COURT: All right. The jury is present. Welcome back, ladies and
2 gentlemen.

3 Please call your next witness.

4 MR. STANTON: State would call Jennifer Lee.

5 [Pause]

6 THE MARSHAL: Please step up on the witness stand. Remain standing and
7 raise your right hand, face the clerk, please.

8 JENNIFER LEE

9 [having been called as a witness and being first duly sworn, testified as follows:]

10 THE CLERK: Please be seated. State and spell your first and last name for
11 the record.

12 THE WITNESS: Jennifer Lee, J-e-n-n-i-f-e-r L-e-e.

13 THE COURT: All right. Whenever you're ready.

14 MR. STANTON: Thank you.

15 DIRECT EXAMINATION OF JENNIFER LEE

16 BY MR. STANTON:

17 Q Ms. Lee, do you know the defendant?

18 A Yes.

19 Q And what relationship, if any, do you have with the defendant?

20 A He's my younger brother.

21 Q Okay. And could you please point him out in the courtroom and tell me
22 an article of clothing that he's wearing this morning?

23 A He's got a red tie on.

24 MR. STANTON: May the record reflect the identification of defendant?

25 THE COURT: It will.

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1 BY MR. STANTON:

2 Q Ma'am, I want to go back to the timeframe of 2011. Did you have
3 occasion then to be living at 991 Country Back Road?

4 A Correct.

5 Q And did you know a young child by the name of Brodie Aschenbrenner?

6 A Yes.

7 Q Did there come a time, ma'am, that you babysat Brodie
8 Aschenbrenner?

9 A Yes.

10 Q How many times a week did you babysit him when you did that?

11 A It was about 18 hours a week, three days a week.

12 Q And do you remember the timeframe where that babysitting service was
13 performed by you?

14 A Between December and May of 2011.

15 Q So would it be December of --

16 A Of 2011, sorry.

17 Q -- '10 and then into?

18 A Eleven.

19 Q Okay. And where did you watch Brodie? Were --

20 A At my home.

21 Q Were there other minor children there at the home?

22 A My two sons. One of them went to school half the day, but my
23 youngest one was always there.

24 Q And at the time that you babysat Brodie, how old were your children?

25 A Four and seven.

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1 Q So older than Brodie?

2 A Yes.

3 Q And were they boys or girls?

4 A Both boys.

5 Q During the time of -- and apologize. You said December is when you
6 began. What was the month in 2011 where you no longer babysat Brodie?

7 A It was December 2011 through -- or 2010 through May.

8 Q May. Thank you. During that approximate six-month period of time, do
9 you think you're familiar with the normal bumps and bruises that Brodie would get
10 during the day when you were watching him?

11 A Yes.

12 Q And obviously you'd see him the next day when he came in, so the
13 times that you didn't see him you might see bruises or injuries that occurred outside
14 your presence.

15 A Correct.

16 Q So for that six months you have a pretty good sense about what Brodie
17 looked like as far as his normal bumps and bruises.

18 A Yes.

19 Q Did you ever see Brodie in diapers?

20 A Yes.

21 Q With nothing else on?

22 A Yes.

23 Q Ever see him naked?

24 A I changed his diapers, so yes.

25 Q Let me show you some photographs. I'm going to begin by showing

1 you -- these are going to be photographs of Brodie after his death. I want to ask you
2 some questions about injuries that you see here. Starting with Exhibit 52. There's a
3 monitor to your left. Do you see that photograph?

4 A Yes.

5 Q I want to direct your attention to Brodie's left side of his temple down to
6 his cheek, on his lower lip, the middle of his forehead, his upper shoulder and down
7 to the bicep area of his left shoulder. Did you see any types of bruising in that
8 severity, quantity and location at any time when you babysat Brodie?

9 A Sorry. He's had bumps and bruises, not all of those at one time by any
10 means in --

11 Q Not that severity?

12 A No.

13 Q Exhibit 53. Brodie's face. And once again, bridge of nose, cheek, on
14 top of the nose, forehead both left, right, and left cheek. Same question as to
15 whether or not the severity, location, frequency of the bruises are similar at any time
16 with what you saw Brodie alive?

17 A No.

18 Q Exhibit 57. Represent to you that is Brodie's left eye. Did you ever see
19 him with a bruise that I'm pointing to in his irish (sic) portion of his eye like that?

20 A No.

21 Q Showing you Exhibit 61, Brodie's back. Highlighting to you the left
22 portion of his hip above his left buttock, right about the middle of his back and these
23 four sequentialed (sic) semicircular shapes and pattern injury up in the upper right
24 shoulder. Did you ever see anything like that?

25 A No.

1 Q Exhibit 63. I'll represent to you that's Brodie's right ear. Did you ever
2 see a bruise like that on his ear?

3 A He had some bruising behind his ear before. It wasn't that red.

4 Q Like to direct your attention to June 13th of 2011. I have Exhibit 77,
5 which is the calendar of that month to assist you if you need that.

6 A Thank you.

7 Q So my question or next series of questions is going to be dealing with
8 Monday, June 13th.

9 A Okay.

10 Q Did you have occasion to be with Brodie that day?

11 A Yes.

12 Q What was the location that you saw Brodie?

13 A We went to the Whitney Ranch Aquatic Center.

14 Q And did you have your children with you?

15 A Yes.

16 Q And the same two that you testified to earlier?

17 A Yes.

18 Q And did you notice any injuries on Brodie on that day at the pool?

19 A He had the bump on his head, he had a little cut on his lip, he had a
20 bruise on his cheek. He had Pinkeye.

21 Q And you saw him in, I'm assuming, a bathing suit kind of as the normal
22 kid would be in a pool?

23 A He had a bathing suit and one of those life vests that's like a shark so it
24 covered --

25 Q Okay. Did you ever see him without that life vest on?

1 A I believe she put a shirt on him when he got out of the pool.
2 Q Okay. So would you not have ever seen him bare naked from the waist
3 up?
4 A I probably did when he was in the water.
5 Q Did you notice anything unusual about his condition of his body as far
6 as injuries go?
7 A Nothing stuck out.
8 Q Did you ever hear Brodie complain of head pain?
9 A He said he had a headache.
10 Q Okay. And how about abdominal pain?
11 A He wasn't normal. But he never complained about abdominal pain.
12 Q How about nausea?
13 A Not to me.
14 Q Vomiting?
15 A I didn't see that.
16 Q Now, same day, Monday, the 13th. Did you see Brodie again that day?
17 A Yes.
18 Q Where did you see him?
19 A At Danny's house.
20 Q Danny?
21 A Fico.
22 Q And how do you know Danny Fico?
23 A He lived next door to me when I was younger. We grew up together.
24 We're really close friends.
25 Q And is he also friends with your brother?

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1 A Yes.

2 Q And what time of evening did you see Brodie that night at Danny Fico's
3 house?

4 A Close to 6:00 p.m. It -- the baseball game was on. We went over there
5 to watch a baseball game.

6 Q And was your brother there?

7 A He showed up about 30 minutes later.

8 Q And so how long would you approximate that you saw Brodie from start
9 to finish Monday evening?

10 A A few hours.

11 Q Was he acting normally?

12 A He was playing with my kids.

13 Q Was that normal?

14 A Yes.

15 Q No signs of injuries other than what you've previously testified to?

16 A No new injuries, no.

17 Q No complaints of vomiting or nauseous, anything like that?

18 A No.

19 Q Did you ever see Brodie injured that night at Danny Fico's?

20 A No.

21 Q You never saw him slip and fall and some concern about an injury that
22 he obtained that night?

23 A He may have slipped and fell, but no, I didn't see it and I didn't --

24 Q And you certainly didn't see --

25 A -- see anything --

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1 Q -- any commotion or concern of either your brother or anybody else at
2 the party to include yourself that would have to come to Brodie's age?

3 A Correct.

4 Q Or aid. Sorry. Now when you left Danny Fico's on Monday, the 13th,
5 did you take your children with you?

6 A Yes.

7 Q And did anybody else leave the residence at the same time you did?

8 A Danny, Michael and Brodie did.

9 Q And did you see them get in a car and leave?

10 A Yes.

11 Q Did you ever see Brodie fall when he left that home?

12 A No.

13 Q Did you -- you were there the whole time?

14 A Yes.

15 Q So when he left the home, you never saw him get injured?

16 A No.

17 Q Showing you what's been Exhibit -- been admitted as State's Exhibit 3.
18 Do you recognize the young boy in that photograph?

19 A Yes.

20 Q Who is that?

21 A It's Brodie.

22 Q And in June of 2011, ma'am, how did you feel -- what were your
23 feelings of Brodie Aschenbrenner?

24 A Loved that little boy.

25 Q Sometime after his death, which you were advised of on that day, June

1 15th, correct?

2 A Correct.

3 Q Your brother called you, the defendant.

4 A He called me.

5 Q And he was the one that informed you that Brodie had passed.

6 A Not when he called me. But he --

7 Q Sometime later?

8 A Yes.

9 Q You went to their home?

10 A Correct.

11 Q And you were there when -- when you arrived, were police there?

12 A Yes.

13 Q Now sometime after the police came, did you receive a couple of phone
14 messages at your home?

15 A Yes.

16 Q By Detective Collins of the Henderson Police Department?

17 A Correct.

18 Q Can you tell the ladies and gentlemen of the jury what Detective
19 Collins's message was that he left on your home phone?

20 A He was --

21 MS. VON MAGDENKO: Objection, Your Honor; hearsay.

22 MR. STANTON: Doesn't -- it's not offered for the truth of the matter and
23 Detective Collins is -- will be testifying this morning. It's for state of mind and
24 conduct of this witness.

25 MS. VON MAGDENKO: How is a detective's statement relevant to her state

1 of mind?

2 THE COURT: I think it falls under a hearsay exception.

3 MR. STANTON: Thank you, Your Honor.

4 BY MR. STANTON:

5 Q You can answer the question.

6 A Can you repeat it? I'm sorry.

7 Q Certainly. What was the message that Detective Collins left on your
8 home phone?

9 A That he would like to talk to me about Brodie.

10 Q Okay. And do you remember how soon after the 15th of June that
11 those messages were left?

12 A A couple of days, probably.

13 Q Were they on the same day or they were on several -- or on two
14 different days?

15 A Two different days.

16 Q And just so it's clear, was it just two messages or was it more than two?

17 A No, it was just the two.

18 Q So he calls you, he wants to talk to you about Brodie's death? For --

19 A That's what I'm figuring.

20 Q Okay.

21 A He never stated that.

22 Q But that's what you believed when you listened to the message?

23 A Yes.

24 MS. VON MAGDENKO: Objection; calls for speculation.

25 MR. STANTON: I -- I'm not asking her to speculate on the detective's -- what

1 she thought it meant. Her state of mind.

2 THE COURT: Sustained.

3 BY MR. STANTON:

4 Q So you -- when you heard the message, you thought that Gerry Collins
5 wanted to talk to you about Brodie?

6 A Correct.

7 Q Okay. Now, when did you call Detective Collins back?

8 A I did not.

9 Q You did not?

10 A No.

11 Q Do you remember the date of August 18th, 2011?

12 A Not off hand.

13 Q Okay. I'll represent to you that may have been the day when Detective
14 Collins and another detective came to your home.

15 A Okay.

16 Q And that would be the home at Country Back Road.

17 A Okay.

18 Q Do you remember that?

19 A Yes.

20 Q Do you remember what time of day it was?

21 A Early afternoon-ish.

22 Q And --

23 A Not exact.

24 Q Okay. That's fine. But it was in the early afternoon of the day, not at
25 night or --

1 A No.

2 Q -- early in the morning. And do you remember them ringing the
3 doorbell?

4 A Yes.

5 Q What did you do when they rang the doorbell?

6 A I took my kids into the back room and we played and watched a movie.

7 Q Did you look at who was at your door?

8 A I couldn't see out the peephole.

9 Q Pardon me?

10 A You -- I couldn't see out the peephole. I had a screen security door, so
11 you can't see.

12 Q Okay. Do -- did they ring the doorbell a number of times?

13 A Yes.

14 Q And when that doorbell ringing stopped, did you go to your front door?

15 A After a while, yes.

16 Q And what did you see at the front door?

17 A They had left a business card.

18 Q And what did the business card say?

19 A It had his name on it.

20 Q Detective?

21 A Collins.

22 Q Gerry Collins, Henderson Police Department, it's got a police symbol of
23 the Henderson Police Department?

24 A Correct.

25 Q And did you take that along with the previous phone messages left at

1 your home that he wanted to speak to you about Brodie's death?

2 A I knew he wanted to speak to me about Brodie, yes.

3 Q And when did you call Detective Collins back?

4 A I did not.

5 Q You never did?

6 A No.

7 Q And as you testify here today, you've never returned that phone call or
8 their visits?

9 A No.

10 MR. STANTON: Nothing further.

11 THE COURT: Cross?

12 CROSS-EXAMINATION

13 BY MS. VON MAGDENKO:

14 Q Although you didn't talk to Detective Collins, you testified in court
15 before?

16 A Correct.

17 Q On this -- on Brodie's death?

18 A Yes.

19 Q Okay. When did you first meet Arica?

20 A I was friends with her older sister, so I knew her when she was a little
21 kid. But we ran into each other again at Amanda's house.

22 Q When was that?

23 A A few months before everything had happened.

24 Q So the fall of 2010?

25 A Yes.

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1 MR. STANTON: Excuse me, counsel? Could you do me a favor and just
2 slide that lectern over to the other side so I can see the witness?

3 MS. VON MAGDENKO: I'll just move it over here so you can see.

4 BY MS. VON MAGDENKO:

5 Q And how often would you -- you babysat Brodie 18 hours a week?

6 A Correct.

7 Q How often would you see Arica during that time period per week or per
8 day?

9 A A couple of hours. She would come over early to drop him off and I
10 would go over there for coffee in the mornings so maybe a couple of hours.

11 Q Per day?

12 A Probably an hour each day.

13 Q And what would you talk about with Arica?

14 A Everything. We were friends.

15 Q Did you talk about her relationship with Michael?

16 A Of course.

17 Q Would you talk about Brodie?

18 A Yes.

19 Q And Arica was paying you for you babysitting?

20 A Yes.

21 Q And how much was she paying you per hour?

22 A Six dollars.

23 Q Have you ever seen Arica hit Brodie?

24 A I've never seen her do it, but she has talked to me about it before.

25 Q And what does she say?

-22-

1 A That she got out of hand once --

2 MR. STANTON: Objection; hearsay, Your Honor.

3 THE COURT: Sustained unless you have a exception.

4 BY MS. VON MAGDENKO:

5 Q Have you ever seen Arica get angry at Brodie?

6 A Yes.

7 Q And can you describe what you saw?

8 A She gets frustrated. She doesn't have patience. She screams, she
9 yells. And she would put him in a room and lock the door.

10 Q She would lock Brodie in a room alone?

11 A That's how they did it.

12 Q When you say they, who are you referring to?

13 A The grandparents and her.

14 Q Why would they do that? What would Brodie be doing to warrant being
15 locked in a room alone?

16 A Even if he was just sleeping, that's how they kept him there until he
17 woke up. It was for any reason they felt necessary. If he was throwing a tantrum,
18 that was their time out.

19 Q When you were at the pool on Monday and Brodie -- who did Brodie tell
20 that he had a headache to?

21 A To Arica but it -- we were all standing there.

22 Q And did Arica do anything when Brodie said his -- he had a headache?

23 A No.

24 MS. VON MAGDENKO: Court's indulgence.

25 THE COURT: Yes.

-23-

1 [Colloquy between counsel]

2 BY MS. VON MAGDENKO:

3 Q Did you ever see your brother interact with Brodie?

4 A Yes.

5 Q And can you describe that interaction?

6 A Playful. He was always tickling him or playing with him or trying to keep
7 him happy.

8 Q Was Brodie a happy kid?

9 A Usually, yes.

10 Q Did they ever play Little Cruisers? Do you know what Little Cruisers
11 are?

12 A I'm not sure what Little Cruisers is.

13 Q Okay. Did Brodie ever look like he was afraid of Michael?

14 A Never.

15 Q All right.

16 MS. VON MAGDENKO: I have no further questions.

17 THE COURT: All right. Thank you.

18 Any redirect?

19 MR. STANTON: Couple.

20 REDIRECT EXAMINATION

21 BY MR. STANTON:

22 Q Counsel asked you about you testified you never made a statement to
23 the police but you testified previously. Do you recall that question?

24 A Yes.

25 Q Your testimony was a sworn testimony under oath on December 1st,

1 2011 before the Clark County Grand Jury, correct?

2 A Correct.

3 Q Now you didn't volunteer to walk down to the Clark County Grand Jury
4 on that day, did you?

5 A No.

6 Q What compelled you to attend the Grand Jury and be placed under oath
7 on December 1st of 2011?

8 A I was given a subpoena.

9 Q Just like you were given a subpoena to testify in this trial this week,
10 correct?

11 A Correct.

12 Q Now, ma'am, you said they, the way they disciplined Arica -- or Brodie,
13 and you said the grandparents. Is that what your testimony was?

14 A The -- excuse me?

15 Q On cross-examination you answered the question about Brodie being
16 disciplined about being locked in a room.

17 A Okay.

18 Q And you said that's the way they disciplined them.

19 A Okay.

20 Q And I thought in your answer you said the grandparents.

21 A The grandparents and Arica.

22 Q Okay. How often were you over at the grandparents' home?

23 A I've only been there three times, maybe.

24 Q And did you see them discipline Brodie by locking him in the room on
25 more than one occasion?

1 A No.

2 Q When did you see that?

3 A I never saw it.

4 MR. STANTON: Nothing further.

5 THE COURT: Anything else of this witness?

6 RECROSS EXAMINATION

7 BY MS. VON MAGDENKO:

8 Q Just so we're clear, did you ever see Arica lock Brodie in the room?

9 A She's put him in his room before, yes. At the apartment.

10 Q Okay. I think that's --

11 MS. VON MAGDENKO: No further questions.

12 THE COURT: Is Ms. Lee free to go?

13 MR. STANTON: Yes, Your Honor.

14 THE COURT: Thank you, ma'am, for your time. You're free to go.

15 Next witness, please.

16 MR. STANTON: And, Your Honor, this witness can be released from her
17 subpoena, please?

18 THE COURT: All right. Thank you.

19 MR. GIORDANI: And State would call Danny Fico.

20 [Pause]

21 THE MARSHAL: Please step up to the witness stand, sir. Remain standing,
22 raise your right hand, face the clerk, please.

23 DANNY FICO

24 [having been called as a witness and being first duly sworn, testified as follows:]

25 THE CLERK: Please be seated. State and spell your first and last name for

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1 the record.

2 THE WITNESS: Danny Fico, D-a-n-n-y, last name Fico, F-i-c-o.

3 THE COURT: Whenever you're ready.

4 MR. GIORDANI: Thank you, Your Honor.

5 DIRECT EXAMINATION OF DANNY FICO

6 BY MR. GIORDANI:

7 Q Mr. Fico, do you know the defendant, Michael Lee?

8 A Yes.

9 Q Can you please point to him and describe an article of clothing he's
10 wearing today?

11 A Blue suit.

12 MR. GIORDANI: Record reflect --

13 THE WITNESS: Navy blue suit.

14 MR. GIORDANI: -- identification, Judge?

15 THE COURT: It will.

16 BY MR. GIORDANI:

17 Q How do you know the defendant?

18 A Known my whole life, next door neighbor growing up.

19 Q Since you were how old?

20 A Six.

21 Q Okay. You and I, to be clear, have never spoken before today, correct?

22 A No.

23 Q And were you made aware that you were asked to come down to our
24 office for a pretrial conference to discuss your testimony today?

25 A Yes.

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1 Q Did you come down for the pretrial conference?

2 MR. ALTIG: I'm going to object at this point, Your Honor, as to the relevancy
3 of the line of questioning.

4 MR. GIORDANI: It goes to his bias --

5 MR. ALTIG: Towards -- may we approach?

6 THE COURT: Uh-huh.

7 MR. ALTIG: Thank you.

8 [Bench conference begins at 10:09 a.m.]

9 MR. ALTIG: Doesn't go to his bias. He has every -- he doesn't have any
10 obligation to go and speak to them at all. Whether they -- they call him and give him
11 an opportunity or not, there's no obligation for him to go and speak to them.

12 MR. GIORDANI: I am --

13 MR. ALTIG: So it doesn't go to any bias, it goes to trying to --

14 MR. GIORDANI: It shows that he's uncooperative with the State, plain and
15 simple.

16 THE COURT: I don't think you need it. Move on.

17 MR. GIORDANI: Okay.

18 [Bench conference ends at 10:09 a.m.]

19 THE COURT: So the objection will be sustained.

20 BY MR. GIORDANI:

21 Q I'm showing you State's Exhibit 3. Do you know that little boy?

22 A Yes.

23 Q How do you know him?

24 A I've known him from when Mike introduced him.

25 Q And who is it?

1 A Brodie.
2 Q And when did Mike introduce you to Brodie?
3 A I'd say around Christmas -- that time.
4 Q Okay. Did you also meet the woman in that photo around that time?
5 A Yes.
6 Q And who is that?
7 A Arica.
8 Q And is that Brodie's mom?
9 A Yes.
10 Q Arica Foster?
11 A Yes.
12 Q What was your relationship with the defendant around late 2010, early
13 2011, mid-2011?
14 A With Michael? That was my best friend.
15 Q All right. And as you sit here today, is it true that you've been convicted
16 of four felonies here in the State of Nevada?
17 A That I have?
18 Q Yes.
19 A Yes.
20 Q And was that in 2002?
21 A Yes.
22 Q And is that one count of burglary while in possession of a firearm?
23 A Yes.
24 Q One count of robbery with use of a deadly weapon?
25 A Yes.

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1 Q Another count of robbery with use of a deadly weapon?

2 A Yes.

3 Q And another count of robbery with use of a deadly weapon?

4 A Yes.

5 Q I want to draw your attention to two specific days in June of 2011, and
6 I'm going to show you a calendar if it helps you.

7 A Okay.

8 Q State's 77. First date I want to draw your attention to is Monday, June
9 13th. Can you see it, Mr. Fico --

10 A Yeah. Yes.

11 Q So Monday, June 13th. Did you come into contact with Arica and
12 Brodie on that day?

13 A Yes.

14 Q And what time was that, approximately?

15 A Sometime in the morning in -- at the gas station.

16 Q Was the defendant also present at some point that morning?

17 A I believe so, yes, sir.

18 Q Do you know where they were going that day?

19 A I believe the pool.

20 Q When you saw Brodie that morning, do you recall as you sit here today
21 what he was wearing?

22 A No. No.

23 Q Do you recall seeing anything on Brodie that caused you concern?

24 A I'm not sure on that day or if it was a different day.

25 Q Okay. And to be clear, you saw them Monday morning and you also

-30-

1 saw them the next morning, Tuesday --

2 A Yes.

3 Q -- and that was at the gas station as well?

4 A Yes.

5 Q So as you sit here today, are you kind of confused as to which day?

6 A Sort of, yes.

7 Q Okay. And let me put it to you this way. At some point did you see
8 some bruises that caused you concern on Brodie?

9 A Yes.

10 Q Now I want to talk about Monday, June 13th, whether or not that's the
11 day. You knew he was going to the pool that day, correct?

12 A When they came in they told me, yes.

13 Q And who came into the store?

14 A Arica, Michael and Brodie.

15 Q Okay. And you don't recall what Brodie was wearing that day; is that
16 correct?

17 A No, I don't.

18 Q All right. Did you also see Brodie and Arica -- I'm sorry -- Brodie and
19 the defendant that evening?

20 A Yes.

21 Q That Monday night.

22 A Yes.

23 Q And when did you see them and --

24 A We --

25 Q -- how did it come about?

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1 A They came over my house. We watched the baseball game.
2 Q Was it the Yankees game?
3 A Yes.
4 Q Who else was present that night?
5 A Ashton, Richie, Jennifer, my dad was there, John --
6 Q Who are Ashton and Richie?
7 A Ashton and Richie are Michael's nephews.
8 Q Okay. And what time, if you can recall, did that game start?
9 A Roughly around five.
10 Q Okay. Do you recall what time the defendant and Brodie came over?
11 A A little bit after the game started, I would say. Close -- not too -- not to
12 much afterwards.
13 Q Around 5:30?
14 A 5:30, yeah.
15 Q Okay. Do you know or can you recall how long they stayed at your
16 house that evening?
17 A I think they stayed the entire game.
18 Q Okay. And in fact did they come -- or did they drive you somewhere
19 after the game?
20 A Drive me somewhere?
21 Q Yes.
22 A No.
23 Q Did you see Brodie interact with anyone else?
24 A Yeah, he was playing. He was interacting with my dad, he was
25 interacting with Mike, he was interacting with my nephews --

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1 Q Okay.

2 A -- Ash and Richie.

3 Q How was he -- how was Brodie acting that night?

4 A He seemed normal, seemed fine.

5 Q Did you see Brodie eat?

6 A Yes.

7 Q And what did he eat?

8 A I believe my dad made chicken cutlets that night.

9 Q Okay. Wasn't it chicken parmesan?

10 A Chicken parmesan cutlets, yes.

11 Q Same thing?

12 A Yeah.

13 Q Okay. And did you see Brodie actually eat that meal?

14 A Yes.

15 Q Do you --

16 A Ate some of it, yes.

17 Q I'm sorry?

18 A Yes, he was eating it.

19 Q Okay. Do you recall that evening seeing anything on his face?

20 A I don't -- yeah, possibly. It seemed like he always had some type of

21 bruise.

22 Q Do you remember testifying in front of a Grand Jury here in Clark

23 County back in 2011?

24 A No.

25 Q Do you recall testifying at some point in 2011?

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1 A Yes, for a prelim I believe.
2 Q And that was actually in front of a judge, preliminary hearing?
3 A Yeah.
4 Q And you don't recall the injuries to Brodie's face that evening?
5 A I don't -- I know he had a bruise, I'm sure.
6 Q Okay.
7 MR. GIORDANI: May I approach the witness to refresh his recollection,
8 Judge?
9 THE COURT: Yes.
10 MR. GIORDANI: It's 27, counsel.
11 BY MR. GIORDANI:
12 Q I'm showing you a transcript from that prior testimony.
13 A Okay.
14 Q Page 27, just review that page and look up at me when you're done.
15 A (Witness complies.)
16 Q Okay. Does that refresh your recollection --
17 A Yes.
18 Q -- as to the injuries you saw on Brodie that evening?
19 A Yes.
20 Q Monday.
21 A Yes.
22 Q And what were those injuries?
23 A Remember seeing a bruise on his cheek.
24 Q Okay.
25 A Believe on his chin. And --

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1 Q Did you also see a minor bruise on his forehead?

2 A Yes.

3 Q And did you also say that the cheek bruise was yellowish and blue and
4 healing?

5 A Yes.

6 Q That night did you inquire as to how he received those injuries with
7 either Brodie or the defendant?

8 A No.

9 Q Were you concerned about those injuries?

10 A Not really, not at the time because most time I saw him he had bruising,
11 so --

12 Q Okay.

13 THE COURT RECORDER: I cannot hear him, counsel.

14 BY MR. GIORDANI:

15 Q You need to speak up a little bit.

16 A Oh, okay.

17 Q She's taking all this down.

18 A Okay.

19 THE COURT RECORDER: Can you respond again, please?

20 THE WITNESS: I said most time I saw him he had bruising.

21 BY MR. GIORDANI:

22 Q Was it bruising that was concerning to you most the time when you saw
23 the bruising?

24 A No.

25 Q Okay. So would you describe this bruising on Monday night as bruising

-35-

1 that was pretty much the same as you had seen before?

2 A Yes.

3 Q In that it didn't cause you concern?

4 A Yes.

5 Q Okay.

6 A Yes.

7 Q Do you recall again whether the defendant gave you a ride somewhere
8 that evening?

9 A I -- I think I met him somewhere, but I don't think he gave me a ride.

10 Q Okay. Where did you meet him?

11 A If it would have been either the gas station or at Jen's.

12 Q And why'd you meet him there?

13 A Just to hang out.

14 Q Okay. Did you drop a car off to your girlfriend that evening?

15 A Did I? Not that I recall.

16 Q Okay.

17 MR. GIORDANI: May I approach, Judge?

18 And counsel, page 33.

19 THE COURT: Yes.

20 BY MR. GIORDANI:

21 Q Would it refresh your recollection to look at your prior testimony?

22 A Yes, absolutely.

23 Q Okay. I'm going to show you pages 38 and 39.

24 A Okay.

25 Q Just read that and look up again when you're done.

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1 A (Witness complies.)
2 Q Does that refresh your recollection?
3 A Yeah, says we met over there.
4 Q Okay. And met over where?
5 A Over at Jen's house.
6 Q And who's we?
7 A Just --
8 Q We -- you said we met over --
9 A I mean I went over there and met with Michael, Jen, Brodie.
10 Q Okay.
11 A John was there with his kids, Ash and Richie.
12 Q Okay. Did you go somewhere thereafter?
13 A I don't recall. Maybe to the gas station or home would have been the
14 two places.
15 Q Okay. Let me approach you again. It's that same pages 38 and 39.
16 And actually it bleeds into page 40.
17 A Okay.
18 Q And go ahead and read those again, see if that refreshes your
19 recollection.
20 A (Witness complies.) Yes.
21 Q Do you --
22 A Yes.
23 Q -- remember that now?
24 A Yeah.
25 Q Okay. How did that sequence of events go about after the baseball

-37-

1 game that evening?

2 A I went from the baseball game, headed over to Jen's house. We're over
3 there not long, 15, 20 minutes, and then we headed back to the gas station, drop my
4 car off, then Mike gave me a ride home.

5 Q Mike with who?

6 A With Brodie.

7 Q Okay. So it sounds like you saw Brodie for a fair amount of time on
8 Monday evening?

9 A Yes.

10 Q I'm going to show you State's already admitted 53. Did you see any
11 injuries that you see in this photo on Brodie that Monday evening?

12 A The cheek, the --

13 Q Which cheek?

14 A Right here looks like.

15 Q And you're indicating --

16 A His --

17 Q -- just for the record she's ----

18 A -- his left.

19 Q -- your left? Any of the other injuries?

20 A Forehead, left forehead.

21 Q And can you -- you can circle on that screen there the bruise you're
22 talking about. It's fair to say there's a number of bruises on his left forehead, right?

23 A Left forehead.

24 Q Mr. Fico, there's a number of bruises on his left forehead, right?

25 A Yes.

1 Q Would you circle the one that you're referring to?
2 A It's been so long. Just don't recall exactly where. I just remember
3 seeing a bruise.
4 Q Okay. Let me ask you this: Did you see all these bruises on his left
5 side?
6 A Not that many, no.
7 Q Did you see any bruises at this severity level on that side?
8 A Possibly, it's been -- been a very -- been a long time.
9 Q How did you leave your house for the baseball game? Did you walk out
10 with anyone?
11 A I don't recall.
12 Q Okay. Did you ever have an incident at any point where you were
13 informed or saw Brodie fall down and hurt himself or any incident where he hurt
14 himself at all?
15 A Me personally, no. No.
16 Q You never witnessed Brodie fall on any rocks --
17 A Fall, yeah. I mean I've seen him fall --
18 Q I'm talking about specifically Monday night --
19 A No.
20 Q -- right after the baseball game.
21 A No.
22 Q I want to now move to the next day, Tuesday, June 14th.
23 A Okay.
24 Q Were you working that day?
25 A Yes.

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1 Q And is that at America's Mart?
2 A Yes.
3 Q And were you working inside or outside?
4 A Inside.
5 Q And when I say inside, I mean --
6 A Inside at the front counter.
7 Q Okay. Did you see Brodie that day as well?
8 A Yes.
9 Q And who was he with when you saw him?
10 A He walked by the counter with Arica.
11 Q Okay. When you saw him that day, did you recall that he was wearing
12 a baseball cap?
13 A I don't recall.
14 Q Okay. Do you recall seeing injuries to Brodie that caused you concern?
15 A I don't recall if it was Monday or Tuesday I saw those injuries.
16 Q Okay.
17 A I -- I know I made a statement.
18 Q Is it fair to say the baseball game was Monday night?
19 A Yes.
20 Q And you saw Brodie the next morning as well?
21 A Yes.
22 Q Were there bruises to Brodie the next day that you hadn't seen the night
23 before?
24 A Yes.
25 Q Did you have a conversation with Arica about those bruises?

1 A I point out to Arica -- I just ask if -- how he got that bruise.
2 Q Okay.
3 A That was really it.
4 Q And is that because you had just seen him the night before hours
5 earlier?
6 A Possibly, yes.
7 Q And that's why that bruise caused you concern?
8 A I just asked her about it, yep.
9 Q I want to move to later that evening. That's again Tuesday, June 14th.
10 A Okay.
11 Q Were you working again that evening or were you at the store again
12 that evening?
13 A I think I was at the store that evening.
14 Q Okay. And did you see the defendant at some point that evening?
15 A Yes.
16 Q Do you recall the time as you sit here today?
17 A Eight, nine-ish maybe.
18 Q Okay.
19 A It was at night.
20 Q And what did the defendant come in for, to your knowledge?
21 A We were just talking. I was at the -- I was playing the machines, just
22 going over I believe him possibly being promoted.
23 Q Okay. Is there -- gambling machines you mean?
24 A Yeah. Yeah.
25 Q And was the defendant also playing those machines?

1 A Yes.

2 Q Okay. When exactly did you find out that Brodie had passed away on
3 June 15th, Wednesday?

4 A Wasn't till that morning when Michael called me.

5 Q Okay. Wasn't Michael at work that morning?

6 A Yes.

7 THE COURT: I'm sorry, date. Which morning?

8 MR. GIORDANI: Wednesday, June --

9 THE COURT: I'm sorry, I didn't hear. Thank you.

10 BY MR. GIORDANI:

11 Q Wednesday, June 15th?

12 A Yes.

13 Q And you discovered that Brodie had died that day?

14 A Yes.

15 Q Later, a couple days later on June 16th were contacted by Henderson
16 Police Department homicide detectives?

17 A I believe so at the gas station, yes.

18 Q At the gas station?

19 A Yeah. Yes.

20 Q Okay. Did you know what they were there for?

21 A Yes.

22 Q And what was that?

23 A They were questioning me about the case.

24 Q And at what point did you tell them about the bruising that you saw that
25 morning on Brodie's face that you hadn't seen the night before?

-42-

1 A I don't believe I --

2 MR. ALTIG: At this point --

3 A -- talked to them.

4 MR. ALTIG: -- Your Honor, I'm going to object again.

5 THE COURT: What's the objection, counsel?

6 MR. ALTIG: Same objection last time we approached. May we approach?

7 THE COURT: Yeah.

8 [Bench conference begins at 10:23 a.m.]

9 MR. ALTIG: He's trying to impeach a witness with something the witness has
10 a lawful right to do and it's not talk to police and not talk to them and not talk to
11 anybody. I don't think it's proper impeachment of a witness by impeaching them
12 with something they have a right to do. (Indiscernible) --

13 MR. GIORDANI: The the witness is not on trial. He doesn't have a Fifth
14 Amendment right and a Sixth Amendment right with regard to that.

15 MR. ALTIG: (Indiscernible) --

16 MR. GIORDANI: I can ask him if he cooperated with detectives. It's
17 extremely relevant --

18 THE COURT: You can.

19 MR. GIORDANI: -- and probative.

20 MR. STANTON: Yeah, because this is direct impeachment about his interest
21 in the injuries, whether or not his -- he was concerned enough to talk to the police
22 about Brodie at all. I mean I think it's directly relevant to this jury evaluating his
23 observations that he's previously testified to.

24 THE COURT: I'm going to allow it. I think it's relevant to the timeframe.

25 MR. ALTIG: Thank you.

1 MR. GIORDANI: Thank you.

2 [Bench conference ends at 10:24 a.m.]

3 BY MR. GIORDANI:

4 Q Do you recall the question that I just asked you or do you want me to
5 repeat --

6 A Can you repeat it, please?

7 Q Yes. You were contacted by Henderson Police Department on June
8 16th.

9 A Yes, they came my gas station.

10 Q And that was homicide detectives came into the gas station?

11 A Yes.

12 Q At what point did you tell them about the bruising to Brodie that you'd
13 see that morning?

14 A I don't recall what I said to them at all, really, to be honest with you.

15 Q Do you recall telling them about the bruising?

16 A No.

17 Q As you sit here today, do you think you told them about the bruising?

18 A I could have. I don't recall though.

19 MR. ALTIG: I'm going to object as asked and answered.

20 THE COURT: He's already answered. It'd be overruled anyways.

21 BY MR. GIORDANI:

22 Q Isn't it true that you told -- that you previously testified under oath that
23 you didn't think -- you didn't know any type of cause of death or anything, you were
24 out of the loop and you were just waiting to hear?

25 A I'm sorry?

1 Q Didn't you previously testify that when detectives came to talk to you,
2 you did not tell them that information because you were out of the loop on cause of
3 death and all that and you were just waiting to hear?

4 A That sounds right.

5 Q Did you ever approach them yourself voluntarily with that information
6 about the bruising that you saw Sunday -- Tuesday that you hadn't seen the night
7 before?

8 A No.

9 Q Did you think that was relevant?

10 A Wasn't really thinking that at the time.

11 Q You were aware they were investigating Brodie's death, right?

12 A Yes.

13 Q July 6, three weeks later, did detectives come and contact you again?

14 A I -- possibly, yes. I --

15 Q Did they come and contact you again?

16 A I don't -- I'm -- it's been a long time. Sure they could have, yes.

17 Q Okay.

18 A I mean.

19 Q Would it refresh your recollection to see your transcripts again as to that
20 issue?

21 A Yes, please.

22 MR. GIORDANI: It's pages 35 and 36.

23 BY MR. GIORDANI:

24 Q Showing you pages 35 and 36. Review these two pages --

25 A Okay.

1 Q -- and look up at me when you're done.

2 A (Witness complies.)

3 MR. ALTIG: Is that of the preliminary hearing transcript, counsel?

4 MR. GIORDANI: Yes.

5 MR. ALTIG: Thank you.

6 [Pause]

7 BY MR. GIORDANI:

8 Q Does that refresh your recollection?

9 A Yeah.

10 Q You acknowledged at that time that you spoke to detectives at some
11 point in the first week of July, right?

12 A Yes.

13 Q And when they came to talk to you, what did you tell them?

14 A I didn't have really much to say.

15 Q You didn't have anything to say?

16 A Yeah.

17 MR. GIORDANI: Pass the witness.

18 THE COURT: Cross?

19 MR. ALTIG: Thank you.

20 CROSS-EXAMINATION

21 BY MR. ALTIG:

22 Q Good morning, Mr. Fico.

23 A Morning.

24 Q Now, how long again did you know Michael?

25 A Since I was six.

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1 Q Since you were 6? And at this time we're talking about June of 2011.
2 Where did you live?
3 A Same apartments, Avalon.
4 Q Okay. Were you in fact in the same building?
5 A Yes.
6 Q Okay. So you lived in the same building as Michael?
7 A Yes.
8 Q How often would you see Brodie and Michael and Arica during a week?
9 A Almost every day.
10 Q And would you see them interact with one another?
11 A Yes.
12 Q And you got to see how Michael interacted with Brodie?
13 A Yes.
14 Q How would you characterize Michael's interactions with Brodie?
15 A Seemed like they always had lots of fun. Always calling him bum, come
16 in the gas station, lots of laughs.
17 Q How would you characterize Arica's interaction with Brodie?
18 A Same.
19 Q Same way?
20 A Yep.
21 Q And how would you characterize Michael's and Arica's interactions?
22 A Everything seemed normal, seemed good.
23 Q Okay. Now, drawing your attention to June 13th of 2011.
24 A Okay.
25 Q You said a few moments ago that you did see Arica and Brodie and

1 Michael come into the store?

2 A Yes, in the morning.

3 Q In the morning time and they -- you believe that they were going to the
4 pool?

5 A Yes.

6 Q And you saw some injuries on Brodie at the time, however they
7 appeared to be normal injuries to you?

8 A Yes.

9 Q You said that he oftentimes had bruising?

10 A Yes.

11 Q What types of bruising would he have?

12 A Just regular bruising on his face, just scuffs on his arms or -- from falling
13 or something.

14 Q Okay. Did he fall a lot?

15 A When I was around him, yes.

16 Q How often were you around him?

17 A When Jen was babysitting, I was there quite often and I saw him fall
18 quite a bit over there and just his walking and his falling.

19 Q Okay. And he hurt himself when he did that?

20 A Sometimes he would, but most -- he'd get back up most the time.

21 Q Okay. Now, there came a time Monday afternoon that you saw
22 everybody again; is that right? At least Michael and Brodie?

23 A Yeah. Back at Jen's house.

24 Q They came to your -- they came -- well they came to --

25 A To the -- to the baseball --

1 Q -- to the baseball game.
2 A -- to my house to watch baseball game.
3 Q Okay. And everything seemed to be okay at that particular time you
4 said?
5 A Yeah.
6 Q Brodie still have his -- those injuries?
7 A Yes.
8 Q Okay. Did you see Jen that -- or did you see Arica that night?
9 A I don't recall.
10 Q You don't --
11 A If it would have been, it would have been late, but I don't recall.
12 Q Okay. Now, that night after the baseball game you left?
13 A Yeah, went over --
14 Q Went to Jen's house?
15 A -- Jen's house.
16 Q You said everything seemed to be fine then?
17 A Yeah.
18 Q How was Michael interacting with Brodie Monday night?
19 A Same. He was -- fed him dinner and everything.
20 Q Michael fed him dinner?
21 A Yeah.
22 Q Okay. Was that common in your interactions to see Michael take care
23 of Brodie like that?
24 A All the time he was with him.
25 Q Okay. Michael --

1 A Yeah.

2 Q -- and he'd feed Brodie?

3 A Yeah. Whenever he -- yep.

4 Q Did Brodie ever seem to be -- to shy away from Michael at all?

5 A No.

6 Q Okay. Did he ever appear to be fearful of Michael?

7 A No.

8 Q On Tuesday morning you said that you saw Michael or at least Arica

9 and Brodie again, right?

10 A Yeah, they came through the gas station.

11 Q And there was some additional bruising at that time?

12 A I remember walking by and just pointing out, asking what happened --

13 Q Okay.

14 A -- on a little bruise on him.

15 Q And don't tell me what Arica's response was, but as to her response to

16 you, did you -- did she seem concerned?

17 A No.

18 Q About the bruising?

19 A No.

20 Q Okay. Did it appear to you that -- we'll leave it at that. She didn't seem

21 concerned you said, right?

22 A No.

23 Q Okay. And then you said you saw Michael later on that evening?

24 A Yes, at the gas station.

25 Q Tuesday evening. At the gas station. He had come in to talk to you?

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1 A Yes.

2 Q And you said that the conversation was about him receiving a

3 promotion?

4 A Yes.

5 Q To supervisor?

6 A Yes.

7 Q Supervisor of what?

8 A Of the car wash.

9 Q Of the car wash itself?

10 A Yes.

11 Q And what was your position with the mart?

12 A General manager of the store.

13 Q Of the store?

14 A Yes.

15 Q Okay. And Michael you said was receiving a promotion to --

16 A To go to --

17 Q -- to supervisor of the car wash?

18 A -- supervise the car wash, yes.

19 Q Was Michael happy about that?

20 A Very.

21 Q Okay. Did he seem excited?

22 A Very excited.

23 Q Okay. When you saw Michael that evening, did he seem irritated or

24 aggravated?

25 A No, not at all.

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1 Q Have you ever seen Michael hit Brodie?

2 A No.

3 Q You ever seen Michael yell at Brodie?

4 A No.

5 Q You ever seen Michael be aggressive with Brodie?

6 A No.

7 Q You heard the State ask you questions about speaking to the police?

8 A Yes.

9 Q Or not speaking to the police?

10 A Yeah.

11 Q Why didn't you speak to the police?

12 A No reason. I was at work. Didn't feel comfortable.

13 Q Okay. You said you -- at one point when the State was cross-

14 examining you, you said that you felt that you were out of the loop as to the cause of
15 death?

16 A Yes.

17 Q So when the police are calling you, you don't know the exact reason --
18 what they're investigating or why they want to talk to you or anything like that, right?

19 A No. Correct.

20 Q Okay.

21 [Colloquy between counsel]

22 BY MR. ALTIG:

23 Q Do you know what time it was on Tuesday evening that Michael found
24 out he received a promotion to supervisor?

25 A Sometime -- 8, 9:00 I would say. Around that time, 7:00. It's -- I can't

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1 remember. It's been a while.

2 Q Okay.

3 A But it was in the evening though.

4 Q In the evening hours?

5 A Yeah.

6 Q On Tuesday?

7 A Yeah.

8 Q Thank you.

9 MR. ALTIG: No further questions, Your Honor.

10 THE COURT: Redirect?

11 MR. GIORDANI: Just briefly.

12 REDIRECT EXAMINATION

13 BY MR. GIORDANI:

14 Q You mentioned on cross-examination that Brodie and the defendant
15 interacted in a particular way and you used the word bum. What does that mean to
16 you?

17 A It was just something him and Michael -- just something he did. They --

18 Q Was that --

19 A -- they interacted together with each other.

20 Q Okay. And is that a nickname that Brodie had for Michael?

21 A I don't know if it was vice versa, but something they both said to each
22 other.

23 Q Bum?

24 A Yeah, bum.

25 Q B-u-m?

1 A Yeah.

2 Q Okay.

3 MR. GIORDANI: Nothing further.

4 THE COURT: Is free to go?

5 MR. ALTIG: Yes, Your Honor.

6 THE WITNESS: Thank you.

7 THE COURT: Thanks.

8 Actually can we just take a quick break before we bring the detective
9 on? Isn't that our last witness of the day?

10 MR. STANTON: Yes, Your Honor.

11 THE COURT: All right.

12 Ladies and gentlemen, let's come back at 15 till. Again you're
13 admonished not to converse amongst yourselves or with anyone on any subject
14 connected with the trial, do not read, watch or listen to any report of or commentary
15 on the trial, and do not form or express an opinion on this case. Come back soon.

16 THE MARSHAL: Thank you, jurors.

17 Please all rise for the exiting jurors.

18 [Jury out at 10:34 a.m.]

19 THE COURT: I just want to talk about scheduling real quick. So we're going
20 to end early today. On Monday the coroner's coming back. And then did you -- did
21 the -- and the State's expected to rest at that point. Then on the defense, are you
22 going to bring a witness on Monday?

23 MS. VON MAGDENKO: Yes. We're planning on it, Your Honor.

24 THE COURT: Who and how many?

25 MS. VON MAGDENKO: We haven't decided. It would be one or two. It

1 would be Dr. Tiwary and Shannon Krynzel, maximum.

2 THE COURT: Okay. And then I don't know how many total witnesses you're
3 planning on having. Are we going to go into Tuesday --

4 MR. ALTIG: You know --

5 THE COURT: -- with your witnesses?

6 MR. ALTIG: We're not sure -- due to some issues that have arisen during the
7 trial, we are talking about certain witnesses that we may not call. So I don't think we
8 can give you an affirmative answer to that.

9 MS. VON MAGDENKO: Until we --

10 THE COURT: Well, I was trying to find out enough to let the jury plan their
11 week next week, because obviously they're going to have to come back Thursday
12 afternoon and Friday.

13 MR. ALTIG: Right.

14 MS. VON MAGDENKO: No, there wouldn't be anything Tuesday or
15 Wednesday, Your Honor.

16 THE COURT: You don't think we'll have anything Tuesday or Wednesday?

17 MS. VON MAGDENKO: No. I mean, I've emailed Dr. Arden again and asked
18 him to let me know if anything changes in his schedule, if he could come on
19 Tuesday or Wednesday, but obviously you'd have to know by Monday and I'm not
20 sure that he'll be able to let me know because it's three different cases he's testifying
21 in --

22 THE COURT: All right.

23 MS. VON MAGDENKO: -- including --

24 THE COURT: So I'll tell the jury for sure Wednesday they'll have free.
25 Tuesday -- I'm not so sure we'll get through two experts and a lay witness on

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1 Monday, but we'll -- I guess we'll see.

2 MR. GIORDANI: Do we have a 1:00 start on Monday?

3 THE COURT: We do.

4 MR. GIORDANI: Okay.

5 THE COURT: Okay. Thanks. That's what I needed to know.

6 MR. ALTIG: Thank you.

7 THE COURT: I'll see you in a second.

8 MS. VON MAGDENKO: Thank you.

9 [Off the record at 10:36 a.m.]

10 [Proceedings resumed at 10:50 a.m.]

11 [Colloquy between the Court and the clerk]

12 THE MARSHAL: All rise for the entering jury, please.

13 [Jury in at 10:50 a.m.]

14 THE MARSHAL: Thank you. Please be seated.

15 THE COURT: Okay, the next witness please.

16 MR. STANTON: Your Honor, the State would call Detective Gerry Collins.

17 THE COURT: Okay.

18 THE MARSHAL: Detective?

19 And, Detective, you'll please step up on the witness stand, remain
20 standing, raise your right hand and face the clerk.

21 MR. COLLINS: Morning, Judge.

22 THE COURT: Morning.

23 GERRY COLLINS

24 [having been called as a witness and being first duly sworn, testified as follows:]

25 THE CLERK: Please be seated. State and spell your first and last name for

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1 the record.

2 THE WITNESS: My name is Gerard Collins, G-e-r-a-r-d C-o-l-l-i-n-s.

3 THE COURT: Whenever you're ready.

4 MR. STANTON: Thank you, Your Honor.

5 DIRECT EXAMINATION OF GERALD COLLINS

6 BY MR. STANTON:

7 Q Detective, are you currently employed?

8 A No, I'm not.

9 Q You're retired?

10 A Retired.

11 Q Prior to your retirement how were you employed, sir?

12 A I was a homicide detective with the Henderson Police Department.

13 Q And how long were you a police officer?

14 A About 25 and a half years.

15 Q And how long were you assigned as a detective in the homicide
16 division?

17 A Probably about 14 years. Right around 14.

18 Q And during the course of your tenure as a homicide detective, do you
19 know approximately how many violent death scenes you responded to either as the
20 primary homicide detective or in an assistant capacity?

21 A When you say violent death scenes, you mean just homicides?

22 Q No. Any death scene where you and other detectives were determining
23 cause and manner of death and ultimately whether homicide was involved.

24 A Oh, my gosh. I never have sat down and figured that out as --

25 Q Just give me an approximate figure.

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1 A Five -- five to 600.

2 Q Okay. And during the course of your assignment as a detective and to
3 include your tenure as a patrol officer, had you been involved in deaths of children
4 and the investigation therein?

5 A Yes.

6 Q I want to direct your attention specifically to June 5th (sic) of 2011.
7 Were you assigned to invest the -- investigate the death of Brodie Aschenbrenner?

8 A Yes, I was.

9 Q Now, there's a term in homicide referred to as the primary detective.
10 Are you familiar with that term?

11 A Yes.

12 Q And are -- were you the primary detective in Brodie Aschenbrenner's
13 case?

14 A Yes, I was the primary detective.

15 Q Can you explain in a general fashion what the primary detective's
16 responsibilities are in an investigation such as this?

17 A Primary detective basically oversees the investigation. They coordinate
18 with the crime scene people who collect evidence at the scene, with the coroner
19 investigation team, with the medical examiner, with other investigators. Duties are
20 alleged (sic) to different people and then when they finish with it, it returns back to
21 me. I compile it and I'm the one that basically oversee -- I'm, for lack of a better
22 term, the manager of the case file.

23 Q And let me ask you on June 15th, did you get called out and asked to
24 respond to a particular location here in the valley?

25 A Yes.

1 Q And what was the location?

2 A It was Seven Hills apartment complex.

3 Q And what are the cross streets there at Seven Hills? Nearest you --

4 A It's St. Rose Parkway and Seven Hills.

5 Q And did you go to a particular apartment building and apartment at that
6 location?

7 A Yes.

8 Q Do you recall meeting other uniformed personnel at the scene?

9 A Yes.

10 Q Was there a -- was the scene preserved or at least cordoned off for
11 non-law enforcement personnel?

12 A When I arrived there, yes, it was.

13 Q Did you go into the apartment?

14 A Yes.

15 Q And did you see a person ultimately identified to you as Brodie
16 Aschenbrenner?

17 A Yes.

18 Q I want to show you what has been admitted into evidence, a series of
19 photographs, beginning with the State's Exhibit 42. Do you recognize what's
20 depicted in that photograph?

21 A Yes, that's the victim, Brodie.

22 Q And that's as he appeared to you when you observed him on that day?

23 A When I initially observed him, yes.

24 Q Now, the items that are attached to his lower right shin area, upper left
25 arm and to the underarm of his right, do you recognize those items?

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1 A Yes. That's medical intervention.

2 Q What do you mean by medical intervention?

3 A The paramedics show up and they try to resuscitate or they do what
4 they can and sometimes they apply different, you know, medical paraphernalia to
5 the body. And when they leave, they leave that attached.

6 Q Would it be fair to say that at the time that you were there, the
7 determination of Brodie being deceased had been made by medical personnel?

8 A Yes.

9 Q Now when someone is deceased at a scene, as you're processing it, do
10 you then, when you arrive, move the body in any way?

11 A No, we do not. We wait for the coroner investigator.

12 Q And that's a common practice?

13 A Yes. It's protocol.

14 Q And that's because the coroner has jurisdiction of the body?

15 A Yes. We do -- we can't touch the body.

16 Q Now, during the course of you examining Brodie, was that one of the
17 primary among many different things, but one of the more primary areas of focus?

18 A I'm sorry --

19 Q When you went -- when you first went into the home.

20 A Yes.

21 Q Did you -- was that -- the examination of Brodie, was that one of your
22 primary areas of focus?

23 A It would become, absolutely, once the coroner investigator got there.
24 We're just kind of looking around, we're -- on the body we're seeing what we can
25 see just by standing back and looking without touching anything.

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1 Q So on the front part of Brodie, was there some concern of you as you
2 examined it waiting the coroner investigator's arrival?

3 A There was some concern, sure.

4 Q What was that concern generated from?

5 A Well, the concern is I saw the bruising and I was questioning that, but
6 we were getting from family members that he was a rambunctious little kid and that
7 he would run into things a lot. So I mean, I wasn't -- I was just keeping all options
8 open, just -- you know, just monitoring it, looking at it, but it did -- it was of some
9 concern.

10 Q And during the course of your arrival of the coroner investigator -- and
11 now when you're at the scene, the coroner goes to the body and you conduct a
12 much closer examination of the body.

13 A Yeah. She starts the examination, preliminary examination.

14 Q And that would be Nancy Dahl?

15 A Nancy Dahl, yes.

16 Q You're present when Ms. Dahl is doing this?

17 A Yes.

18 Q And during the course of that investigation, did you -- did there come a
19 time where you began to notice more injuries -- once again showing you 42 and
20 closer -- on the front of Brodie?

21 A Well, when she was manipulating the body and doing her examination
22 and all that, she lifted up the front lip and we saw that the fremulin (sic throughout)
23 -- there was an injury to the fremulin. She was very concerned at that point once
24 she started manipulating the head back and forth and then we could see the
25 bruising a lot better. So yeah, things did get a little more -- I should say we were a

1 little more concerned at that point.

2 Q And showing you Exhibit 44, would that be consistent with what you just
3 testified about the frenulum or inside the upper lip?

4 A Yes.

5 Q Did that cause you concern as well?

6 A Yes.

7 Q Based upon your training and experience?

8 A Absolutely.

9 Q Now at some point during this examination, did Ms. Dahl turn Brodie's
10 body over at the scene?

11 A Yes.

12 Q Showing you Exhibit 45. Did that area and how that injury appeared to
13 you cause you concern?

14 A Yeah, a lot of alarms went off.

15 Q And what was it that caused you concern as far as what you thought
16 you were looking at?

17 A Well, the biggest thing was obviously right up here.

18 Q Go ahead, if you could touch the screen for me.

19 A Up in this area. To me at that point it looked like fingernail gouges like
20 somebody had grabbed the child violently and dug their fingernails into the skin.

21 Q As a result of your training and experience and your role as the primary
22 homicide detective, did you order that DNA swabs of this area be taken?

23 A Eventually, yes.

24 Q And why did you ask that DNA swabs be taken of this area?

25 A Because there could be a possibility that if these were fingernail gouges

1 that DNA could have been transferred from the person who gouged or made these
2 indentations with their fingernails. There's a possibility that DNA could be in that
3 injury.

4 Q And you were advised of the results of the DNA examination that you
5 requested to be done about the swabs taken from both Arica Foster and the
6 defendant, Michael Lee?

7 A Yes.

8 Q And did the DNA results indicate any foreign DNA other than Brodie's
9 on that area of his body?

10 A No, it didn't indicate any foreign DNA.

11 Q Is that unusual in your experience about finding no results or at least no
12 additional DNA in an area that you knew had been touched by somebody else?

13 A No, that's not unusual. There's a lot of things that could affect why it's
14 not, but it's not unusual.

15 Q During the course of your examination of Brodie, were there other
16 injuries now on the back side that caused you concern with what you had seen (sic)
17 on the front and the sides?

18 A Yeah. There was a couple more. There was one that had two parallel
19 lines with a little bruising around it.

20 Q But your --

21 A There was also one in the -- I believe it was the upper right quadrant,
22 some bruising up there.

23 Q And the parallel lines, showing you Exhibit 45, would be --

24 A Right down here, yes.

25 Q Go ahead, circle that for me. As a result of what you, the CSA and

1 Nancy Dahl observe, how does that affect what you look at when you process the
2 rest of the defendant and Arica Foster's apartment?

3 A Well, at that point we -- I basically made the determination that this is
4 probably more than just a child dying from a -- like a SIDS or something like that and
5 so what I did is I froze the scene and went and got a search warrant from a judge.

6 Q And then after you had the search warrant and you performed that
7 search, did you find items that you then impounded as evidence?

8 A Yeah. We were trying to find the items that possibly could have made
9 these -- those injuries. We looked at a few things like some coat hangers and there
10 was a curtain rod that kind of slid in and out of it. It's flat and it's got these parallel
11 grooves on the back that might have been it, so we just kind of like scooped up what
12 we could to see if anything could match up.

13 Q And when you say scoop them up, you actually physically impound
14 them in a procedure --

15 A Well, yes, the crime scene people did that.

16 Q And was one of those items a ruler that was in Brodie's room?

17 A I believe so, yes.

18 Q Now, as the manager of your case file, were you able to conclusively
19 link any of those items to the pattern injuries on Brodie's body?

20 A No.

21 Q Oh. Would it be fair to say that you couldn't exclude them, but you
22 couldn't say that they were the ones that it -- were used?

23 A That would be a fair assessment.

24 Q Now on the next day; that is, June 16th, did you attend the autopsy of
25 Brodie?

1 A Yes.

2 Q And that was performed by who?

3 A That was performed by Dr. Gavin.

4 Q Now, after -- well, during the autopsy, are you involved in discussing
5 what you observe, what the doctor tells you at the autopsy procedure itself?

6 A Yeah. It's kind of a back and forth thing. You know, she has a lot of
7 questions and so I try to answer them as best as I can with what knowledge that we
8 have. So there was some discussion at the time of the autopsy and further on.

9 Q Is that kind of standard as far as what you do and what Nancy Dahl
10 does of providing the doctor the information that you had from the scene and what
11 you had gathered to date?

12 A Yeah. That's more or less the process. That's why the coroner
13 investigator goes out to the scene so she can file her report --

14 Q Now --

15 A -- and submit it to the doctor.

16 Q -- prior to the autopsy on June 16th, had you interviewed Arica Foster?

17 A Coroner Investigator Dahl and I -- well, Coroner Investigator Dahl
18 basically wanted to interview her and so at about 11:45 in the morning or so we
19 interviewed Arica outside of the apartment.

20 Q And how long -- or what time did that interview take place?

21 A About 11:45 in the morning.

22 Q And how long did that interview take place?

23 A It wasn't long. It was probably about maybe 18 minutes or so.

24 Q And could you describe what Arica's demeanor was when you were
25 interviewing her?

1 A She was emotionally upset. She was all over the place. She was --
2 you could -- when she would talk, it was very difficult to understand her a lot of
3 times. She was just -- I don't want to say she was a mess, but I mean she was just
4 very emotionally upset.

5 Q Now, in your line of work, I'm assuming but I don't want to that you
6 interview people that are emotionally upset?

7 A Yes.

8 Q And is it difficult at times as a detective to get information from people in
9 that condition?

10 A Yeah, because they're not thinking properly. They're focused on what
11 happened and so there's a lot of times where we can't get a lot of information out of
12 them.

13 Q When was the next time that you asked for and Ms. Foster agreed to be
14 interviewed by you regarding this case?

15 A I asked her to come in the next day, but when I called when she didn't
16 show up, the family told me that she was under medication from a doctor because of
17 her status and so we set it up --

18 MR. ALTIG: Objection; hearsay.

19 MR. STANTON: I'd just move on, Your Honor.

20 THE COURT: Okay. Thanks.

21 MR. STANTON: I --

22 BY MR. STANTON:

23 Q Detective, when was the next time you interviewed her?

24 A June 17th at about 2:30 in the afternoon.

25 Q And where was the location of that interview?

1 A It was at the north substation.

2 Q And how long did that interview take place?

3 A It's probably about two, two and a half hours long.

4 Q And could you describe once again your assessment of Ms. Foster's
5 demeanor while you were interviewing her for several hours on that day?

6 A She was more coherent, but she was still emotional. She still -- I still
7 had to ask her to speak up because I couldn't hear her. She was somewhat -- she
8 would speak and then she would fall back into -- like a -- she would like zone off.
9 But she was a little better than on the 15th. But she was still emotional.

10 Q And directing your attention to the next interview, when would have --
11 that have been as far as the next time you talked to Arica?

12 A Next time I talked to her was June 21st and that was about 1:30 in the
13 afternoon.

14 Q And where physically was that interview?

15 A That was at the main station.

16 Q And how long did that interview take place?

17 A That interview lasted probably about two hours, an hour and a half, two
18 hours, right in there.

19 Q Now, during the course of your interviews with Ms. Foster, you are
20 asking questions about what happened to Brodie and his history, that -- in part --

21 A Sure. We're hitting a lot of different areas.

22 Q Now, as it relates to the autopsy and your managing the flow of
23 information from Dr. Gavin in the coroner's office, was that process wrapped up in a
24 couple days?

25 A The -- you mean -- no. The autopsy takes a long period of time, several

1 weeks all the way up to maybe a couple, three, four months.

2 Q And in this particular case, do you recall when Dr. Gavin's final report
3 was issued in this particular case as it related to Brodie?

4 A Yeah. I received the final signed report on October 13th.

5 Q Now, when you get this information from Brodie's injuries, external and
6 internal that you know on the 16th of June and in the prevailing days, is that
7 information important to you in your investigation?

8 A It is very important.

9 Q When you interview somebody, a witness, a potential witness or for that
10 matter a potential suspect, would you ever relate those intimate details that you
11 knew about the injuries of Brodie from the autopsy and from your conversations with
12 Dr. Gavin to that witness --

13 A No.

14 Q -- or suspect?

15 A No, I wouldn't do that.

16 Q Why not?

17 A Well, because you don't want to give the person an opportunity to kind
18 of like mold their testimony around some fact that I might give them from the
19 autopsy or anything like that. You want an honest answer from them without them
20 knowing anything of what I know.

21 Q I want to direct your attention to July 6, 2011. Did you contact Danny
22 Fico at America's Mart or America --

23 A Yes, I did.

24 Q And what was the purpose of you contacting Mr. Fico on that day?

25 A Well, I had later learned from -- I believe it was in the June 21st

1 interview from Arica -- that she said that prior to going to the Shark Reef they had
2 stopped --

3 MR. ALTIG: Objection; hearsay.

4 MR. STANTON: It's not offered for the truth of the matter about why he went
5 to talk to this witness and what he relayed to this witness.

6 THE COURT: Overruled.

7 THE WITNESS: So she said that they stopped in at America's Mart to pick up
8 some drinks and different things and that she had a conversation with Danny.
9 Danny saw Brodie and said hello to him and then Arica told me that Danny asked
10 her well what's up with the bruising on the face or words to that effect. And Arica
11 told me that she told Danny, she says well Mike told me that --

12 MR. ALTIG: Your Honor, objecting again. There's like double layers of
13 hearsay now and --

14 MR. STANTON: Once again, Judge, it's not offered for the truth of the matter
15 and I think it's going to be tied into my next question about what he relates to Danny
16 Fico.

17 THE COURT: Overruled.

18 THE WITNESS: And so Arica told me that Danny -- or she told Danny that
19 Mike told me that he fell or he got injured at your place.

20 BY MR. STANTON:

21 Q That is, at Mr. Fico's home Monday --

22 A Yes.

23 Q -- Monday night? So that was important to you?

24 A Sure. Absolutely.

25 Q And he was a person that you wanted to interview to confirm that

1 sequence of events that Arica gave you?

2 A Right. I wanted to know if that happened.

3 Q And did you -- when you went there, did you tell Mr. Fico who you were
4 and who -- what you were -- who you were working for?

5 A Yes, I identified and I -- myself and I told him why I was there.

6 Q And did you identify the fact that you were investigating Brodie's death?

7 A Yes.

8 Q And did you specifically tell him that you had heard information that he
9 might believe would be valuable to your investigation?

10 A Yes.

11 Q As you sit here today, if I were to ask you, without reference to
12 anything, the exact response that Mr. Fico or Fico gave you when you ask him that,
13 do you -- could you tell me verbatim what he said?

14 A I don't know if it's verbatim, but I think it was something --

15 MR. ALTIG: I'm going to object --

16 BY MR. STANTON:

17 Q I don't want you --

18 A Okay.

19 Q -- to say --

20 A No, I couldn't say it verbatim.

21 Q Okay. Would referring to your report refresh your recollection?

22 A Yes, it would.

23 Q Okay. If you could go to that section of your report?

24 MR. STANTON: And while he's looking for that, Judge, I anticipate counsel's
25 hearsay objection and -- because I'm going to ask him to read verbatim what it is in

1 his report.

2 Am I correct, counsel?

3 MR. ALTIG: Yes.

4 MR. STANTON: My response is, it's a prior inconsistent statement as Mr.
5 Fico's testimony and prior sworn testimony not only in this courtroom but at the
6 preliminary hearing.

7 MR. ALTIG: I still rest on the hearsay objection.

8 THE COURT: All right.

9 MR. STANTON: Prior inconsistent statement.

10 MR. ALTIG: Understood.

11 THE COURT: All right.

12 MR. ALTIG: Not under oath.

13 THE COURT: I think it falls under the exception.

14 BY MR. STANTON:

15 Q Okay. If you can go to that section? And do you see that section that
16 has -- of your report that quotes what Mr. Fico tells you?

17 A Yes.

18 Q What did he tell you?

19 A He said I don't think I'm going to feel comfortable doing that.

20 Q And doing that means talking to you?

21 A Talking to me, yeah.

22 Q I'd like to direct your attention to August 18th, 2011. On that day, did
23 you and a fellow homicide detective go to Jennifer Lee's home at 991 Country Back
24 Road here in Clark County?

25 A Yes.

1 Q What was the purpose of you contacting Ms. Lee in this investigation?

2 A I wanted to talk to her about a -- an incident that had been relayed to
3 me during the investigation.

4 Q Something that was important to you?

5 A Yes.

6 Q And had you previously attempted to contact her telephonically?

7 A Yeah. Twice I tried to. I left her two messages, once on June 30th and
8 once on July 1st.

9 Q And on August 18th, what time of day was it; do you recall?

10 A I want to -- I think it was about 10, 10:30, right around that.

11 Q And --

12 A In the morning. In the morning.

13 Q -- did you ring the doorbell?

14 A When I initially approached the door, yes, I rang it once.

15 Q Did you ring it more than once?

16 A Eventually I did.

17 Q And after you rang the first doorbell, did you wait?

18 A Yeah. I approached the door. I'd heard voices on the inside, you know,
19 kids and then I heard the television, so I rang the doorbell once like, you know, you
20 normally would and I didn't get a response at the door so then I rang it again and I
21 backed off and waited and didn't get a response. Then I rang it a third time and
22 didn't get a response so I says well, I want to get them to the door, so I just basically
23 sat on the door knob (sic) and hit it 24 times.

24 Q And --

25 A And I never got --

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1 Q -- did anybody ever respond?

2 A No, nobody ever responded.

3 Q And did you leave something at the residence that day?

4 A Left a card.

5 Q Business card?

6 A Yeah. Usually when I visit some place, I always leave a business card.

7 Q And does it identify you by name?

8 A Yes.

9 Q And what agency you work for?

10 A Yes.

11 Q Did you ever hear back from Jennifer Lee?

12 A No.

13 Q As you testify here today had she ever contacted you as a result of
14 those contacts?

15 A No. I've never been contacted by her.

16 MR. STANTON: Nothing further, Your Honor.

17 THE COURT: Cross?

18 MS. VON MAGDENKO: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MS. VON MAGDENKO:

21 Q Detective, you -- the first full interview you had with Arica Foster was on
22 June 17th, 2011; is that correct? From your testimony?

23 A When you say first full interview, what do you mean?

24 Q I just want to make --

25 A You mean like a formal --

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1 Q Yes.
2 A -- sit-down interview?
3 Q Yes.
4 A Yeah. The first one that I had was on June 17th.
5 Q And that was just two days after Brodie's death?
6 A Yes.
7 Q And that lasted approximately two to two and a half hours?
8 A Yes, right around there.
9 Q So it was pretty thorough?
10 A As much as it could be in her -- because of her state of mind.
11 Q And is there police -- that was at the police station, correct?
12 A The north substation.
13 Q So is there police protocol what happens when a witness is
14 interviewed?
15 A You're going to have to be specific about protocol. What do you mean?
16 Q Whether or not it's taped or videoed or --
17 A Oh, yes.
18 Q -- if other people are present, that sort of thing.
19 A Yeah. We tape them.
20 Q Okay. And is it audio and video?
21 A At that place it was audio and video.
22 Q Okay. And was her statement in fact audio and video recorded?
23 A Yes, it was.
24 Q And is there a chain of custody that happens with that audio and video?
25 A Normally there is, but this was a new system and so the chain of

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1 custody really wasn't established at that time.

2 Q So the north substation did not have an established chain of custody for
3 evidence like this?

4 A No. Basically what it comes down to is the -- is we tried to download it
5 at the time, after, and there was some kind of computer glitch that we couldn't get it
6 downloaded because it was a brand new system. And Kami Lewis, the secretary
7 who works that north station, she tried to do it several times after that and she
8 contacted me, she says I can't get it downloaded, I'm going to have to contact the
9 company. She said they tried contacting the company and when the company came
10 out so they could fix the situation, that system runs on a loop which means like
11 every so many hours it just records over itself and because of that -- because I don't
12 know exactly how long she got the company in there, but she called me and she
13 says we lost it, we don't have it.

14 Q So the substation lost the first formal interview with Arica Foster after
15 the --

16 A Who lost it?

17 Q The substation system?

18 A Yeah, the -- it just got lost in the system.

19 Q Okay. But you -- did you take notes --

20 A I --

21 Q -- of that interview?

22 A I didn't, but the detective that I was with, Amber Swartwood, she took
23 copious notes.

24 Q Okay. And those were accurate notes, to your knowledge?

25 A As far as I could see, yes.

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1 Q Okay. And she -- did she type those notes up or did you?

2 A I put them in the report.

3 Q Okay. So you put her notes in the report and you entered them on
4 June 30th, 2011?

5 A I would have to look back. I'm not sure what date it was entered on.

6 Q Does that sound fair?

7 A If it's at the top of the report, then --

8 Q Yeah.

9 A -- probably that's the date, yeah.

10 Q Okay. And is it fair to say that during that time period Arica told you --
11 and you can look at your report if you don't remember, on page 63.

12 A Okay.

13 Q That Brodie had actually fallen forward in an ATV accident?

14 A What paragraph are you on?

15 Q One, two, three, four -- fifth. Where it says Arica said that on Monday,
16 June 13th, and then it goes on.

17 A Arica said on Monday, June 13th?

18 MS. VON MAGDENKO: Your Honor, can I approach the witness?

19 THE COURT: Yes.

20 THE WITNESS: Yeah. Can you -- I --

21 MS. VON MAGDENKO: You know, it's funny, the pagination that I have and
22 the prosecution had is different. So here (indiscernible) and I don't know why it is --

23 THE WITNESS: Okay. Where are we at then? Right here?

24 MS. VON MAGDENKO: Yeah.

25 THE WITNESS: Let me see if I can --

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1 MS. VON MAGDENKO: It might be the next page.
2 THE WITNESS: Yeah. Right here?
3 MS. VON MAGDENKO: Yeah.
4 THE WITNESS: When they were going to the pool?
5 MS. VON MAGDENKO: Yeah. That's --
6 THE WITNESS: Okay. All right.
7 MS. VON MAGDENKO: So it's the last sentence.
8 THE WITNESS: Last sentence: She said that when he struck the curb it sent
9 him forward and struck his face on the car.
10 BY MS. VON MAGDENKO:
11 Q And that's -- to your understanding, that's an accurate statement of
12 what she said during the interview two days after?
13 A Well, which car are we talking about?
14 Q This four-wheeler.
15 A Oh, the toy electric car?
16 Q Yeah.
17 A Yes.
18 Q Not a motor vehicle?
19 A Right. Okay.
20 Q No.
21 A Yeah. The toy electric car, yes.
22 Q Okay. And in addition to this, you also did another interview with Arica
23 that was formal, but there was actually a transcript made of that?
24 A Yes. That was on the 21st.
25 Q Okay. So that was just a few days later?

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1 A Yes.

2 Q And during that time period -- and you can look at it and I'll -- on page
3 105, did you have discussions about Brodie's ability to speak?

4 A Did we have a discussion about what?

5 Q Did she quote Brodie on -- you know, if he said anything?

6 A She quoted him several times.

7 Q Okay. And is the transcript accurate based upon what Arica said at that
8 time?

9 A I would say if there's any question, the transcript would probably be the
10 most accurate thing.

11 Q Okay. On page 105, if I can just direct your attention to the bottom of
12 the page, middle bottom?

13 A I might have to look at yours again.

14 Q And again, our pagination is different. I don't know why we have a
15 different page number than you do.

16 A I don't know.

17 Q I think you might be before us. Right here. Hang on (indiscernible)
18 copy.

19 A You're at 105?

20 Q But the State's 105 isn't our 105 --

21 A (Indiscernible) --

22 See here. Hmm.

23 Q There it is, yeah.

24 A Typed it on my computer, okay. So where is it you want me to look at?
25 Right there. So he's -- he'd stand on the -- okay, so he'd stand on the chair?

1 Q He says -- hang on --

2 A Okay. The transcript says hey -- he stands on his chair and I'm making
3 coffee and he says hey, mama, can I have some coffee?

4 Q And is that accurate of what Arica said at that time right after his death
5 about his ability to speak? That that was his statement?

6 A That's what she said in the interview.

7 Q Right. I just want -- is that --

8 A Okay, she -- the understanding I get is that Brodie said something to
9 her and she said that's what he said.

10 Q And I just want to make sure the transcript is accurate as far as what
11 she said.

12 A Yeah. I would say the transcript is accurate.

13 Q Okay. And what I'm going to direct your attention to -- it says 113 on
14 what I was provided from the prosecution, so that's -- you were looking at my 105.
15 So that's eight pages later. So it might be eight pages later for you.

16 A I'm sorry, you said it was --

17 MS. VON MAGDENKO: Your Honor, we -- the -- for whatever reason, the
18 transcript that was provided to us by the State has different page numbers than what
19 the State has and what he has. So when I say page 113, it's actually not the same
20 page number.

21 THE COURT: Okay. Can you assist him in finding the page you're
22 referencing?

23 BY MS. VON MAGDENKO:

24 Q It's my 113, which may be your --

25 A Okay, so if it's your 113, this is 4, so it might be 17. What's the

1 beginning that you want?

2 Q Actually it's (indiscernible) nice here. That's --

3 A Emotional -- Detective Collins very -- yeah.

4 Q Okay.

5 A I'm thinking that right here, okay.

6 Q Okay, so --

7 A Mom --

8 Q Right here.

9 A Okay, Mom --

10 Q I'm just asking you about if that quote --

11 A He put the money?

12 Q Yeah.

13 A You want me to read that?

14 Q Yeah.

15 A Okay. He put the money in the backpack, but I went to grab his walkie
16 talkie and he kept telling me mom, no, I got my cash in my backpack, I got my cash
17 in my backpack.

18 BY MS. VON MAGDENKO:

19 Q If Arica testified that she said a different word, packback, would that be
20 -- would Arica's recollection be accurate or would the transcript be more accurate?

21 As to her words. Would the transcriptionist --

22 A I think --

23 Q -- change her words?

24 A I -- no, I think the transcript is the more accurate one.

25 Q Okay. So was DNA taken of the defendant after Brodie's death?

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1 A Yes.

2 Q And did the -- because you believe there was finger marks on the back
3 of Brodie?

4 A Well, that's why we took them both of Arica and of Michael.

5 Q Okay. Well, with respect to Michael, did the DNA come back positive?
6 For --

7 A Not --

8 Q -- being on Brodie's back?

9 A Not for that. For the -- what I thought was the fingernail impressions,
10 not for that.

11 Q Okay. Did the coroner tell you -- you were present at the autopsy,
12 right?

13 A Yes.

14 Q And you told the coroner certain things about the factual knowledge you
15 had?

16 A Yes.

17 Q About the case. And the coroner told you that she believed the cause
18 of death, this abdomen tear, happened four to seven hours prior to death?

19 A That wasn't at the time of the autopsy.

20 Q Oh, when did she tell you that?

21 A This was much later when we made the discussions, like this was -- we
22 started discussing these things when she started getting her test results back, so
23 we're talking late September, right around the first of October, right around there.

24 Q Okay. So the coroner ran tests and only after running tests determined
25 that this abdominal injury happened four to seven hours prior to death?

1 A Yeah.

2 MR. STANTON: I'm going to object if it's being offered for the truth of the
3 matter, which I believe it is. But if it's just being offered about this detective's state
4 of mind, I'm not sure how it's directly relevant, but I would certainly not -- withdraw
5 my objection if that's the reason.

6 BY MS. VON MAGDENKO:

7 Q Well, you're doing an investigation and you --

8 THE COURT: Hold on a second.

9 MS. VON MAGDENKO: I'm trying to respond. He's --

10 THE COURT: Okay. Well, it wouldn't be -- I don't think he'd be qualified to
11 testify regarding the coroner's findings.

12 MS. VON MAGDENKO: But as part of his investigation. He's trying to
13 determine --

14 THE COURT: If it's not for the truth of the matter asserted.

15 MS. VON MAGDENKO: Yes.

16 THE COURT: Okay.

17 BY MS. VON MAGDENKO:

18 Q As part of your investigation, you need to know when these injuries
19 happened, right?

20 A Yes.

21 Q Okay. And you don't know whether or not it's actually true, but that's
22 just what the coroner told you?

23 A I'm going based upon what the coroner says to me.

24 Q Okay. And just --

25 A The medical examiner, I should say.

1 Q Oh, I'm sorry, the medical examiner. And is it true, for the purposes of
2 your investigation, that she told you that a fall could have contributed to his head
3 injury?

4 A Yes. We discussed those types of things, yes.

5 Q Okay. All right. And did you -- in the June 21st interview you asked
6 Arica about the pinpoint bruising.

7 A Yes.

8 Q And she said that was from grandpa?

9 A Yeah. They -- I guess grandpa used to play -- they call it teletype or
10 typewriter on him and that's the results of him doing that.

11 Q And when you interviewed her at that time, was she explaining a lot of
12 the bruising?

13 A You're talking about Arica, correct?

14 Q Correct.

15 A Okay. At which interview are you talking about?

16 Q The June 21st one.

17 A June 21st?

18 Q And I can go through it.

19 A Well, she was trying to explain, you know, the bruises that she knew
20 about, you know, about how he would go over to grandma's house and he would run
21 into things and there was a wall outside of his bedroom that he would sometimes
22 run into when he ran out. Just different things that he -- everybody described him as
23 a very rambunctious kid.

24 Q So she's describing the injuries he had and did she say that the bruise
25 inside his ear, was that present during that time period or was that a prior bruise?

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1 A I don't recall that. I don't recall her saying anything about that.
2 Q It's my page 73.
3 A Okay.
4 Q And there's been some confusion about the timing of when that -- when
5 they're referring to that.
6 A What does the -- what does it start with?
7 MS. VON MAGDENKO: May I approach, Your Honor?
8 THE COURT: You may.
9 MS. VON MAGDENKO: Thank you.
10 BY MS. VON MAGDENKO:
11 Q Yeah, this (indiscernible) weird.
12 A He knows --
13 Q (Indiscernible) --
14 A Get to that. Okay (indiscernible) the bruising. Okay, did the bruising
15 getting worse. Okay, right here. So it was a bump on his head?
16 Q No --
17 A Yeah. So which one (indiscernible) --
18 Q This one, yeah.
19 A His ear? I just had it (indiscernible) -- oh his ear had this weird --
20 Q Yeah.
21 A Okay.
22 Q When she's talking about this ear bruise, is she -- when is she referring
23 to it?
24 A I can't remember.
25 Q Does the transcript tell us at all if she's referring to --

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1 A If it's in the transcript, I'm sure the transcript is accurate.

2 Q Okay. So it's -- she's talking about the weekend before his death he
3 has this ear bruise?

4 A If that's what the transcript says, yeah. I don't know.

5 Q Well, I just want you to be sure. It's right in front of you. Can you just
6 read it and be sure right there?

7 A I have to read like before and possibly after to kind of get my
8 (indicating) --

9 Q Please do. I just --

10 A Okay.

11 Q I just want to be sure.

12 A Yeah. She was telling me that this one probably occurred -- probably
13 occurred a week before.

14 Q And that he had it at the time of his death then?

15 A Yes.

16 Q Okay.

17 A That was the impression I got from what she told me.

18 Q Yeah. That's my reading, but you're -- I want it -- you're the one who
19 was there.

20 A Right.

21 Q It's your testimony. So during this time period, Arica is trying to explain
22 these bruising, correct?

23 A Yes.

24 Q And then so with respect to the bruises on his forehead, Arica -- and
25 this is in the same section. Arica said he always had bruising on his forehead? It's

1 further down on the page, about half a page down. And that's when -- and then
2 that's when I said --

3 A Are you at and that's when I said he always has these little?

4 MS. VON MAGDENKO: Your Honor, can I just go closer to the witness to
5 make this easier?

6 THE COURT: That's fine.

7 THE WITNESS: Is this it right here?

8 MS. VON MAGDENKO: Right here and --

9 THE WITNESS: Yeah, bruises --

10 MS. VON MAGDENKO: Okay.

11 THE WITNESS: -- on the forehead. Yeah.

12 MS. VON MAGDENKO: Yeah.

13 THE WITNESS: That's it.

14 MS. VON MAGDENKO: (Indiscernible) personal space.

15 THE WITNESS: Do you want me to -- want me to read that?

16 MS. VON MAGDENKO: Yeah.

17 THE WITNESS: Arica said: And that's when I said he always has these little
18 bruises on his forehead, but I didn't -- I mean I've seen my son walk into his room
19 and his dresser is right there, the corner.

20 BY MS. VON MAGDENKO:

21 Q So what Arica's trying to tell you is that Brodie just walks into his own
22 furniture?

23 A She's telling me that he runs into things and he gets these little bruises.

24 Q Okay. And then if we actually go to the summary, the June -- the two
25 days after his death, page 63, did she tell you then that he always had even a bump

1 on his forehead?

2 A Where we at?

3 Q The incident summary. The 20th --

4 A Said that Brodie --

5 Q She said -- starts with said.

6 A (Indiscernible). Okay. Here we go --

7 Q There, said.

8 A Said Brodie always --

9 Q Yeah. Always had a bump on his forehead.

10 A Said that Brodie always had a bump on his forehead from falling or
11 running into things.

12 Q And then Arica goes on to try and explain away these bruises that she
13 said -- actually, were you provided with a copy of the preliminary hearing transcript?

14 A No.

15 Q No. Okay. You haven't --

16 A No. I didn't testify, so I didn't get it.

17 Q You didn't actually review that?

18 A No, I did not.

19 Q Okay. Do you recall Arica telling you that he had a scratch on his back
20 at all during your interview with her?

21 A Yes.

22 Q Okay.

23 A When -- for the curtain incident?

24 Q For the curtain incident.

25 A Yeah. She told me about that.

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1 Q Okay. And did she tell you about he got an additional mark from --
2 when he was at the pool? Do you recall that?

3 A Additional mark at the pool.

4 Q Yeah. Do you --

5 A She said --

6 Q -- do you --

7 A I know she mentioned something about his lower lip where he would
8 kind of rub his lower lip with his tongue and his teeth.

9 Q Okay. Did --

10 A And so that created some type of a skin rash or whatever.

11 Q Okay.

12 A That was present.

13 Q And did she tell you that he had a knot on the back of his head too,
14 prior to death?

15 A Yeah, I think she mentioned something about a small knot.

16 Q Okay. And did she mention that he actually cut his upper lip too, so in
17 addition to the lower lip she's trying to explain?

18 A The fremulin?

19 Q She -- no, she doesn't say fremulin.

20 A Well, under --

21 Q Yeah.

22 A -- underneath the lip?

23 Q Yeah. Yeah.

24 A Yeah. The -- they told me that he was running with a sippy cup.

25 Q Oh.

1 A And that he had fallen forward and that's how he received that injury.

2 Q Okay. Okay. So, so far when you're interviewing her, she's explained
3 away a lot of the bruising; the forehead, the lower lip, the frenulum cut, one on the
4 back, the ear. These have all been explained away by Arica.

5 A Yeah --

6 MR. STANTON: Objection --

7 THE WITNESS: Well --

8 MR. STANTON: -- it misstates the -- I'll withdraw it.

9 THE WITNESS: -- she's not basically taking all the bruises all over the face
10 and explaining each one.

11 MS. VON MAGDENKO: Right.

12 THE WITNESS: She's basically saying that he runs into a lot of things and
13 that's why he has some bruising, you know? So I mean, she's -- specifically the
14 frenulin (phonetic) under the lip, the marks under the -- on the bottom lip, you know,
15 where kids kind of lick or rub their lip, they get some type of an irritation there. And
16 she was applying some topical things to that. And then she mentioned the two
17 linear lines or what she said were two linear lines on the back.

18 BY MS. VON MAGDENKO:

19 Q And she mentioned the ear --

20 A And she obviously mentioned the ear, yes.

21 Q And she mentioned the knot on the head.

22 A And the knot on the back of the head, yes.

23 Q And she mentioned the forehead bruising.

24 A From --

25 Q It was -- she said --

1 A -- the car -- well, go ahead.
2 Q No, no, you go ahead. I don't want to interrupt you.
3 A I know she said something about the cheek.
4 Q Oh, the cheek.
5 A The front cheek when she --
6 Q Yeah.
7 A -- when --
8 Q Her -- the cheek.
9 A -- when he was driving his little car. And he hit the curb.
10 Q Okay. And she also said he always had forehead bruising and always
11 had a bump on his forehead?
12 A Well, those are her words, yeah. He always had --
13 Q Yeah, no, these are just her words.
14 A Yeah.
15 Q Right? So she's probably explained about five or six injuries at that
16 point. One, two, three, four, five.
17 MR. STANTON: You know, Your Honor, I'm going to object. Counsel can't
18 testify. She can ask questions.
19 THE COURT: Watch the form of the question, please.
20 MS. VON MAGDENKO: Okay.
21 BY MS. VON MAGDENKO:
22 Q And Brodie had a -- black eyes, correct? And she said that was from
23 his pinkeye?
24 A Yeah. There was some mention about darkness under his eyes. And
25 that he did -- he had pinkeye.

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1 Q Okay. I just want to make sure I've gone over all the injuries. In
2 addition to the other injuries, just to group them together, and then the pinpoint
3 bruising, that was from grandpa, according to her, on the chest?

4 A Yes.

5 Q Okay. The night that Brodie died -- and this is the incident summary,
6 this is the one where the video got deleted accidentally. On page 65 -- it was my 65
7 and maybe you recall this, but is it accurate that Arica told you that when Michael
8 put Brodie in the bed with her that Brodie was alive and Brodie said I love you?

9 A My impression through the interview was that Brodie was alive when
10 Michael put her in bed with her -- put Brodie in bed with her.

11 Q Okay.

12 A Yeah.

13 MS. VON MAGDENKO: Just want to look at my notes since they're over
14 here.

15 Court's indulgence.

16 BY MS. VON MAGDENKO:

17 Q Did you actually take DNA from Brodie's back?

18 A Yes.

19 Q Okay. And did the DNA come back with any DNA that wasn't his?

20 A No. There wasn't any foreign DNA to Brodie or to Arica or to Michael.

21 Q Could you tell if -- and I don't know if you can -- if Brodie's back had
22 been washed clean prior to the DNA testing?

23 A He didn't look like he'd been washed. You mean at the scene?

24 Q Yes.

25 A Yeah. It didn't look like that he had been washed, no.

1 MS. VON MAGDENKO: I have no further questions. Thank you, Detective.

2 THE COURT: Any redirect?

3 MR. STANTON: Yes.

4 REDIRECT EXAMINATION

5 BY MR. STANTON:

6 Q Detective, could you turn to page 76 of your incident report? I'm
7 specifically going to ask you a series of questions about the ear bruise that you just
8 testified about that counsel asked. Are you there?

9 A I'm at 76, yeah.

10 Q Okay. About a little past halfway there's a question by you that says so
11 what -- tell me about that ear thing. Do you see that?

12 A So what -- tell me about the ear thing, yes.

13 Q So you see that. And Ms. Foster's response was that's the weekend
14 before, correct?

15 A That it had to have been the weekend before.

16 Q Okay. It says that's the weekend before?

17 A Yes.

18 Q Now if you keep on reading down, the next answer from her is that --
19 and then the weekend before my sister -- hey, you know, this is -- I can't do this.
20 And then you said go ahead and tell me about the ear, and then she says he had
21 this weird bruise like right here, and then she's demonstrating something around the
22 ear, correct?

23 A Yes.

24 Q Now -- and then you -- it wasn't a solid bruise. It was discolored,
25 reddish purple like, correct?

1 A Yes.

2 Q Okay. Now keep on going with me. Did it -- your question: Did it get
3 worse as you looked at it or did it get better? You see that?

4 A Yes.

5 Q Okay. And the answer: I mean, the normal two days went by where it
6 got a little bit worse and then it just got better. Your question: Okay, just started
7 disappearing after a couple days? Yeah. So this is when she's talking about -- and
8 if you go up above that when she's -- just before the ear she's talking about the boys
9 being around Brodie that are being too rough. Isn't she's (sic) talking to you about --

10 A Where's -- okay. Wait a minute.

11 Q Do you see right above when you're talking about the ear?

12 A Yeah, it's -- it was a bump on his head, okay, these boys have to be
13 playing rough too. Is that the part you're talking about?

14 Q Correct. And you can go all the way up to the top of that page.

15 A Right.

16 Q Isn't the reference of the weekend before she's telling you about when
17 she terminated the babysitting with the defendant's sister, Jennifer Lee?

18 A Yes.

19 Q Now, Detective, would -- in your experience, would washing an area or
20 part of a body wipe DNA away? Wiping, washing?

21 A It could. It could.

22 Q Now, counsel asked you questions about your discussion with Dr.
23 Gavin and the timing of the injuries. Do you recall that questioning?

24 A Yes.

25 Q Dr. Gavin and you discussed that there were multiple injuries that

1 caused Brodie's death, correct?

2 A Yes.

3 Q In particular, the head injury and the acute peritonitis from the dissected
4 duodenum?

5 A Well, the head injuries were a contributing factor.

6 Q Correct, but my question is, is that she discussed both of those with
7 you?

8 A Yes.

9 Q And -- as being causes of his death?

10 A Yes.

11 Q Did you have discussions with Dr. Gavin that the timing of those two
12 injuries, the head and the abdomen, were different?

13 A Yes.

14 Q Now, counsel asked you the term four to seven hours. Did she tell you
15 that this injury was inflicted four to seven hours prior to Brodie's death or did she
16 give you a range?

17 A Oh, she said four to seven hours prior to death.

18 Q And then was she able to tell you that it could have been inflicted
19 further back from that?

20 A Possibly.

21 Q You would believe that her sworn testimony in that regard would be
22 more accurate than your memory. Would that be accurate?

23 A Oh --

24 Q In this courtroom and in this trial.

25 A Absolutely, yes.

1 Q Now, the frenulum incident that you're talking about.

2 A Right.

3 Q Counsel said that Arica explained away the frenulum incident with a
4 bottle, the sippy cup. That's not happened at all as far as that injury; is that correct,
5 as far as Arica telling you how that occurred?

6 A That's the impression that I had on the fremulin.

7 Q Okay. And did she tell you where she got that information from about
8 how he fell with the sippy cup?

9 A I believe the mother -- the mother had told me, Merridee, okay, she had
10 told me that she saw the injury, she took a picture of the injury and this was well
11 before the incident had occurred, the -- on June 15th. But from what I got from the
12 family, from Arica and Merridee, is that he was running with a sippy cup and he had
13 fallen over and the sippy cup had caused the injury.

14 Q Okay. Would you agree with me that Arica's sworn testimony would be
15 more accurate about how she got that information?

16 MS. VON MAGDENKO: Objection, Your Honor. He's trying -- now he's
17 saying that Arica's testimony here is better than what she said before. That's not --

18 MR. STANTON: No, that's not what I'm asking.

19 MS. VON MAGDENKO: -- for the detective to determine.

20 MR. STANTON: That's not what I'm asking.

21 MS. VON MAGDENKO: That's the province of the jury, Your Honor.

22 MR. STANTON: That's not what I'm asking.

23 THE COURT: I think it's okay. You're not asking him to comment on the
24 testimony of other individuals. You're asking him to testify on his own.

25 BY MR. STANTON:

1 Q Well, Detective, let me put it to --

2 MS. VON MAGDENKO: No.

3 Q -- to you this way. The information that you got about the frenulum and
4 the sippy cup was from Arica.

5 A Yes.

6 Q And you would believe that the knowledge of where that came from
7 would be more accurate from Arica than from you?

8 A Oh, yes.

9 MR. STANTON: Nothing further.

10 THE COURT: Anything else of the detective?

11 MS. VON MAGDENKO: No, Your Honor.

12 THE COURT: All right. Thank you, Detective, for your time. You're free to
13 go, sir.

14 Counsel?

15 MR. STANTON: Your Honor --

16 THE COURT: Be the last witness of the day?

17 MR. STANTON: Your Honor -- it is, Your Honor, and it is our last witness
18 except for the cross-examination or the further examination of Dr. Gavin which I
19 think is currently scheduled for Monday at 1:00.

20 THE COURT: It is.

21 Ladies and gentlemen of the jury, we're leaving early today. We will
22 see you Monday at 1:00. But I want to -- before you guys leave, I want to talk about
23 a couple things. We try to schedule everything on the trial as best we can, but
24 sometimes it's an art, not a science, and we have to deal with the schedules of a
25 bunch of other people.

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1 Probably what's going to happen next week is we'll have testimony
2 Monday afternoon, for sure, probably from one to five. On Tuesday, we may or may
3 not have testimony on Tuesday. We will know Monday. And Wednesday we will
4 not have testimony and then we'll be back Thursday at 1:00. And the case should
5 be wrapped up and sent to you guys sometime on Friday. So you can kind of plan
6 your schedule with your employers, babysitters, et cetera.

7 So until I see you on Monday at 1:00, you are admonished not to
8 converse amongst yourselves or with anyone on any subject connected with the
9 trial, do not read, watch or listen to any report of or commentary on the trial, do not
10 do any research on your own and do not form or express an opinion on this case.
11 See you on Monday.

12 UNIDENTIFIED SPEAKER: And, Judge, that's Wednesday we won't have --

13 THE COURT: Wednesday you won't have anything.

14 UNIDENTIFIED SPEAKER: Okay, I -- I'll let my boss know.

15 THE COURT: Wednesday for sure. Maybe Tuesday.

16 UNIDENTIFIED SPEAKER: Maybe Tuesday too?

17 THE COURT: Yeah.

18 THE MARSHAL: Thank you. All rise for the exiting jury, please.

19 [Jury out 11:44 a.m.]

20 THE COURT: And please don't go off the record yet, Maria.

21 Okay. Before we -- and the jury's out of the room. Okay. So before we
22 go off the record let's go ahead and admonish Mr. Lee.

23 Are you ready, Maria?

24 THE COURT RECORDER: Yes, ma'am.

25 THE COURT: All right.

1 Mr. Lee, I'm sure your attorneys have talked to you about this, but I also
2 have to go over it with you. Under the Constitution of the United States and under
3 the Constitution of the State of Nevada, you cannot be compelled to testify in this
4 case. Do you understand that, sir?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: However, you may, at your own request, give up this right and
7 take the witness stand and testify. However, if you do so, you'll be subject to cross-
8 examination by the District Attorney and anything that you say, whether it's in direct
9 or cross-examination, will be the subject of fair comment when the District Attorney
10 speaks to the jury in their closing arguments. Do you understand that, sir?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: And if you choose not to testify, the Court will not permit the
13 District Attorney to make any comments to the jury because you have chosen not to
14 testify. Do you understand that, sir?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: And if you elect not to testify, the Court will instruct the jury, but
17 only if your attorney specifically requests as follows: The law does not compel a
18 defendant in a criminal case to take the stand and testify and no presumption may
19 be raised and no inference of any kind may be drawn from the failure of a defendant
20 to testify.

21 Do you have any questions regarding this admonishment, sir?

22 THE DEFENDANT: No, ma'am.

23 THE COURT: Okay. One thing I have to tell you is if you decide to testify and
24 you have a felony conviction within the last 10 years and the defense has not sought
25 to preclude that from coming before the jury, if you take the stand and testify, the

1 District Attorney, in the -- front of the jury, will be able to ask you the following
2 questions: Number one, have you been convicted of a felony, and number two,
3 what was the felony, and number three, when it -- when did it happen. However,
4 they cannot go into any other details. All right, sir? Do you have any questions, sir?

5 THE DEFENDANT: No, ma'am.

6 THE COURT: All right.

7 Counsel, can we go off the record or do we need to make a -- any
8 record on anything at this time?

9 MR. STANTON: The only thing -- and I apologize if you said this, Judge. Did
10 you inquire that the defendant had enough time to discuss this with his counsel, his
11 decision in this regard?

12 THE COURT: Did I ask him whether or not he has discussed with his
13 attorneys?

14 MR. STANTON: No, whether he's had sufficient time to discuss that issue of
15 testifying or not testifying with his lawyers.

16 THE COURT: I did not.

17 MR. STANTON: Okay. Would you mind asking that question as part of your
18 colloquy with the defendant this morning?

19 THE COURT: Yeah.

20 THE DEFENDANT: Yes, ma'am, I have and I just haven't decided yet.

21 THE COURT: Fair enough. And I wanted to go over the admonishment
22 today so that you could give it more thought over the course of the weekend.

23 THE DEFENDANT: Thank you very much.

24 THE COURT: Okay. See you on Monday if there's nothing else.

25 MS. VON MAGDENKO: Thank you.

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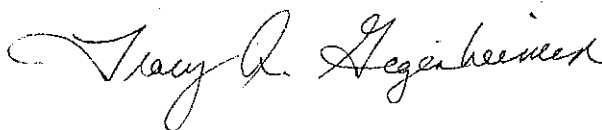
1 MR. STANTON: Thank you.

2 [Proceedings concluded at 11:47 a.m.]

3 ATTEST: We hereby certify that we have truly and correctly transcribed the
4 audio/visual proceedings in the above-entitled case to the best of our ability.

5 

6
7 Patricia M. Noell, CERT*D-362
8 Court Transcriptionist

9 

10
11 Tracy A. Gegenheimer, CER-282, CET-282
12 Court Recorder/Transcriber

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DISTRICT COURT
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,

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Plaintiff,

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vs.

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MICHAEL LEE,

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13

Defendant.

CASE NO. C277650-1

DEPT. XXIII

14

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

15

16

MONDAY, AUGUST 11, 2014

17

TRANSCRIPT OF PROCEEDINGS

18

JURY TRIAL - DAY 6

19

APPEARANCES:

20

For the State:

21

DAVID STANTON, ESQ.

Chief District Attorney

22

JOHN L. GIORDANI, III, ESQ.

District Attorney

23

For the Defendant:

24

NADIA VON MAGDENKO, ESQ.

STEVEN M. ALTIG, ESQ.

25

RECORDED BY: MARIA GARIBAY, COURT RECORDER

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FOR THE STATE:

(None)

FOR THE DEFENDANT:

(None)

1 Monday, August 11, 2014 at 1:36 p.m.

2
3 [Outside the presence of the jury]

4 THE COURT: All of our jurors are here.

5 All right. Good afternoon everyone. All of our jurors are here. Are we
6 ready to begin -- bring the jurors back in? I -- are we calling the coroner -- recalling
7 the coroner right now?

8 MR. STANTON: I believe so, Your Honor.

9 THE COURT: Okay, I think we left off we were on cross.

10 MR. STANTON: Correct.

11 MR. ALTIG: Yes, Your Honor.

12 THE COURT: Okay. So -- Randy, would you please bring them in?

13 THE MARSHAL: Yes, ma'am.

14 [Pause]

15 THE MARSHAL: All rise for the entering jury, please.

16 [Jury in at 1:37 p.m.]

17 THE MARSHAL: Thank you. Please be seated.

18 THE COURT: Okay. Welcome back, ladies and gentlemen of the jury. I
19 hope you had a wonderful weekend. At this point we're going to recall Dr. Gavin.

20 If you could please bring her in, Randy?

21 THE MARSHAL: Dr. Gavin? Back to the witness stand, please.

22 THE COURT: Doctor, last week when you were in court testifying you were
23 placed under oath at that time. You are still under oath today, okay?

24 THE WITNESS: Correct.

25 THE COURT: All right. If you'd like in cross?

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1 MR. ALTIG: Yes, Your Honor. Thank you.

2 THE WITNESS: May I sit down?

3 THE COURT: Oh, of course. Sit down please.

4 LISA GAVIN

5 [having been recalled as a witness and being previously sworn, testified as follows:]

6 CROSS-EXAMINATION

7 BY MR. ALTIG:

8 Q Good afternoon.

9 A Good afternoon.

10 Q How are you?

11 A Good. How are you today?

12 Q Good, thanks. I want to talk a little bit about your qualifications and
13 experience again, okay?

14 A Okay.

15 Q When did you first start working for the Clark County Coroner's Office?

16 A In 2009.

17 Q And was that your first job as a forensic pathologist?

18 A Correct.

19 Q You hadn't worked as a forensic pathologist before that?

20 A No.

21 Q And this particular autopsy, the autopsy of Brodie, was this your first
22 transected duodenum autopsy that you did alone?

23 A Correct.

24 Q Okay. You had never done one alone before?

25 A Correct.

1 Q What does it mean to be board certified?

2 A There's an examination that you take to be able to get your board
3 certification.

4 Q Okay. And what is the importance of having board certification?

5 A I'm not sure how people qualify it as a importance.

6 Q And are you or were you at the time of the autopsy of Brodie board
7 certified?

8 A No.

9 Q Are you currently board certified?

10 A No.

11 Q Want to talk to you a little bit about some of these injuries that you
12 dated -- when you testified here on direct examination, you dated a couple of the
13 injuries --

14 A Correct.

15 Q -- that Brodie had. I believe you dated specifically the duodenum -- the
16 transection of the duodenum and then also I think it was the galeel (phonetic)
17 hemorrhage?

18 A The galeal hemorrhage, yes.

19 Q Galeal hemorrhage that you dated, right?

20 A Correct.

21 Q Okay, and I believe you said they were 24 hours give or take an hour or
22 two?

23 A About 24 hours.

24 Q About 24 hours, okay. And when you date injuries like this, you actually
25 it's important to take and collect samples of the tissue, right?

1 A Correct.

2 Q Okay, because you can date fairly accurately through microscopic
3 examination of the tissue?

4 A Correct.

5 Q Right? You don't date by visually viewing the injury?

6 A Correct.

7 Q Okay. And the most accurate way to date it is by microscopic viewing
8 of the injury, correct? The tissue --

9 A The most accurate we can.

10 Q Okay. And what you're looking for when you're looking for that -- you're
11 looking for several things, but one of the big indicators as to the timing of the injury
12 is iron staining, correct?

13 A Correct.

14 Q Okay. Now iron staining, that comes from certain responders that
15 respond to the injury site that the body sends out to the injury site and there's certain
16 ones that come that contain iron with them, correct?

17 A There's iron that's absorbed. We talked about the breakdown of the
18 hemoglobin and that carries the iron in the red blood cell, and then that's what we
19 pick up with that iron stain.

20 Q Okay. Is the iron that was contained inside the hemoglobin?

21 A Yes.

22 Q Right? And the more iron that's visible in the injury would be significant
23 of the injury happening a longer time ago, correct?

24 A It's not the amount of iron, per se, it's the -- the more of the damage is
25 getting absorbed by those macrophages so more of those blood cells that are being

-7-

1 broken up are getting absorbed into the macrophages.

2 Q Leaving more iron?

3 A It can stain more depending on how much more is being broken down.

4 Q Okay. Now there were a lot of injuries here with Brodie that you did not
5 take slides from, correct?

6 A That's correct

7 Q Okay. The two that you mentioned were the duodenum injury and then
8 the galeal hemorrhage, correct?

9 A We took sections from the scalp and we also looked at the area of the
10 duodenum as well.

11 Q Okay. And did you -- you talked about all these different contusions on
12 his back, things like that. There was a -- let me see, a contusion of the right flank
13 and right lateral hip. Did you take a section of that injury?

14 A I didn't take sections of the contusions on the body.

15 Q None of the contusions on the body?

16 A Correct.

17 Q Okay. Now, as to the transected duodenum and the galeal
18 hemorrhage, you said you set the time 24 hours -- approximately 24 hours for that
19 injury to have occurred, correct?

20 A It's approximate.

21 Q Okay. And when you say 24 hours, you're saying 24 hours from what
22 time?

23 A From the time of the injury.

24 Q When we're going -- we have a time of death, correct?

25 A Correct.

1 Q And when you say the injury occurred 24 hours, you're talking about
2 from the time of death to the time of the injury, correct?

3 A Correct.

4 Q Okay. And what was the time of death that you established for Brodie?

5 A We didn't establish an exact time of death. The way we record time of
6 death --

7 Q Okay.

8 A -- is based on when we arrive at the scene and we determine that the
9 child is dead. That's usually what we use for our time of death and it's usually the
10 investigator that'll make that determination.

11 Q And what time of death was that?

12 A I don't know what they wrote in their report.

13 Q If it was it approximately 11:30, would that be --

14 A I don't recall what they --

15 Q You don't recall?

16 A -- wrote in their report.

17 Q If I showed you the report, would it refresh your recollection?

18 A Yes, please.

19 Q Thanks.

20 [Colloquy between counsel]

21 MR. ALTIG: May I approach, Your Honor?

22 THE COURT: You may.

23 MR. ALTIG: Thank you.

24 BY MR. ALTIG:

25 Q (Indiscernible) --

1 A Thank you. Yeah, they reported the time of death as 11:10 a.m.

2 Q And so your 24-hour calculation is based off of that time is what you're
3 testifying to, correct?

4 A No, the -- the investigator usually gets to the body after the law
5 enforcement has been there, so it often doesn't represent the accurate time in terms
6 of when the child was found dead. You can usually based that sometimes off of
7 whoever's found the person and then even then you don't know at what point in time
8 they -- how long they've been dead from the time that they've been found.

9 Q And who -- and how did you base it? Off of which time?

10 A I didn't base it off either of those times.

11 Q What time did you base it off of?

12 A I look at the composition of the body and talk about the time of death.

13 Q Okay. And did you -- are there certain ways to establish a time of death
14 as a forensic pathologist?

15 A Yes.

16 Q Can you take liver temperatures and things like that to determine a time
17 of death?

18 A Sometimes people take liver temperatures. It's a lot of stuff that you
19 can see on TV, but it's not always that accurate because it depends on the
20 environmental changes and those don't always give you a accurate representation
21 of the time of death.

22 Q And what did you do to determine the actual time of death?

23 A You can look at changes in the body in terms of whether or not it's in
24 rigor mortis which is the stiffening of the muscles or whether you're looking at the
25 livor mortis which is the settling of the blood in the body.

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1 Q And that's what you looked at to determine what you believed to be
2 your time of death?

3 A And that's one of the things that I can look at and taking that information
4 in conjunction with the information that we have from investigations and try to put
5 those together to get an approximation. It's not like, you know, Quincy on TV where
6 you get the exact time. It's like a range of time.

7 Q And what was your range of time in this particular case?

8 A I have to look back at my report to refresh my memory.

9 MR. ALTIG: May I show -- may I approach, Your Honor?

10 THE COURT: Yes.

11 THE WITNESS: Thank you.

12 It's at least 12 hours prior to my exam.

13 BY MR. ALTIG:

14 Q Okay, and your exam was the following day, correct?

15 A Correct.

16 Q But we know that -- we know that as of 11 a.m. the day before your
17 exam he was passed, right? That's when your investigator --

18 A Correct.

19 Q -- arrived. So in your report did you establish a time of death as to what
20 you believe the time of death was?

21 A No, I don't write down what I believe the time of death was. I have
22 information in there about the rigor mortis receding --

23 Q Okay.

24 A -- and then the livor mortis --

25 Q Okay. Now, I'm just trying to get a good idea as to when you say this

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1 injury occurs 24 hours ago or 24 hours from before the time of death, I mean I'm
2 trying to get an estimate as to what you -- what you're talking about, what timeframe
3 we're talking about here. Can you give me an estimate?

4 A It's approximately 24 hours prior to the time of his death, at least for
5 some of the head injury.

6 Q Okay. Some of the head injury and you said as to the duodenal injury
7 as well, right?

8 A Yes.

9 Q Okay. And so when we know from the investigator's report that their
10 time of death was 11, right?

11 A Correct, from the investigator's report.

12 Q And you knew that he was deceased before the investigator showed
13 up, correct?

14 A Correct.

15 Q Okay. You don't know for how long he was deceased before the
16 investigator showed up?

17 A No, I don't.

18 Q Okay. If there was a call to 911 saying that the child was dead at 8:30,
19 we would assume the child was dead by 8:30, correct?

20 A Yes, we can assume that.

21 Q Okay. And so when we're making those assumptions, we can safely
22 assume that your estimation of the time of the injury was 24 hours before 11 a.m.,
23 24 hours before 8:30 a.m. --

24 A Sure.

25 Q -- correct? Okay.

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1 A We can make that assumption.

2 Q And so when we're looking at that and we're looking at that assumption
3 and we're saying that injury occurred let's say -- we were talking he died Wednesday
4 at 11 a.m., the call was made Wednesday, 8:30 a.m., right?

5 A That's what we said.

6 Q Okay. And so we then would estimate backwards in time saying that
7 his -- that the injuries that caused his death, the duodenal tear injury and then you
8 said the -- I think you said the cranial injury was not the cause of death but it was a
9 contributing factor you said, correct?

10 A Contributing, correct.

11 Q Okay. So those would have occurred, according to your estimation,
12 sometime Tuesday between 11 a.m. and 8:30 a.m., right? Or sometime --

13 A It's -- it's an approximation.

14 Q Okay. That's your approximation would be about that, right?

15 A It's an approximation.

16 Q And that's what your approximation is, correct?

17 A It's at least about 24 hours. It's around 24 hours.

18 Q At least?

19 A It's at least 24 hours. It's around 24 hours.

20 Q Okay, so it could be more 24 hour -- more than 24 hours?

21 A It's around 24 hours.

22 Q Okay. And that would tell you when you're doing the examination then
23 if you said it's approximately 24 hours being Tuesday sometime about 11 a.m., 8
24 a.m., that things that potentially happened let's say Tuesday evening weren't in your
25 estimation a part of the cause of death, correct?

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1 A Again it's an approximation.

2 Q How much are we approximating by?

3 A We don't know how his body responds.

4 Q Okay. Could the approximation be 12 hours?

5 A I don't know how --

6 Q As opposed to 24?

7 A -- his body responds.

8 Q Okay. But we are looking at those -- the iron staining and stuff like that

9 and that's how you determine that approximation, right?

10 A We do look at the iron stains to assist with that.

11 Q And that those iron -- those -- the responders and things like that that

12 come out -- that you check for the iron, they respond in certain pretty consistent time

13 intervals?

14 A Yeah, it can be consistent in terms of the pattern in which we see them

15 and we talked about that last week, which cells come out and the timing that they

16 come out is very similar. How long someone takes to heal we've already talked

17 about and how long they -- that response is for them can vary.

18 Q Now would you agree with me that when someone is injured, they don't

19 necessarily get a bruise right away? Is that correct?

20 A That's correct.

21 Q Okay. Bruising's something that happens over time?

22 A Yes.

23 Q Right? And a bruise can actually get worse over time, correct?

24 A I don't know if it's worse. It's the way in which it heals so the quality of it

25 can change and we talked about those changes last week as well.

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1 Q Well and as a -- it doesn't just all of a sudden pop in and be dark purple,
2 it kind of fades in and it fades back out, right?

3 A It can fade in and fade out as many of you have seen on yourselves, I'm
4 sure.

5 Q Okay. So when someone gets a bruise at a particular point, it doesn't
6 necessary mean that when they received that bruise, that was the time that the
7 injury occurred, correct?

8 A It can vary based on the individual.

9 Q Right. And -- so an individual can receive a bruise and potentially a day
10 later -- or receive an injury and potentially a day later start showing a bruise,
11 correct?

12 A It's possible.

13 Q Okay. Can even start showing a bruise two days later, correct?

14 A It depends on the individual.

15 Q It depends on the individual, it depends on the type of injury, right?

16 A It could depend on the type of injury as well.

17 Q Now would you also agree with me that bruising on a person's body
18 after they pass away becomes more intense? Postmortem.

19 A As the blood settles -- we talked about the livor mortis and the blood
20 settling in the body. If it's been injured in that area, it's already spread out in that
21 area, so it becomes more evident as the blood settles in the body. The bruise itself,
22 if you will, becomes more evident. So it's not that it gets bigger, it just becomes
23 more apparent because the rest of the blood has settled in the body.

24 Q Okay. So it becomes more evident? That's right -- that's what you
25 said --

1 A More apparent, yeah.

2 Q Right? Okay. And it becomes more apparent within just several hours
3 after death, right, as the blood starts to settle?

4 A As the blood starts to settle, you can see it more apparently in -- in -- on
5 the body.

6 Q Would you agree that occurs within first two hours after death?

7 A Yes, livor starts to drop down very quickly once someone has passed
8 and that's why the shades of their skin changes when you look at someone who's
9 passed.

10 Q Okay. And you said that's within the first two hours?

11 A It can occur in that period of time.

12 Q And so you saw these pictures -- and I'm not going to show them to you
13 again. I don't want to display them to the jury again, but you saw these pictures of
14 Brodie after he passed, correct?

15 A Correct.

16 Q Okay. And you saw the bruises on Brodie after he passed, correct?

17 A Correct.

18 Q Okay. And those pictures were taken some of them at your -- at the
19 coroner's office, correct?

20 A That's correct.

21 Q Okay. And some of them at the scene of the crime, correct? Or the
22 scene of the incident.

23 A The ones that we look at were predominantly the ones from our office.

24 Q And those were taken how long after his passing?

25 A The following day from his passing, so --

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1 Q So when these pictures are shown to you, that's not the way Brodie
2 appeared -- the bruises appeared when he was alive, correct?

3 A Correct.

4 Q Okay. And when they show -- if these pictures were shown to other
5 witnesses and asked if this is the way they saw Brodie the last time they saw Brodie
6 alive, the witness is going to say no, correct?

7 MR. STANTON: Objection; calls for speculation.

8 THE COURT: Sustained.

9 BY MR. ALTIG:

10 Q In your opinion, the pictures do not reflect accurately the way Brodie
11 looked when he was alive, correct? The bruising?

12 A The bruising would look different because he would have more of his
13 flesh color, if you will, more of the blood would be present flowing. He'd have a --
14 he'd have a pulse.

15 Q And you can also get postmortem bruising, correct?

16 A It's not bruising that occurs postmortem. If there is a -- if you're in the
17 process of the livor settling and you still have some blood that's present in that
18 tissue, if that tissue is injured in some way, if you will, you can have that blood
19 spread out in that area and appear to be an injury.

20 Q Would you agree with me that it's important as a coroner or as a
21 forensic pathologist to be cognizant of things like if whether or not the individual
22 you're looking at was given CPR?

23 A Yes.

24 Q Okay. Because CPR can cause injuries to the individual's body,
25 correct?

1 A That's correct.

2 Q Such as putting a mask on the individual's face, they can cause scratch
3 marks on their face and things like that, correct?

4 A I haven't seen scratch marks on the face, but I imagine it could.

5 Q So those are things that you pay attention to when you're doing an
6 examination, right?

7 A Yes.

8 Q Okay. Now, did you have any involvement with the collection of the
9 DNA in this particular matter?

10 A I'm always present during that portion of the sampling.

11 Q Okay. Do you review the results of the DNA when they come back?

12 A I do not.

13 Q Okay. Do you know much about the DNA process, why it's collected --
14 are you trained in that regard?

15 A Yeah, we understand that process.

16 Q Okay, and you're trained in that regard?

17 A Yes.

18 Q Okay. And why is it that they collect DNA samples from injuries?

19 A We don't collect it from injuries.

20 Q Okay.

21 A We collect DNA from the body.

22 Q Were you -- from the body of the decedent?

23 A Of the decedent.

24 Q And in this particular matter, was DNA collected from what you -- I think
25 you testified to there were several semicircular marks that resembled nail marks.

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1 Did you know if DNA was collected from those?

2 A I don't know if they scraped for that and -- and/or they swabbed for that
3 at all. I don't know.

4 Q You don't know?

5 A No, I do not.

6 Q Okay. Do you know if -- what they're looking for specifically when
7 they're swabbing for DNA?

8 A They're looking for DNA that might be other than the decedent.

9 Q By DNA, we're talking about human cells, correct?

10 A Correct.

11 Q Okay, so they're looking for other human cells that would leave traces
12 of human DNA, whoever they're looking for it at, right?

13 A Correct.

14 Q And if -- in your opinion since you're experienced with DNA, if an injury
15 occurred by way of let's say something that was made out of metal, that wouldn't
16 necessarily leave DNA on the person's body, correct?

17 A It may or may not depending on what's on the metal and whether it
18 transfers on to the body.

19 Q Could say the same thing about wood, correct?

20 A Correct.

21 Q Okay. Could say the same thing about stone, correct?

22 A Correct.

23 Q And we could say the same thing about acrylic, correct?

24 A It's possible.

25 Q Okay. Like acrylic nails, right?

1 A It's possible they can have different DNA under them as well.

2 Q Okay.

3 MR. ALTIG: Court's indulgence one moment, please.

4 THE COURT: Uh-huh.

5 [Colloquy between counsel]

6 BY MR. ALTIG:

7 Q I want to go back just one second and ask you a couple follow-up
8 questions. We're dealing with the time of death. You never actually approximated
9 the time of death in Brodie's case, did you?

10 A No, we didn't.

11 Q You didn't?

12 A No, I didn't.

13 Q Okay.

14 MR. ALTIG: No further questions, Your Honor. Thank you.

15 THE COURT: Redirect.

16 REDIRECT EXAMINATION

17 BY MR. STANTON:

18 Q Dr. Gavin, the information that you gather through the autopsy -- I think
19 your testimony several days ago on direct examination I was asking you about the
20 process of the autopsy to determine cause and manner and you indicated that
21 there's several aspects of your ultimate report to determine cause and manner. Is
22 part of that the investigative report by Nancy Dahl?

23 A Yes.

24 Q And Ms. Dahl gives you information that is critical from the scene from
25 witnesses that she talks to -- she interviews?

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1 A That's correct.

2 Q Now, related to what counsel ask you about the time of death and for
3 purposes of my questions to you on redirect examination, I want you to use the term
4 time of death to mean what it literally means and that is when Brodie's life actually
5 ended, when his heart stopped beating. Okay?

6 A Okay.

7 Q So you mentioned this 11:10 a.m. time of death that Investigator Dahl
8 pronounces sounds like more of as an administrative function to just insert a time
9 when she's confident of that, correct?

10 A That's correct.

11 Q Now I'd like you to go to your memory and if you need to refresh your
12 memory, I'm going to ask you about information contained Investigator Dahl's report
13 to you and to the coroner's office. Do you recall as you sit there today, without
14 referring to her report, what Investigator Dahl indicated in her investigation about the
15 discovery of Brodie by the mother, Arica Foster? Not the timing of things. Do you
16 recall that independently?

17 A I don't recall that independently.

18 Q Okay. Would be looking at Investigator's Dahl's refresh your
19 recollection when I ask you questions about the timing of things?

20 A I think so.

21 MR. STANTON: May I approach, Your Honor?

22 THE COURT: You may.

23 MR. STANTON: Page 1, counsel.

24 MR. ALTIG: Yes, sir.

25 BY MR. STANTON:

1 Q Do you see the highlighted section there? Let me just go through a
2 couple things. Ms. Dahl indicates that based upon the history of her investigation
3 provided by the mother of Brodie, Arica Foster, she approximates the time of the
4 discovery of Brodie at about 8:45 a.m. and she describes touching Brodie and that
5 there were two things that were observed by the mom; one, Brodie was cold and
6 two, Brodie is stiff. Do you see that?

7 A Yes, cool to the touch and stiff.

8 Q Okay. Let me address each one individually. What does cool to touch
9 mean to you as a forensic pathologist determining what is going on with a body
10 when someone experiences that sensation?

11 A It depends if there's --

12 MR. ALTIG: I'm going to object at this point, Your Honor, as to the
13 speculative nature of the questioning. It's asking what she would determine
14 someone else felt when they touched it -- when they touched something cold.

15 MR. STANTON: Well, that's not my question at all.

16 BY MR. STANTON:

17 Q Doctor, did you -- I'm not asking you about what someone felt. I'm
18 asking you what it meant to you as a forensic pathologist.

19 MR. STANTON: So if counsel --

20 THE COURT: Are you still objecting?

21 MR. ALTIG: Yeah. Yes, ma'am.

22 MR. STANTON: Well it's not speculative, Judge, because I'm not asking her
23 to step into Ms. Foster's --

24 THE COURT: She's asking what it means in a medical context. Is that what
25 you're getting at?

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1 MR. STANTON: Exactly.

2 THE COURT: Then I'll allow it for that purpose.

3 THE WITNESS: When we're talking about cool, we're trying to do the best we
4 can to infer a temperature of the body. Again I mentioned that we don't do the -- like
5 on TV sticking the thermometer in the liver. Some offices do do that. That's not a
6 common practice here in our office because of the variation that you can have.
7 When you talk about cool, a lot of things you have to wonder is whether or not the
8 environment is refrigerated for example, whether or not the body's been exposed to
9 environmental temperatures that are elevated. So if you're saying cool and you're
10 assuming a normal environment, then it's suggesting that the temperature of the
11 body is decreased and suggesting that the body is deceased.

12 BY MR. STANTON:

13 Q And what is -- is there a recognized -- once again, in an average
14 contents absent some -- excluding extremes of temperature and outdoor exposure,
15 but is there recognized within the medical community an average rate of loss of
16 body heat once someone dies?

17 A Yes, there is.

18 Q And what is that?

19 A It's about a degree or to a degree and a half an hour. So as the person
20 is -- once they die, they start to lose that over each hour.

21 Q And I would assume that the core of the body stays warmer longer?

22 A That's correct.

23 Q Now, Doctor, you mentioned two terms and I'd like to go back to them
24 as it relates to the second phenomenon that's listed in Investigator Dahl's report and
25 that is an expression that Brodie was stiff. You previously mentioned something

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1 called rigor mortis. Could you explain what rigor mortis is?

2 A Normally your muscles will move as you indicate them to do so and
3 there are chemicals that are present in your muscles that allow that muscle to
4 function and it requires energy to be able to do that. If someone has died, there's no
5 longer that energy going into that muscle to allow it to move and because there's no
6 energy to allow it to move, it's going to stay in that position that it was last in. And
7 that's fixed in that position and stiff in that position and we call that rigor mortis.

8 Q And how long -- and there's a recognized time where rygor mortis or
9 rigor mortis enters the body and different parts of the body, appendages to the core
10 of the body, and then when rigor mortis leaves the body. Is it a recognized rate of
11 onset of rigor and then the elapse or the extinguishment of rigor?

12 A Yes, there is and it can also be dependent upon environmental
13 temperatures as well, the rate at which that occurs. Assuming that everything is in a
14 normal state, not -- not Vegas normal but normal in terms of the environment of
15 being say refrigerated air for example, it may take up to 12 hours for you to even
16 start to see that rigor subside and if it's cooler in that environment, it may take even
17 longer.

18 Q And how much would you begin to see the onset of rigor; that is, when
19 someone from the cessation of the last heartbeat of Brodie to the onset of rigor
20 when rigor would be noticeable to the touch; that is, the stiffness, when would you
21 potentially see the earliest onset of rigor?

22 A You could see that within a couple hours of death.

23 Q Now, you talked about -- or counsel asked you a question about
24 bruising and bruising being more pronounced at autopsy versus in life. And you
25 mentioned something called livor mortis; is that correct?

1 A Correct.

2 Q Now livor mortis is the settling of blood and it's settling of blood
3 pursuant to gravity, correct?

4 A That's correct.

5 Q And so is that indicative or at least something that explains to you the
6 position of the body around and after the time of death?

7 A Yes, it can.

8 Q And so if I'm lying on my back and I pass away, the blood in my body is
9 going to pull, pursuant to the laws of gravity, towards the back of my body?

10 A That's correct.

11 Q Now if I'm lying on the ground and my back has pressure against the
12 floor, there's something called blanching, correct?

13 A It can happen either direction. It doesn't have to be towards the front or
14 the back. If there's an area where the body has settled that is applied some
15 pressure to that area, there'll be an area of what they call blanching. You won't see
16 the livor pooled in that area. You won't see the -- the blood pooled in that area
17 because it's been pressed against something. So an area of pressure has called
18 the -- caused that area to blanch is the word they like to use.

19 Q So the bruising to Brodie's face, assuming that he's lying on his back
20 after death, the blood would be flowing away from his face and towards the back of
21 his body if he's positioned face up?

22 A That's correct.

23 Q Now, counsel asked you questions about CPR and let's say for the
24 purpose of my question that Brodie is as described in Investigator Dahl's report to be
25 cold to the touch and stiff at 8:50 a.m. approximately when 911 is called. Do you

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1 see that as far as the timing in the highlighted section on page 1 about the timing of
2 the 911 call?

3 A Yes, I do.

4 Q Now, is it accurate, Doctor, that dead people don't bleed?

5 A That's correct.

6 Q So if I were to cut a body that was deceased, it wouldn't bleed?

7 A Well --

8 Q Absent there's no blood underneath the skin and there's not a wound
9 beneath it, but as a general principle, what we would normally see as bleeding
10 wouldn't occur?

11 A What most people think in the living as bleeding, if you were to cut
12 yourself and then you have a blood pressure, that allows some of that blood to come
13 out. Of course if you cut an artery, it's more significant than if you cut a vein where
14 when we cut into the body, there is some blood because there's blood present in the
15 tissues, but it's not the same as if we were doing a surgical procedure on a live
16 person in terms of the amount of blood that would be present. So they're not
17 bleeding in the way that you would think of if you cut yourself, but there's blood
18 present in the tissue.

19 Q And based upon the observations of the mother that Brodie was both
20 stiff and cold to the touch, if CPR had been performed after sensing that and Brodie
21 was in fact medically deceased, no additional bruising would occur --

22 MR. ALTIG: I'm going to object at this point. I believe he's leading the
23 witness, Your Honor.

24 MR. STANTON: Well, I am but I'll rephrase, Your Honor.

25 BY MR. STANTON:

1 Q Assume that if Brodie's mom applied CPR after discovering his body
2 being cold and stiff, would you imagine or could you envision that that activity would
3 cause bruising?

4 A No.

5 Q For the same reasons you just described?

6 A Yes.

7 Q The heart's not beating?

8 A Correct.

9 Q Now, counsel asked you --

10 MR. STANTON: May I approach again, Your Honor?

11 THE COURT: You may.

12 BY MR. STANTON:

13 Q Counsel asked you a question about postmortem lividity or the
14 phenomena of blood pooling in the back and bruises getting more pronounced. We
15 saw photographs of the autopsy of Brodie's back being scalpeled (sic), cut, and then
16 removed for further examination from the dura or the outer skin to his ribs. Do you
17 recall that portion of the autopsy?

18 A Yes, I do.

19 Q Is that in part, Doctor, to determine the bruising on his back as to
20 whether or not it's an artifact of lividity or livor mortis -- blood pooling down below to
21 determine it or distinguish it from actual bruising injuries?

22 A Yes.

23 MR. STANTON: Nothing further.

24 THE COURT: Anything else?

25 MR. ALTIG: Yes, Your Honor. Thank you.

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RECROSS EXAMINATION

BY MR. ALTIG:

Q Now, Doctor, you talked about the cool to the touch the State's asking you about, this cool to the touch.

A Correct.

Q Remember him asking you about that?

A Correct. Yes, I do.

Q Okay. And you said it has a specific medical term -- terminology when you guys are talking about something being cool to the touch, correct?

A Correct.

Q Okay. You don't know what cool to the touch is to me, do you?

A No, I do not.

Q You don't know what cool to the touch is to Arica, do you?

A No, I do not.

Q You don't know if she feels something that's 95 degrees that's cooler than her skin, that might be cool to the touch to her, correct?

A It may be.

Q Okay. Now you also talked about there being a loss of body heat after death of 1.5 degrees per hour.

A It starts out about 1.5 and then go about to 1.

Q Okay. It really depends on certain environmental conditions, correct?

A Yes, I said that.

Q Okay. So if it's hot outside, the heat's going to be lost at a slower rate?

A That's correct

Q Okay. And if it's cool outside, the heat's going to be lost at a quicker

1 rate?

2 A That's correct

3 Q And do you know what the temperature was in the apartment Brodie
4 was found in?

5 A I do not.

6 Q Okay. Do you know what if air conditioning -- the air was even on?

7 A I do not.

8 Q Do you know what the temperature was outside that day?

9 A I do not.

10 Q Do you know what the month was?

11 A We did it I believe in May if that's correct, yeah.

12 Q Now you also talked about some comments regarding the stiff portion of
13 a body and you went and explained what all that stuff meant?

14 A Yes, correct.

15 Q Now the report that you refreshed your recollection with, your
16 investigator's report, it's relaying information to you that was relayed by Arica,
17 correct?

18 A That's correct.

19 Q That she found Brodie's body to be stiff, correct?

20 A That's correct.

21 Q And you don't know what Arica believes to be stiff, do you?

22 A No, I do not.

23 Q Okay. You wouldn't know what I believe to be stiff, right?

24 A That's correct

25 Q Okay. Now you talked about bleeding and there being no bleeding after

1 death. And the State asked you some questions about CPR. Remember those?

2 A Yes.

3 Q Okay. And you said that CPR wouldn't leave bruises because I believe

4 the State said the heart is not beating, correct?

5 A He was saying that I believe.

6 Q Okay. And you agreed with him, correct?

7 A Correct.

8 Q Okay. Now, what's the purpose of CPR?

9 A The purpose of CPR would be to try to revive someone who's dead.

10 Q Okay. And how do they do that?

11 A Compressions on the chest.

12 Q So they start beating the heart for the person, correct?

13 A Right.

14 Q And beating the heart moves blood around the body, correct?

15 A That's correct.

16 Q Okay. So if a person's beating the heart for somebody else and they

17 get cut, they can bleed?

18 A It's possible you could see somebody at the same time they're cut

19 there's going to be blood.

20 Q Right. Even though their heart's not beating on their -- on its own,

21 correct?

22 A That's correct.

23 Q Okay. Now, one last little bit of questioning. Bruises that are on a

24 person's body prior to death sometimes may not be visible to anybody looking at

25 them, correct?

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1 A We mentioned that before.
2 Q And after death, they can then become visible, correct?
3 A That's correct.
4 Q Thank you.
5 MR. ALTIG: No further questions.
6 THE COURT: All right. Any other questions?
7 MR. STANTON: No, Your Honor.
8 THE COURT: All right, ma'am, thank you for your time. You're free to go.
9 THE WITNESS: Thank you.
10 THE COURT: Next witness please.
11 MR. STANTON: Your Honor, the State would recall Detective Gerry Collins.
12 THE COURT: Did we release him previously?
13 MR. STANTON: I believe so, Your Honor.
14 THE COURT: Yeah. So we need to re-swear him.
15 Go ahead and swear him in.
16 THE CLERK: Yes, Your Honor.
17 GERARD COLLINS
18 [having been recalled as a witness and being previously sworn, testified as follows:]
19 THE CLERK: Please be seated. State and spell your first and last name for
20 the record.
21 THE WITNESS: Gerard Collins, G-e-r-a-r-d C-o-l-l-i-n-s.
22 MR. STANTON: May I begin, Your Honor?
23 THE COURT: You may.
24 DIRECT EXAMINATION OF GERARD COLLINS
25 BY MR. STANTON:

1 Q Detective, after you left court last week, I asked you to look at three
2 different items in your investigative file; is that correct?

3 A Yes.

4 Q The first one I asked you to do is relative to defense counsel's question
5 regarding the injury related to you about a sippy cup in Brodie's mouth.

6 A The fremulin (sic).

7 Q Do you recall that --

8 A About the frenulum?

9 Q Yes.

10 A Yes.

11 Q And I asked you to go back to your report and to look at the statements
12 of Ms. Foster and the grandmother, Merridee, and I want to ask you a series of
13 questions about that. Have you had opportunity since you last testified to go over
14 that portions of your report?

15 A Yes, I did.

16 Q And specifically, I want to ask you about the source of that information
17 about that injury. At the time that you got that information, who were you talking to?

18 A I was talking to Arica and her mother, Merridee Moshier.

19 Q They were both present at the same time?

20 A Yes.

21 Q And do you remember what day that would have been?

22 A That was the 17th of June.

23 Q And on June 17th, you -- they told you about this incident because you
24 asked them specifically about injuries around the lips and frenulum area, correct?

25 A Yes, I did.

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1 Q And they told you about this sippy cup?

2 A Yes.

3 Q Did there come a time where they explained to you both the timing of
4 when that injury occurred and how they knew about the injury?

5 A Yes.

6 Q What did they say was the timing -- when was that injury that they
7 observed?

8 MS. VON MAGDENKO: Your Honor, objection; hearsay.

9 MR. STANTON: Your Honor, counsel asked this witness about the questions
10 of Merridee and this particular injury. I would assume that it was relevant to them
11 when they asked the question and therefore I don't think they can object that it's
12 hearsay now.

13 MS. VON MAGDENKO: Your Honor, I'm making the objection now. So it's
14 not -- I don't (indiscernible) defense is related to what happened days ago.

15 THE COURT: Go ahead and ask the question.

16 BY MR. STANTON:

17 Q Who -- what was the timing of the injury?

18 A Merridee, the mother of Arica, told me that the injury occurred probably
19 about May 3rd.

20 Q Of 2011?

21 A Of 2011.

22 Q And where did both Merridee and Arica get the source of the
23 information?

24 A Merridee said that Michael had told them about the incident.

25 Q The next thing I wanted to ask you about was Brad Moshier and your

1 interview with Brad Moshier. There was -- I asked you to look about the incident of
2 when Brad saw an injury on the ear. Do you recall that?

3 A Just to clarify, I didn't have an interview with Brad Moshier. That was
4 Detective Mitchell.

5 Q That transcript is part of your investigative file, correct?

6 A Yes.

7 Q And in review of Brad Moshier's transcript, there's question ask about
8 when was the last time he saw a bruise on Brodie's ear and he mentioned Sunday.
9 Do you recall that in his transcript?

10 A Yes.

11 Q Now, in that transcript, he also says that Sunday was when he viewed
12 the body or was at the viewing, correct?

13 A Yes.

14 Q Now, during the course of that interview, does he relate when he saw a
15 bruise on Brodie's ear before the Sunday viewing?

16 A Yeah, he said that he had member -- he remembered a bruise like that
17 consistent with what he saw --

18 MR. ALTIG: I'm going to object again hearsay, Your Honor.

19 MR. STANTON: Once again, Your Honor, this was inquired on cross-
20 examination of Mr. Moshier. They sought to impeach him with his statement. I'm
21 now doing it by a prior or recorded statement of that particular witness. Therefore
22 by definition is not hearsay.

23 MR. ALTIG: I don't think they can do it through this particular witness. If they
24 want to call Mr. Moshier back and put Mr. Moshier back up to explain his
25 statements, they can. If counsel's saying he made an error and didn't object to a

1 hearsay objection, we're objecting to hearsay now and his error doesn't really matter
2 to that objection.

3 MR. STANTON: And Judge, it's not hearsay, it's about what his statement
4 says. Counsel -- I'm not asking him about his testimony in this trial of Mr. Moshier's.
5 That -- he's already done that. I'm asking what the transcript says.

6 THE COURT: Mr. Moshier's transcript?

7 MR. STANTON: Yes, Your Honor.

8 THE COURT: I'll allow it.

9 BY MR. STANTON:

10 Q In the transcript, what does he say about when he last observed a
11 bruise on Brodie's ear while Brodie was alive?

12 A He said he remembered seeing a bruise like that probably about a
13 month or a month and a half prior to his death on the ear.

14 Q And I ask you to review Arica Foster's -- those transcripts of her
15 interview as well as your notes of the interview of June 17th. In particular, a
16 statement by Ms. Foster about a bruise on Brodie's ear that she observed. Do you
17 recall looking back at her both transcripts and your notes of the June 17th interview?

18 A Yes. I was asked that question about when she said it occurred or she
19 saw it and I had said the weekend prior to -- to death or something along that line --

20 Q And that was questions by counsel on cross-examination last week?

21 A Yes. And I remember sitting here and I said well let me go back a little
22 bit and read a little bit, but I didn't go back far enough. And after court when I went
23 back far enough, I realized that Arica was talking about the -- the weekend prior to
24 May 14th.

25 Q And May 14th had some impact or some importance about something

1 occurring regarding Arica and Brodie. What was that?

2 A As near as I can remember, Arica was seeing a lot more bruising and
3 that she was becoming upset and she -- she told me, she says, I told my sister that I
4 can't do this and -- and at that point in time she had her sister, Amanda, watching --
5 watching Brodie from that point on.

6 Q So after your review of the entirety of the transcript of Arica in this
7 subject matter, your testimony now would be that the ear bruise she observed was
8 one week prior to the May 14th, 2011 time period?

9 A Yes.

10 MR. STANTON: Nothing further.

11 THE COURT: Any other questions?

12 MS. VON MAGDENKO: Yes, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. VON MAGDENKO:

15 Q So when Arica's explaining away the frenulum bruising, her and her
16 mother say oh well, Michael told us that's how it got cut?

17 A Merridee basically said that she had talked to Michael about it and that
18 Michael was apparently there and said that Brodie was running with the cup in his
19 mouth and that the dog hit Brodie and knocked him down.

20 Q Okay, and Merridee didn't seem concerned about a torn frenulum?

21 A She said she was. That's why she took a picture of it.

22 Q She took a picture of it?

23 A Yeah.

24 Q Okay. Did she say she thought Michael hurt Brodie?

25 A There wasn't any -- there -- there wasn't any -- she didn't answer

1 anything like that. She didn't -- there wasn't any accusation. There wasn't anything
2 like that, no.

3 Q So right -- and this is two days after Brodie died, right?

4 A What was -- the --

5 Q You're having this conversation --

6 A -- the interview?

7 Q Yeah.

8 A Yeah, on the 17th.

9 Q Okay, so two days after Brodie died, neither Arica nor Merridee think
10 that Michael did anything, right?

11 A They didn't indicate to me that he -- that he was beating the child or
12 anything like that.

13 Q But a little boy had just died. Would you think it would be relevant for
14 someone to bring up if they thought someone had -- was beating a kid?

15 A Well unless you wanted me to plant that in their head, I don't -- I didn't
16 think it was my place to plant that in their head. I was just on a fact finding. I
17 wanted to know what happen. I wanted to get background information. That's why I
18 was doing the interviews.

19 Q Do you do fact finding to see if someone had beaten the kid?

20 A Well that's what ultimately the investigation is all about, yes.

21 Q Okay, so during that interview, did you ask if anyone had beaten Mike --
22 Brodie?

23 A Not specifically, no. Nothing -- nothing direct like that.

24 Q Okay. And they didn't volunteer anything against Michael?

25 A No. Although now that I remember, when I showed Arica the photo of

1 the entire back of Brodie, when she fell on the floor she says -- something along a
2 quote of about why did he do that to him or something along that. I can look back
3 and -- and give you the word for word on it.

4 Q Did she say she witnessed anything?

5 A No.

6 Q Arica testified before to the jury that she made statements on the record
7 and off the record. Do you have an understanding of any interview you did with her
8 off the record?

9 A No.

10 Q No. So when she said that, she's just making things up?

11 MR. STANTON: Objection. That's argumentative, Your Honor.

12 THE COURT: Sustained.

13 BY MS. VON MAGDENKO:

14 Q You can answer.

15 MR. STANTON: I believe the objection was sustained --

16 THE COURT: Sustained.

17 MR. STANTON: -- Your Honor.

18 MS. VON MAGDENKO: I'm sorry.

19 BY MS. VON MAGDENKO:

20 Q Do you normally take statements of witnesses off the record?

21 A No, everything they say to me is on the record.

22 Q Okay. We talked before about DNA. When you're looking at DNA, are
23 you only looking at human cells? Or what is DNA?

24 A I don't think I'm qualified to answer that question.

25 Q Okay. So you don't know what leaves DNA and what doesn't?

1 A Not in -- not in depth or anything like that.

2 Q Okay. Did Arica tell you that she ever saw Michael hit Brodie?

3 A I don't believe she did say that, no.

4 Q And did grandma say that she ever saw Michael hit Brodie?

5 A Again I don't -- I don't think Merridee ever said that. Not to me anyway.

6 Q And did you interview anyone else in connection with the death of
7 Brodie?

8 A Just the ones that are documented that I interviewed.

9 Q And did any of those witnesses say that they had ever seen Michael hit
10 Brodie?

11 MR. STANTON: Objection; calls for speculation. Or hearsay, Your Honor.
12 I'm sorry.

13 THE COURT: Overruled.

14 BY MS. VON MAGDENKO:

15 Q You can answer.

16 A As far as I know, I don't think anybody said they actually saw him hit
17 anybody.

18 Q Okay.

19 A Or hit Brodie, I should say.

20 MS. VON MAGDENKO: Court's indulgence.

21 No further questions.

22 THE COURT: Anything else?

23 MR. STANTON: Briefly, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. STANTON:

1 Q Detective Collins, there's questions about the nature of this injury of the
2 frenulum. In fact, Merridee and Arica never told you that they witnessed an injury
3 where the frenulum was actually disrupted or torn, but they gave it to you in the
4 context of injuries they've ever observed to his mouth; is that accurate?

5 A Yes.

6 Q Now, when they said that they took a picture, they provided you,
7 Merridee and Arica, with a number of pictures of Brodie in the days and months
8 leading up to his death, correct?

9 A Yes.

10 Q And did you ever see the picture that they were describing about Brodie
11 and that injury?

12 A I can't recall if I saw that one or not.

13 Q But no pictures ever shown to you were of the lip of Brodie pulled up
14 looking at the actual frenulum; is that accurate?

15 A Not from Merridee or Arica.

16 Q Or anybody else until the autopsy?

17 A There might have been one taken at the scene when he was -- when
18 Coroner Dahl --

19 Q I apologize. For the -- I'm talking about in Brodie's life when he was
20 alive --

21 A Prior to -- prior to his death?

22 Q Correct.

23 A I don't recall any picture like that.

24 MR. STANTON: Nothing further.

25 RECROSS EXAMINATION

1 BY MS. VON MAGDENKO:

2 Q So just some I'm clear, when you're talking about the torn frenulum,
3 Merridee and Arica say we took a photo of that injury?

4 A Merridee said she took a photo of it with her cell phone.

5 Q And yet she never provided it to you; is that correct?

6 A I can't remember if it's in what -- what she gave -- what Arica gave me
7 or not. I don't believe that I saw one of that.

8 Q Okay.

9 MS. VON MAGDENKO: Court's indulgence.

10 [Colloquy between counsel]

11 MS. VON MAGDENKO: No further questions. Thank you.

12 THE COURT: Is he free to go?

13 MR. STANTON: Yes, Your Honor.

14 THE COURT: Thank you. You're free to go, sir.

15 Do we have one more witness?

16 MR. STANTON: No, Your Honor.

17 THE COURT: That's it for the day?

18 MR. STANTON: The State rest, Your Honor.

19 THE COURT: All right. And have you checked to make sure everything is
20 moved into evidence?

21 MR. STANTON: We have, Your Honor.

22 THE COURT: Okay. And are you -- do you have any witnesses here today?

23 MR. ALTIG: Not today, Your Honor. I don't believe.

24 THE COURT: All right. So I think we talked about before the jury came in the
25 next witness the defense has is Thursday afternoon?

1 MR. ALTIG: Thursday, Your Honor, yes.

2 THE COURT: Okay.

3 So ladies and gentlemen of the jury, we are finished for the day. We're
4 going to actually be dark tomorrow and dark on Wednesday. The next time I will
5 see you in court is Thursday at 1:00. And again, we're sorry for the inconvenience,
6 but a doctor for the defense was unavailable and out of town so this is the first time
7 we could get the doctor to testify which is Thursday afternoon.

8 Again, this case should be sent to you probably Friday for your
9 deliberations, so until I see you Thursday at one, you're admonished not to converse
10 amongst yourselves or with anyone any subjected connected with the trial, do not
11 read, watch or listen any report of or commentary on the trial, and do not form or
12 express an opinion on this case. See you on Thursday at one.

13 THE MARSHAL: All rise for the exiting jury.

14 Jurors, please leave your notebooks on the chairs.

15 [Jury out at 2:30 p.m.]

16 THE COURT: Is there anything we need to address before we go off the
17 record?

18 MR. STANTON: No, Your Honor. When would you like to have the jury
19 instructions?

20 THE COURT: Well, when will you all be able to go over them? You want to
21 go over them -- when would you like to go over them?

22 MR. STANTON: Soon.

23 THE COURT: We have Thursday morning. Do -- am I free Thursday
24 morning?

25 THE CLERK: Yes, Your Honor.

1 THE COURT: You want go over them Thursday morning?
2 MR. ALTIG: Can I check my calendar real --
3 THE COURT: Sure. I mean most of them should be standard.
4 MR. ALTIG: Right. I would imagine.
5 MR. GIORDANI: Judge, would it be possible to do it late Thursday morning
6 like 10:30?
7 MR. ALTIG: I am open all Thursday.
8 THE COURT: Why don't we do it Thursday morning at 10:30. That way you
9 guys can have a chance to look at each other's proposed jury instructions.
10 MR. ALTIG: Thank you.
11 MR. GIORDANI: Thank you.
12 MS. VON MAGDENKO: Thank you, Your Honor.
13 THE COURT: So 10:30.
14 MR. ALTIG: I had the whole day off -- blocked for the trial, you know, and you
15 told the jury come back at 1:00 on Thursday. Is that what we did?
16 MS. VON MAGDENKO: Yeah.
17 THE COURT: I did because that's when you said --
18 MR. ALTIG: Okay.
19 THE COURT: -- your expert would be here.
20 MR. ALTIG: Okay.
21 THE COURT: And then --
22 MR. ALTIG: All right. Thank you.
23 THE COURT: -- you have a 3:00 on -- no, Friday you have --
24 MS. VON MAGDENKO: Friday.
25 MR. ALTIG: Friday I have to be across town at three.

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1 THE COURT: You should be fine because I imagine we'll do the jury
2 instructions in the morning and then --

3 MR. ALTIG: And close?

4 THE COURT: -- the closings.

5 MR. ALTIG: If it's not, I can try to get someone to go in my place, but I'm --

6 THE COURT: No --

7 MR. ALTIG: -- want to specifically speak to them about some stuff so --

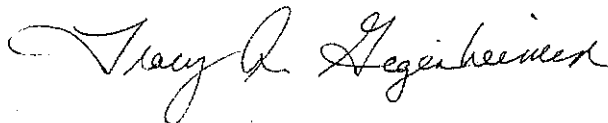
8 THE COURT: No, no, no, I understand. I know that you do those programs
9 in the community. No, that's fine. It'll work.

10 MR. ALTIG: Okay.

11 THE COURT: Yeah. I can't imagine it won't be to the jury by three.

12 [Proceedings concluded at 2:31 p.m.]

13 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
14 proceedings in the above-entitled case to the best of my ability.

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18 Tracy A. Gegenheimer, CER-282, CET-282
19 Court Recorder/Transcriber
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL LEE,

Defendant.

CASE NO. C277650-1
DEPT. XXIII

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

THURSDAY, AUGUST 14, 2014

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 7

APPEARANCES:

For the State:

DAVID STANTON, ESQ.
Chief District Attorney
JOHN L. GIORDANI, III, ESQ.
District Attorney

For the Defendant:

NADIA VON MAGDENKO, ESQ.
STEVEN M. ALTIG, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

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1 Proposed Jury Instruction

6

FOR THE DEFENDANT:

G Photograph

25

1 Thursday, August 14, 2014 at 10:53 a.m.

2
3 [Outside the presence of the jury]

4 THE COURT: Okay. I -- are we on, Maria?

5 THE COURT RECORDER: Yes.

6 THE COURT: Okay, so everyone's here, the defendant's here, all the
7 counsel are here, and I understand that there's only a few that are not agreed to; is
8 that right?

9 MR. ALTIG: That is correct, Your Honor.

10 THE COURT: Okay, so why don't we go with the ones that are not agreed
11 to. And two -- and I have two copies. One with citations, one without. Okay, so tell
12 me which ones are in dispute.

13 MR. ALTIG: I'm getting there, Your Honor. Hold on one second.

14 THE CLERK: Can we call the case, Judge?

15 THE COURT: Oh we didn't call it? I'm sorry.

16 So it's -- we're doing jury instructions on C277650. The defendant is
17 present. All counsel are present. Counsel's indicated a large portion of the jury
18 instructions are stipulated; however, we're going to go through the ones that are not
19 agreed upon.

20 MR. ALTIG: It's about 17 pages back, Your Honor. The State refers to it as
21 the *Tavares* instruction. It begins with you have heard evidence. You have heard
22 evidence that the defendant may have committed other crimes.

23 THE COURT: Okay.

24 MR. ALTIG: For tactical reasons, we are asking that that instruction be
25 removed and not presented to the jury.

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1 MR. STANTON: And we have no objection to that, Your Honor.

2 THE COURT: I don't think there was any evidence of other crimes.

3 MR. ALTIG: No, the State though in abundance of caution believes under
4 *Tavares* that it can -- other bad conduct can be referred to and I think that they
5 believe that that limits that issue. However, given our defense, we are asking it be
6 removed.

7 THE COURT: Okay, it -- the State has no opposition so by defense request,
8 it'll be removed.

9 MR. ALTIG: Thank you. About three instructions behind that. It's the State's
10 expert witness instruction.

11 THE COURT: Yes.

12 MR. ALTIG: We're asking that that instruction be replaced with our proposed
13 instruction -- if I may approach?

14 THE COURT: You may.

15 MR. ALTIG: Sorry, I didn't forward it to Your Honor --

16 THE COURT: This looks like the standard one we see all the time.

17 MR. ALTIG: Right. There is one that's given by the Ninth Circuit and we
18 believe the wording of that is a little bit stronger and we would rather that instruction
19 be given to the jury than the instruction submitted.

20 THE COURT: But I think the one the State proposed is one that's been
21 utilized here in Nevada.

22 MR. ALTIG: Okay.

23 MR. STANTON: And Judge, I believe -- just for the record, I believe the
24 State's proposed that begins a witness who has is a more complete articulation of
25 the law for jurors not only to understand what an expert is but also how to consider

1 and weigh their testimony.

2 THE COURT: Doesn't this one come out of the Nevada books for jury
3 instructions?

4 MR. STANTON: Is it a pattern instruction in the Nevada, yes.

5 THE COURT: It's one of the ones that's been approved.

6 MR. ALTIG: Right, and the instruction I submitted, Your Honor, is a pattern
7 instruction for the Ninth Circuit Federal Courts and so that's why we were asking for
8 that one. There's some wording in there that we think is a little bit more significant
9 regarding experts' experience and education and things like that.

10 THE COURT: You know, I'm going to go ahead and use the one that's been
11 approved here in Nevada which is the State's proposed. We'll make this a court's
12 exhibit.

13 Okay, Mr. Altig, what else do you have?

14 [Court's Exhibit 1 admitted]

15 MR. ALTIG: That was the only other instruction I believe that we had issues
16 with.

17 THE COURT: Okay.

18 [Colloquy between counsel]

19 THE COURT: That's it?

20 MR. STANTON: Judge, there is one other matter on instructions. On the
21 one just prior to the one that the expert witness at least in the order --

22 THE COURT: Oh, hold on. Now I have to count back, but yeah, which --
23 what's wrong with it?

24 MR. STANTON: There's nothing wrong with it, but just while we're settling it,
25 this is an instruction that has to be affirmatively asked for or declined by the

1 defense --

2 THE COURT: About testifying?

3 MR. ALTIG: Oh, I'm sorry.

4 MR. STANTON: Correct.

5 MR. ALTIG: We were affirmatively asking for that one at this particular point.

6 THE COURT: About the defendant's right not --

7 MR. ALTIG: Yes, Your Honor.

8 THE COURT: -- to testify?

9 MR. ALTIG: I'm sorry, yes.

10 THE COURT: Okay.

11 MR. ALTIG: And there was one other issue that Ms. Von Magdenko brought
12 to my attention. It's with regard to the State's requested felony murder rule
13 instruction.

14 THE COURT: Which one is that?

15 MR. ALTIG: It's one, two, three, four, five, six, seven pages back from the
16 beginning.

17 MR. STANTON: How does it begin?

18 MR. ALTIG: There are certain kinds of murder.

19 THE COURT: Doesn't that come with a statute? Okay, what's the --

20 MR. ALTIG: I think the --

21 THE COURT: -- dispute?

22 MR. ALTIG: -- the issue is, Your Honor, that the State is alleging not only
23 that there was an act of child abuse, but that there was a failure to receive -- failure
24 to obtain medical treatment allegation in the information and that that felony murder
25 rule may cause some -- or cause some issues with regard to the jury's deliberation

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1 when deliberating whether or not he received medical treatment or was a person
2 obligated to seek out medical treatment. The child died from that medical treatment
3 or from the lack of medical treatment and therefore it's murder and without there
4 being any kind of overt act.

5 THE COURT: I don't really -- I'm sorry, I don't really understand your
6 objection. I'm sorry, please --

7 MR. ALTIG: It's just that there could be --

8 THE COURT: -- help me understand.

9 MR. ALTIG: -- some potential confusion with regard to the way that the
10 information is pled. The information's pled that not only that there was an overt act
11 on the part of the defendant causing bodily harm but also that there was a lack of
12 medical treatment -- it says and/or a lack of medical treatment and I believe that the
13 issue being raised would be that there's some potential confusion that the jury
14 could take the fact that the defendant may have been a person obligated to seek
15 out medical treatment didn't and then through that particular statute say that is
16 murder in and of itself without there being any overt act on his part to do anything.
17 That's the objection.

18 THE COURT: Okay. By the State?

19 MR. STANTON: Well, Judge, I got to join the Court at least to the extent that
20 I'm a little confused about the objection to the instruction. It is an accurate
21 statement of the law in Nevada, and the law in Nevada is and was expressly
22 passed by the legislature that child abuse is first degree murder. That is statutorily
23 defined. That's why under the theory -- the sole theory in this case of child abuse
24 murder that the malice involved need not be express; that it is implied by the
25 conduct and that conduct has been legislatively codified.

1 And when counsel says an overt act, I'm not sure if he's attempting to
2 draw a distinction between a physical act of abuse versus some failure or omission
3 to act. But I -- I don't want to speculate, but --

4 THE COURT: Is there -- I'm sorry. In instructions, is there a -- is there the
5 definition of child abuse in the statute?

6 MR. ALTIG: The instructions do instruct on child abuse. They do not instruct
7 on the -- that particular element on the failure to receive medical care.

8 THE COURT: Well the jury's going to first have to determine whether or not
9 there's child abuse -- those injuries are child abuse or not.

10 MR. ALTIG: Right.

11 THE COURT: I don't see where you're talking about in the -- I'm looking at
12 the instruction with the information. Where is the receive care --

13 MR. ALTIG: The information -- Your Honor, the instruction with the
14 information reads --

15 THE COURT: Oh, defendant did fail to seek medical care for the said Brodie
16 Aschenbrenner. Are you --

17 MR. ALTIG: Right.

18 THE COURT: -- disputing the fact that he would have had an obligation to
19 provide care?

20 MR. ALTIG: Yes. That's one of our disputes --

21 THE COURT: But isn't there an obligation to provide assistance if you create
22 the injury?

23 MR. ALTIG: That would assume that he created the injury.

24 MR. STANTON: Well, in addition -- but that's a question of fact. In addition,
25 he is the sole caretaker at operative time periods of this minor child and I think that

1 testimony currently stands uncontroverted to this jury. But I still don't understand
2 the argument of why this is going to lead confusion to the jury of consideration of
3 the felony murder rule.

4 THE COURT: Because I think that if they believe the mom did it but the
5 boyfriend should have taken him to the doctor, that they'll tag him with the murder --

6 MR. ALTIG: Yes, Your Honor.

7 THE COURT: -- even though they don't think he committed the murder.

8 MR. ALTIG: Yes, Your Honor. That's the confusion.

9 MR. STANTON: Okay, but yeah --

10 THE COURT: I can see that --

11 MR. STANTON: It's not pled that way and nor do I think the instructions of
12 law speak to that.

13 MR. ALTIG: Well it is -- it is pled and/or suffered head injuries and the
14 defendant failed to seek medical care for said Brodie Aschenbrenner. The issue is
15 then does the jury take that part of it, the State's proved that element, and then say
16 well because he failed to seek medical care --

17 THE COURT: Frankly I agree with you.

18 MR. ALTIG: -- that's felony child abuse, felony child abuse means first
19 degree murder, he's convicted of first degree murder when he hadn't done it, mom
20 did it. Or somebody else did it.

21 THE COURT: Actually I agree with the defendant. I mean the -- it's -- based
22 on the evidence presented, it's going to come down there's two people near that
23 child within that window. It was either the mother or the defendant. So I do think
24 that and but you're claiming that he actually did the act versus the mother actually
25 doing the act and I guess there's always the possibility that the jury, like the Court

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1 did, could consider that the mother did the act but he should have and failed to take
2 the child for medical assistance. So I do think it's confusing.

3 MR. ALTIG: Right.

4 THE COURT: And I think it would be confusing given the fact that there's
5 really been no testimony and I don't anticipate there will be testimony about the
6 obligation of an individual to seek out medical care.

7 MR. STANTON: That's correct, Your Honor.

8 MR. ALTIG: That is correct.

9 THE COURT: So I think that it should come out.

10 MR. STANTON: Okay. What should come out, the instruction as a whole or
11 to clarify the --

12 THE COURT: No, I think the only -- and I'm sorry, I didn't mean to cut you off
13 if I did. I think if I'm understanding Mr. Altig, on the jury instruction that has the
14 section from the information, it's on line 24, defendant did fail to seek medical care
15 for the said Brodie Aschenbrenner. There's no evidence on that at all during the
16 case.

17 MR. STANTON: Okay.

18 THE COURT: I don't see any other language regarding the failure to seek
19 medical care. Do you, Mr. Altig? Or am I --

20 MR. ALTIG: No, Your Honor.

21 THE COURT: What?

22 MR. ALTIG: No, Your Honor.

23 THE COURT: Okay. So then that should be removed as it doesn't conform
24 with the evidence.

25 MR. ALTIG: That would correct the -- and then the instruction would be fine

1 then.

2 THE COURT: Okay. So with that being removed, is there -- are there any
3 other issue with respect to the jury instructions?

4 MR. STANTON: Judge, there's only one additional one. I provided your
5 court this morning the statutory definition of substantial bodily harm. I don't know --

6 THE COURT: Okay.

7 MR. STANTON: -- if the Court got that. I have a clean copy here.

8 THE COURT: I would like the copy.

9 Is there any objection to this one?

10 MR. ALTIG: Your Honor, no, that's the -- what I believe to be the --

11 THE COURT: It's usually statutory.

12 MR. ALTIG: -- statutory definition of that. The only issue -- the only question
13 I have just for clarification is what actual lines are we striking on the information
14 page?

15 THE COURT: It would be line 24, the end of line 24 going 25, defendant did
16 fail to seek medical care for the said Brodie Aschenbrenner.

17 MR. ALTIG: Okay. Thank you.

18 MR. GIORDANI: It's going to have to start --

19 MR. STANTON: Start a little bit before that, Judge.

20 THE COURT: Let's see.

21 MR. ALTIG: At the and/or?

22 MR. STANTON: Where it says -- yeah, right above it, and/or after
23 determining because that kind of sets up that --

24 THE COURT: Oh, yeah, you're right. I'm sorry, I didn't read that --

25 MR. ALTIG: So line 23 --

1 THE COURT: -- all that together.

2 MR. ALTIG: -- starting at the and/or. Okay.

3 THE COURT: Uh-huh. Yes. Okay, so that's it --

4 MR. STANTON: Now, Judge, would you like me to do that and provide it to
5 the Court or I provided the WordPerfect to the Court. How would you like me to do
6 that?

7 THE COURT: I would like for you guys to do the corrections.

8 MR. STANTON: Okay.

9 THE COURT: And I'll tell you why I have you guys do it. I know other
10 departments do it, but you know, if something were to be done in error in the jury
11 instructions, I don't want it on us.

12 MR. STANTON: Yeah. Fair enough.

13 THE COURT: You guys can do it. So what I do is go through -- now that we
14 have jury instructions that are stipulated upon or settled by the Court, once you get
15 the final packet, please go through together and number them and the reason I do
16 that is so that you guys can make sure that everything is in fact in the packet of jury
17 instructions which will ultimately be marked as the originals.

18 MR. ALTIG: Thank you.

19 THE COURT: And then once that's done, we'll just see you guys at one.

20 MR. ALTIG: Yes, Your Honor.

21 MR. STANTON: And as far as the timing goes, there's one additional issue --
22 may I approach?

23 THE COURT: Yeah.

24 MR. STANTON: This is the report prepared by the defense expert that I
25 believe is going to testify this afternoon. His last name is Arden. I've had

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1 somewhat of a detailed discussion with counsel before you Court -- the Court came
2 into session and they've assured me that there is going to be no elicited testimony
3 through this witness that goes outside the four corners of his report. And so
4 obviously I take them at their word. That is a significant concern of the State's.
5 The State would object to any testimony in the form of it being done out loud in front
6 of this jury and if the State believes it, obviously we're going to object, ask the jury
7 be excused and to explore the area.

8 But we went over with it so that there's I don't believe a
9 misunderstanding between the State and the defense that he rendered this opinion
10 over a year ago in writing that has been provided timely to the State. I've reviewed
11 it in detail a number of times. It's been discussed with Dr. Gavin prior to her
12 testimony and thus, I believe, pursuant to the rules of evidence and to the notice of
13 expert witnesses, this witness is confined to the subject matter as expressed in his
14 report. And once again, defense counsel have assured me that that's going to be
15 the case.

16 With that, Your Honor, I don't imagine that the length of the testimony
17 -- I believe they're going to recall Jennifer Lee, the defendant's sister, and then
18 they're going to call Mr. Arden, and then that may be their last witness. Obviously
19 we have the issue of the defendant which I think we should take up now and then it
20 would be my recommendation for timing that we then charge the jury this afternoon
21 so that when we come in on Monday at 9:30 I would presume or something close --

22 THE COURT: Tomorrow's Friday.

23 MR. ALTIG: Friday.

24 MR. STANTON: Or Friday. I'm sorry. We come in on Friday at 9:30 that we
25 could go directly into closing arguments.

1 THE COURT: I'm fine with that. If the time -- the time allows, I'm fine with
2 that.

3 Counsel on the report?

4 MS. VON MAGDENKO: I'm not planning on asking him anything outside of
5 his report, Your Honor.

6 THE COURT: Okay. And that rule's consistent in civil and criminal cases.

7 MR. ALTIG: There --

8 MS. VON MAGDENKO: Yes.

9 THE COURT: Here let me give the State --

10 MR. ALTIG: One --

11 THE COURT: -- back your copy of the report.

12 MR. ALTIG: One other issue with regard to Dr. Arden. He does have -- and I
13 spoke to the State about this. They have received a copy of it sometime ago and I
14 showed them a hard copy of it today. He does have a PowerPoint presentation he
15 needs to use for purposes of explaining his testimony. It's more demonstrative in
16 nature. I don't believe the --

17 THE COURT: And the State seen it?

18 MR. ALTIG: The State has.

19 THE COURT: Okay.

20 MR. ALTIG: I don't think they have any objection to him using it for
21 demonstrative purposes.

22 MR. STANTON: Yes, that it's not going to be an admitted exhibit, but that it
23 can be used to assist in his testimony before the jury.

24 THE COURT: That's fine. Anything else we need to address?

25 MR. ALTIG: One other issue, Your Honor, and I don't mean to belabor an

1 issue and beat a dead horse, but I would -- just so the record's clear, I need to
2 renew the motion for mistrial. I understand Your Honor's --

3 THE COURT: On what grounds?

4 MR. ALTIG: After the testimony of Gavin, State's expert, that expert testified
5 very clearly that the injuries that were photographed on that child were -- the child
6 was not in the same condition when the child was alive as the injuries documented
7 on that child in the photographs that were displayed over and over and over again.
8 Those photographs were used by the State to show witness after witness after
9 witness and basically asking them is this the way Brodie looked the last time you
10 saw him alive and they said no. Their expert came and took the stand and straight
11 up said he wouldn't have looked that way because the images don't depict him the
12 way he would have looked when he was alive, the injuries are more significant,
13 they're more pronounced, things like that.

14 THE COURT: But what she did not say is that all those additional injuries
15 other than the ones that were previously identified by the witnesses and their
16 testimony, she did not say those suddenly would have occurred at the time of death
17 versus being before.

18 MR. ALTIG: Right, no, and I --

19 THE COURT: She just didn't know --

20 MR. ALTIG: Right.

21 THE COURT: -- really.

22 MR. ALTIG: And I understand that your ruling was that there was some
23 defense put forward in the opening statement that these things may have been
24 accidental and you were allowing the -- that for that purpose and I understand Your
25 Honor's ruling. I just wanted to make sure I made a record regarding that and --

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1 THE COURT: Okay, and I -- again, I think that it goes to the weight versus
2 the admissibility and I -- certainly I think it's fair game at the time of closing --

3 MR. ALTIG: Okay.

4 THE COURT: -- to focus in on those aspects of the testimony.

5 MR. ALTIG: Thank you very much.

6 THE COURT: Anything else?

7 MR. STANTON: No, Your Honor.

8 THE COURT: All right. Thank you.

9 MR. ALTIG: Thank you.

10 MS. VON MAGDENKO: Thank you, Your Honor.

11 [Off the record at 11:10 a.m.]

12 [Proceedings resumed at 1:19 p.m.]

13 [Outside the presence of the jury]

14 THE COURT RECORDER: Okay, on the record.

15 THE COURT: Okay.

16 MS. VON MAGDENKO: I guess we won't need a break because I'm going to
17 turn it on right now so --

18 THE COURT: Is everyone ready? We have the jury here.

19 MR. STANTON: State's ready.

20 THE COURT: By the defense?

21 MS. VON MAGDENKO: Your Honor, we're ready.

22 THE COURT: Okay.

23 MS. VON MAGDENKO: Maria, I can plug this in even though I'm going to
24 use this -- the Elmo first?

25 THE COURT: Would you yell at Jason to please -- can you tell Jason it's

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1 time to bring the jury in, please? Thank you.

2 THE MARSHAL: Ready?

3 THE COURT: And you rested last time, right?

4 MR. STANTON: We did.

5 THE COURT: Okay. So this will begin their case in chief.

6 MR. STANTON: Yes.

7 THE MARSHAL: District Court XXIII jury is present.

8 [Jury in at 1:20 p.m.]

9 THE COURT: Welcome back, ladies and gentlemen. When we were in here
10 last, the State rested its case in chief and now what's going to happen is the
11 defense is going to present their case.

12 Your first witness, please.

13 MS. VON MAGDENKO: Your Honor, we would call Jennifer Lee, please.

14 THE COURT: Okay.

15 [Pause]

16 THE COURT: She'll need to be re-sworn.

17 THE CLERK: Yes, Your Honor.

18 THE COURT: Good afternoon, Ms. Lee. Please raise your right hand.

19 THE MARSHAL: Please raise your right hand and be sworn in by our clerk.

20 JENNIFER LEE

21 [having been called as a witness and being again duly sworn, testified as follows:]

22 THE CLERK: Please be seated. State and spell your first and last name for
23 the record.

24 THE WITNESS: J-e-n-n-i-f-e-r L-e-e.

25 THE COURT: Whenever you're ready, counsel

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1 MS. VON MAGDENKO: Thank you, Your Honor.

2 DIRECT EXAMINATION OF JENNIFER LEE

3 BY MS. VON MAGDENKO:

4 Q Ms. Lee, you had testified previously in this case. Do you recall that?

5 A Yes.

6 Q Okay. And some questions were asked of you about the Monday
7 before Brodie's death?

8 A Yes.

9 Q And you testified that you were at the pool and Brodie was there
10 Monday?

11 A Correct.

12 Q What time was that?

13 A Between 11 and 2:30.

14 Q What time did you arrive at the pool?

15 A About -- about 10:30.

16 Q And who were you with?

17 A My two sons.

18 Q And when did Brodie arrive?

19 A Right about opening, right before 11.

20 Q And was Brodie with anyone?

21 A With Michael and Arica.

22 Q And did you bring any food with you to this pool?

23 A Michael and Arica brought Little Caesars pizza.

24 Q How many pizzas was it?

25 A I believe one.

1 Q And at some point did Michael and Arica sit down for that pizza?
2 A Yes, as soon as we walked in, we all sat down to eat.
3 Q And was Brodie with Arica at that time?
4 A Yes.
5 Q And did Brodie eat his Little Caesars?
6 A No.
7 Q And you had testified previously generally about Brodie's physical state
8 that day that -- while at the pool. Can you be more specific?
9 A He had a big lump on his head.
10 Q Where was that?
11 A The corner. This is the side facing him, I believe.
12 Q So the left side of his head?
13 A Correct. And he had a cut under his lip a little bit and a little bruise on
14 his cheek.
15 Q And did Brodie indicate to you anything about his physical condition?
16 A He said he had a headache, but that was really all he had said.
17 Q Was Arica present when he said that?
18 A Yes.
19 Q And were there anything going on with Brodie's eyes?
20 A They were kind of droopy at the end when we were getting ready to
21 leave about 2:30.
22 Q And what do you mean by droopy?
23 A The corners were kind of sagging down.
24 Q And how old were your children at this time?
25 A Four and seven.

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1 Q And did you have any discussions with Arica about Brodie's physical
2 health at that time?

3 A I told her maybe talk -- take her -- take him to the doctor.

4 Q Okay. And what was her response?

5 A She wasn't sure that it was that bad. So I asked her to maybe call the
6 pharmacist just to see if maybe it was the pinkeye medication with the chlorine, just
7 to get some kind of explanation.

8 Q What was her response?

9 A She said okay.

10 Q And you had occasion to see Brodie a second time that Monday,
11 correct?

12 A Correct.

13 Q What time was that?

14 A I believe it was 5:00. It was Monday Night Baseball, I believe. Or it
15 was a baseball game. Yeah, Monday Night Baseball.

16 Q Five p.m.?

17 A Yes.

18 Q And where was that?

19 A At Danny's house.

20 Q What time did you arrive?

21 A The game had already started, so 5, 5:15.

22 Q And when did Brodie arrive?

23 A About half an hour later-ish.

24 Q And did his physical condition change that you saw?

25 A Not really.

1 Q And who did Brodie arrive with?
2 A With Michael.
3 Q And was any food provided to Brodie at that baseball game Monday
4 night?
5 A Yes.
6 Q What was it?
7 A Chicken parmesan.
8 Q And did Brodie actually in fact eat the chicken parmesan?
9 A No.
10 Q Did Brodie say anything regarding his not eating?
11 A No.
12 Q And after -- when did you find out Brodie died?
13 A Wednesday morning.
14 Q At approximately what time?
15 A A little after nine.
16 Q And what did you do when you found out?
17 A We were kind of just standing around trying to find out what was going
18 on and what was happening.
19 Q How did you find out?
20 A Michael.
21 Q Okay. Actually going back to the pool Monday morning, did -- was
22 Brodie acting like his normal self?
23 A He wasn't as rambunctious. He was just sitting with Arica in the water.
24 Q And did he want to be around you at all?
25 A Not really.

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1 Q Did he say anything to you?
2 A Not really. He was really quiet.
3 Q And was that normal for Brodie?
4 A No.
5 Q Back -- what time -- Michael told you that Brodie had died?
6 A Correct.
7 Q And what did you do after you found out?
8 A We cried a little bit, we hugged each other, and we stood around and
9 waited for Arica.
10 Q Where were you when this was happening?
11 A Right out front of the apartment.
12 Q Where was Arica?
13 A She was being questioned in the police car.
14 Q Did -- what happened after Arica was in the police car?
15 A When she came out, she was extremely upset.
16 Q Did she say anything while she was upset?
17 A She said oh my god, they're going to blame me for this.
18 Q Did you say anything in response?
19 A No.
20 Q Did she say anything else at that time?
21 A No.
22 MS. VON MAGDENKO: I'm going to -- Your Honor, if the Court will allow, I'm
23 going to approach the witness with a photograph for --
24 THE COURT: Have you shown it to the State?
25 MS. VON MAGDENKO: Yes, I have. It's Defendant's Proposed Exhibit G.

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1 THE COURT: That's fine.

2 BY MS. VON MAGDENKO:

3 Q Ma'am, have you seen this photo before?

4 A Yes.

5 Q And do you know who took the photograph?

6 A I believe it was my fiancé.

7 Q Okay. And did you -- were you present when the photograph was
8 taken?

9 A Yes, I'm -- I'm in it.

10 Q You're in it. Okay. And is this a fair and accurate representation of the
11 photograph as it was taken since you were in it?

12 A Yes.

13 Q Okay. And do you know when it was taken?

14 A It was April, right before all this happened. It was my son's birthday
15 party.

16 Q Oh this is your son's birthday party?

17 A Correct.

18 Q And that be 2011?

19 A Yes.

20 Q Can you just write that on there?

21 A Uh-huh.

22 MS. VON MAGDENKO: Your Honor, I would seek to move Defendant's
23 Proposed Exhibit into evidence.

24 MR. STANTON: State's -- Defense G. The State has no objection.

25 THE COURT: That's fine. Would you like to publish?

1 MS. VON MAGDENKO: Yes, Your Honor.

2 THE COURT: Permission granted.

3 [Defendant's Exhibit G admitted]

4 BY MS. VON MAGDENKO:

5 Q So this photograph was taken two months before Brodie's death?

6 A Correct.

7 Q And I don't -- is that out of focus?

8 A It's a little blurry.

9 Q Oh. Auto focus. And can you say who is this in the photo?

10 A It's Michael.

11 Q And who is this?

12 A It's Brodie.

13 Q And Brodie's sitting on Michael lap?

14 A Correct.

15 Q Was that common?

16 A Yes.

17 Q Did -- what were the nature of the interactions between Brodie and
18 Michael --

19 A They were always playful. Michael wanted to have fun with him. He
20 would tickle him, he would, you know, shoot squirt guns with him, anything to have
21 fun.

22 MR. STANTON: And, Your Honor, could we have some foundation as to the
23 time period counsel's question?

24 THE COURT: Please.

25 BY MS. VON MAGDENKO:

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1 Q When was the first time you saw Brodie and Michael interact with each
2 other?

3 A As soon as Arica and Michael started dating.

4 Q And when was that?

5 A I wouldn't have a -- October I believe, but I'm not a hundred percent
6 sure.

7 Q So approximately October 2010?

8 A Correct.

9 Q And this photo -- and then you -- and when did that interaction end?

10 A With -- between Michael and Brodie?

11 Q Yes.

12 A It -- it didn't.

13 Q And during that time period from the time that -- of October 2010 until
14 Brodie's death, did the nature of Michael's interaction with Brodie change at all?

15 A No.

16 MS. VON MAGDENKO: Court's indulgence?

17 THE COURT: Sure.

18 [Colloquy between counsel]

19 MS. VON MAGDENKO: I have no further questions.

20 THE COURT: Cross.

21 MR. STANTON: No questions.

22 THE COURT: Thank you, ma'am, for your time. You're free to go.

23 The next witness, please?

24 MS. VON MAGDENKO: Your Honor, we would like to call Dr. Arden.

25 THE COURT: Okay.

1 [Pause]

2 THE MARSHAL: Doctor, remain standing, please raise your right hand, be
3 sworn in by our clerk.

4 JONATHAN ARDEN

5 [having been called as a witness and being first duly sworn, testified as follows:]

6 THE CLERK: Please be seated. State and spell your first and last name for
7 the record.

8 THE WITNESS: I'm Dr. Jonathan Arden. First name is J-o-n-a-t-h-a-n. My
9 last name is A-r-d-e-n.

10 THE COURT: Whenever you're ready.

11 MS. VON MAGDENKO: Thank you, Your Honor.

12 DIRECT EXAMINATION OF JONATHAN ARDEN

13 BY MS. VON MAGDENKO:

14 Q And Dr. Arden, would you tell the jury your educational experience and
15 work experience?

16 A I attended college for two years at the Johns Hopkins University in
17 Baltimore and then for two years at the University of Michigan where I received my
18 Bachelor of Science degree in 1976. I then attended and graduated from the
19 University of Michigan Medical School, receiving my M.D. or Doctor of Medicine in
20 1980. I then followed that with two medical specialty training programs, what you
21 commonly hear people call residency training programs. The first of those was a
22 three-year program in the field of anatomic pathology which took place at the New
23 York University Medical Center in New York City, and the second was a one-year
24 program in forensic pathologic and that took place at the Office of the Chief Medical
25 Examiner for the State of Maryland. That's located in Baltimore.

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1 Subsequent to completing my education and training, I have become
2 board certified by the American Board of Pathology in 1985 in both anatomic and
3 forensic pathology. And then I embarked upon a career as a medical examiner. I
4 spent a total of 20 years working as a government medical examiner in four different
5 offices. I had shorter stints in Suffolk County, New York and the State of Delaware.
6 Then I spent nine years working for the City of New York in the Office of Chief
7 Medical Examiner where I finished as the first deputy chief medical examiner or the
8 second in command for that system. I followed that with about five and a half years
9 as chief medical examiner in Washington, DC.

10 At the completion of that 20-year block, I then embarked primarily on a
11 private practice, in essence a consulting practice, the type of work that brings me
12 here today. And so I have a private consulting practice in forensic pathology and
13 medicine which has been ongoing since 2004.

14 Overlapping with that, in the -- in the earlier portion of my consulting
15 career, I spent about 18 months with a part-time appointment in the medical
16 examiner system for Northern Virginia where I live. That was more of a community-
17 based kind of position. I wasn't doing autopsies for them, but I was functioning as
18 they have physicians in the community kind of the -- the frontline, the eyes and the
19 ears, making case decisions and investigations and so on.

20 And for the past six years, I have a part-time appointment with the
21 Office of the Chief Medical Examiner for the State of West Virginia and that -- that is
22 still active and ongoing, and in that position I do function the same that a medical
23 examiner does so when I make my -- my visits to West Virginia, I perform autopsies,
24 I sign death certificates, I author autopsy reports, I participate in their conferences,
25 and I'm available to testify in court on behalf of the work that I do for the medical

1 examiner.

2 Q So as part of that you provide testimony for the government in the State
3 of West Virginia?

4 A Yes, well as recently as a few days ago, I appeared as a witness in a
5 criminal case called by the prosecution based on work I did for the State of West
6 Virginia. In my private consulting work, I do work in both civil cases and criminal
7 cases. In the criminal cases, most of my -- most -- most of the times I'm retained by
8 the defense because the prosecution normally has the local medical examiner or
9 coroner as an expert or a witness, but I do occasionally get consulted and retained
10 by prosecutors as an outside consultant and on a few occasions I've been asked to
11 testify in their cases as well.

12 Q And do you have a special area of expertise or interest when -- in the
13 area of forensic pathology -- that's a broad topic, is it not?

14 A It is, and I do have an area of special interest in my -- in my career in
15 forensic pathology and the area in particular is pediatric forensic pathology. It's
16 something I've pursued going back to medical school and residency and my training
17 days and then throughout my career in terms of pursuing additional specific
18 casework in -- in child and infant deaths in terms of working on child fatality review
19 teams.

20 In I think I was -- I forgotten the year. I think it's 1991 I -- I -- sorry, I
21 totally forgotten the -- I -- I chaired one of our national meetings. It was a half-day
22 meeting in New York City for the National Association of Medical Examiners and the
23 topic that I lectured on and that I created the seminar about was related to child
24 abuse deaths. I've taught about sudden infant death, child abuse and neglect, other
25 pediatric forensic topics, and I've -- I worked as a consultant on many such cases.

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1 Q And in this case were you retained as a consultant?

2 A Yes, ma'am.

3 Q And did you review anything as part of that?

4 A I did. I was provided materials primarily relating to the autopsy on this
5 child, Brodie, so I had the autopsy report. That came with several consulting reports
6 or -- or additional reports such as the neuropathology report which is the
7 examination of the brain. The separate exam of the eyes was also done by that
8 same neuropathologist. There was a consulting report from a radiologist who read
9 the x-rays or the -- the imaging studies that were part of the autopsy.

10 I was also provided and reviewed the photographs from the autopsy. I
11 was provided and reviewed those x-rays or imaging studies from the autopsy. I was
12 provided the microscopic slides from the autopsy which I personally examined. I
13 also received the -- there were statements made by various people. I had those
14 statements. I had the affidavit for the warrant which had the summary of the law
15 enforcement investigation concerning the death. I think I saw -- I think there were
16 several other photographs that I saw of the child during his life as well.

17 Q And can you approximate how much time you have spent on this case?

18 A I have spent about 30 hours of consulting time prior to today working on
19 this case.

20 Q And that's in formulating your opinions?

21 A Reviewing the materials, formulating my opinions, discussing them with
22 you. Yes.

23 Q And you testified that you actually had slides of Brodie? Can you
24 explain that to the jury?

25 A Sure. Part of the autopsy procedure may be microscopic examination

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1 of various organs or tissues if there is a sense that there may be findings to be
2 observed that are not visible to the naked eye, they require the -- the magnification
3 of the microscope. So microscopic examination is not a requirement in every
4 forensic autopsy, but it is commonly used especially for certain types of autopsies.
5 Childhood autopsies being one of those -- child death autopsies being one of those
6 areas in which microscopic examination is commonly used.

7 So in order to do a microscopic examination, the pathologist takes
8 samples of the tissues or organs, the -- the -- the part you want to look at under the
9 microscope, and those are sent to a laboratory where they are processed and the --
10 the tissue is embedded in a little block of wax actually which is what holds it and
11 then there's a cutting machine that makes slices that are less than paper thin.

12 Those slices are then mounted on to little glass slides. They're --
13 they're pieces of glass that are usually about (indicating) I guess roughly two and a
14 half by three-quarters of an inch, and once the tissue has then been mounted on
15 those, again it goes through chemical processing in the lab to stain the tissues
16 because otherwise it would just be clear and you end up with a -- that little slide of
17 glass that has the tissue on it and that's the -- the -- the thing that allows you then to
18 put it on to the microscope, shine a light through it, put the different lenses on it, and
19 examine the features.

20 Q And who provided you with the actual tissue samples of Brodie?

21 A The Clark County Coroner.

22 Q And what were you asked to do in this case?

23 A I was asked to review the circumstances of the death and -- and
24 particularly the autopsy and all of those other related documents and things such as
25 photographs and -- and x-rays and so on and slides, and to provide an independent

1 assessment of the autopsy and the autopsy findings and to provide an independent
2 interpretation of those findings. As it has turned out, the -- the single biggest issue
3 that I've been asked to deal with and provide opinions on has to do with the
4 evidence of the ages of some of those injuries.

5 Q And were you able to come to any findings?

6 A Yes, I was.

7 Q And what were those findings?

8 A Well in -- in very brief summary, the two areas of injury that I particularly
9 looked at -- I -- I mean I've looked at all of the injuries and the whole autopsy, but the
10 -- the two areas of injury that I particularly focused on were the injuries in the scalp,
11 which were areas of bruising which is evidence of impact to the scalp, and the -- the
12 -- the process that was going on inside the abdominal cavity as a result of the
13 transection or the -- the separation in the duodenum which is part of the small
14 intestine. So the process that resulted from the tearing open of the bowel was
15 peritonitis which is a descriptive word that simply means inflammation of the
16 peritoneum or the peritoneal cavity and that's the proper anatomical name for the
17 abdominal cavity where the intestines are residing and so on. So I was looking most
18 importantly at the evidence of response and therefore age -- age or ages of the
19 scalp hemorrhages and the peritonitis.

20 Q And if we can go to the scalp hemorrhage, what are you looking at to
21 determine the age of the injury?

22 A Well in the scalp hemorrhage and in the peritonitis and in general, there
23 are several kinds of features that one may see -- some of them with the naked eye,
24 but particularly with the microscope -- that allow you to gauge the response of the
25 body to the injury. And so the first thing that happens if you have an injury if you

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1 disrupt tissue, you break blood vessels in most injuries and you have bleeding. And
2 we use the term hemorrhage for that, but hemorrhage is nothing more than a fancy
3 word that means bleeding. So one thing to look at is the bleeding; is there bleeding
4 or not, is there a lot of bleeding or not, is there any evidence that those red blood
5 cells look like they have started to break down, which they will do eventually, or do
6 they look brand new and crisp and fresh when you look at them under the
7 microscope? So that's -- that's one phase and I'll -- I'll come back to the -- the other
8 evidence that relates to bleeding in a second.

9 The first response once there is an injury and there's bleeding is what's
10 called inflammation, and the body sends out cells. Most of those cells start out their
11 lives as white blood cells. And there's different kinds of inflammatory cells. So they
12 -- they rush to the area that's been damaged and they start to try to mop up the
13 damage and -- and control the damage and basically the response to trying to put
14 an end to the process and to -- to clean up, if you will, the damage that's been done.

15 So we can recognize under the microscope, for instance, there's a
16 certain kind of cell that is called a -- a neutrophil and the neutrophils -- and they
17 have several different names for them, but neutrophils are like the first responders.
18 They come rushing in first when you have an injury or infection and they're -- they
19 are the hallmark of the beginning of the inflammatory response, what we call the
20 acute inflammation. That's the early phase.

21 There's another wave of cells that will come and follow them and it
22 may start fairly early but becomes predominant in a couple of days time and those
23 second wave of cells, the proper name for those cells they're called macrophages.
24 But the important thing about them is that they -- they're like gobblers. They come in
25 to mop up the -- the damage and the diseased tissue. They literally engulf, eat it up,

1 and carry it away.

2 So when you start to see an inflammatory response under the
3 microscope that now has a substantial proportion of macrophages to go along with
4 those neutrophils, we're now getting into the second wave of response so this gets
5 called subacute. It's not quite acute anymore, but it hasn't gone all the way down to
6 an older phase which would be called chronic.

7 So you can separate acute, subacute and chronic inflammation by
8 looking at the kinds of cells under the microscope and which ones are predominant
9 and it gives you the sense of what phase you're in. And the different phases have
10 rough timeframes that go with them. This is not a precise, you know, I can put a
11 stopwatch on it kind of thing, but I can differentiate number one, this phase is usually
12 what happens from a few hours to a few days, the acute phase. The subacute
13 usually is starting in two or three days and may go on up -- up to possibly a week.
14 The chronic phase usually starts at about a week or so and can go on for long times
15 thereafter.

16 The other -- the only other two things I want to mention to give you the
17 full picture of what I look at under the microscope to try to put a timeframe or
18 sometimes a minimum timeframe on the response to this injury or that injury -- two
19 other things. One is I mentioned the hemorrhage, and one of the things that
20 happens when you have bleeding -- you now have red blood cells that have
21 escaped from the blood vessels. They're in the tissue. And the body wants to get
22 rid of them. They don't belong there.

23 So the body will send out inflammatory cells that start to gobble up and
24 break down the red blood cells. And one of the things that happens in the
25 breakdown process is that there's a protein inside your red blood cells called

1 hemoglobin and hemoglobin is a protein that contains iron and that is what carries
2 the oxygen in your red blood cells.

3 So when the inflammatory response starts breaking down these
4 escaped red blood cells, it chemically breaks down the hemoglobin. And there's
5 another protein that has iron in it that is the breakdown product of the hemoglobin
6 and sorry to throw a million big words at you here, but this breakdown product is
7 called hemosiderin. The important thing is that we can identify under the
8 microscope hemosiderin, the breakdown product, and you can sometimes just see it
9 in the regular ordinary slides, but you can also do a special stain on those slides that
10 highlights the iron containing compound. And it -- it -- it makes it bright blue so you
11 can see it easier.

12 So the important thing about this breakdown of hemoglobin and the --
13 and this other product and this positive iron staining is that it takes a certain amount
14 of time before that happens. And in fact, most of the literature will tell you it takes
15 about three days or so before you can see that under the microscope. You may be
16 able to see it in 48 to 72 hours, but -- and -- and there's also some literature that
17 says it's -- it may happen in -- in 72 hours, but in fact, it doesn't get easy to see until
18 maybe four or five days.

19 There's some older literature that says you start to see it readily under
20 the microscope at 90 hours. That's about three and a half days, almost four days.
21 But it's important because positive iron staining, the presence of that breakdown
22 product, is an indicator that something has been going on for at least two and
23 probably at least three days. So it's a good -- it's a good finding and it give -- gives
24 you a minimum age of something even if it doesn't give you an exact age.

25 And then the last thing is that all of this process I've just described for

1 you of inflammation and -- and mopping up the damage and carrying away the
2 debris and everything, if it goes on long enough, it melds smoothly into the actual
3 healing process where the body starts to send in connective tissue cells that literally
4 make like a structure. In some places they make a scar. But the next phase after
5 inflammation is healing where you -- you stabilize everything and if you can't rebuild
6 it the way it was, then you make a scar.

7 Q And with respect to this minimum two to three days, did you look that in
8 the head and in the abdominal area?

9 A Yes, ma'am.

10 Q Okay. And you had said that Brodie had suffered from peritonitis; is
11 that correct?

12 A Yes, he did.

13 Q Is that inflammation?

14 A Yes, peritonitis is a form of inflammation. It's a type of inflammation in a
15 particular part of the body.

16 Q And when you're talking about time periods, you're talking about the
17 time periods of inflammation?

18 A Yes, the time period that you can -- you can characterize looking under
19 the microscope at the inflammation, at whether or not there's positive iron staining,
20 whether or not there is evidence that it's -- it's getting into the -- the next phase of
21 healing, those are all the things that I can look at under the microscope and in fact,
22 those are what I was addressing in the slides from the head and from the -- from the
23 abdomen for Brodie.

24 Q And as part of this you looked at the coroner's autopsy report, correct?

25 A I did.

1 Q And what you're looking for to determine age, is that iron?

2 A The -- the iron or the positive iron staining is one of those factors.
3 That's the one that gives you that two or three day minimum timeframe.

4 Q And in your review did the coroner determine if there was any iron
5 staining?

6 A She reported some iron stains, not on all of the slides of injury, but on
7 some of them and she reported some of them as having a little bit of positive
8 staining, some of them as not having positive staining.

9 Q And you received slides from the coroner's office?

10 A I received a set of the regular stained slides from the coroner's office. I
11 -- that -- including the brain and eye slides. And I received what are called blank
12 slides, unstained slides from the coroner's office which I had to go take to a lab to
13 make my own iron stains.

14 Q And did you prepare any presentation to assist the jury in seeing what
15 you're saying?

16 A I did.

17 Q And would it be beneficial to show that to the jury?

18 A Yes, ma'am.

19 MS. VON MAGDENKO: Your Honor, permission to put that up for the jury to
20 see?

21 THE COURT: Is it the PowerPoint we discussed --

22 MS. VON MAGDENKO: Yes.

23 THE COURT: -- earlier? And that's the one -- it's been previously shown to
24 the State?

25 MR. STANTON: Yes, Your Honor.

1 THE COURT: And you --

2 MR. STANTON: And the State has no objection.

3 THE COURT: Okay, then that's fine, yes.

4 MS. VON MAGDENKO: Thank you, Your Honor.

5 Maria, if we can just --

6 [Colloquy between counsel]

7 BY MS. VON MAGDENKO:

8 Q And is this page 1 of your presentation?

9 A Yes, ma'am.

10 Q And what is on page 1?

11 A This is just the title to show you the -- the name of the case, and I'm
12 going to be demonstrating microscopic features related to the aging of the injuries to
13 Brodie Aschenbrenner and then it's got my name and actually, that's the date that I
14 made the PowerPoint, or the -- the month and year.

15 Q And what is the second slide?

16 A Yes, this slide now is -- is a brief text slide that summarizes actually
17 what I've said, the types of features that I look for, for evidence of inflammation,
18 evidence of -- of aging and response to injuries and bleeding. And so you see the
19 bullet point inflammation. The first -- first point under that are the cells that respond
20 to the site of the damage to limit it and remove the debris.

21 Next point I made is what I've already told you about the different kinds
22 of cells that come at different times. So you have neutrophils which are the acute --
23 I always call them the first responders. You may start seeing them as rapidly as
24 several hours and they may hang around or -- or be pretty obvious for as long as a
25 few days.

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1 Next bullet point down you see the word macrophages. Those are
2 those second wave or the mop up cells as I call them. They literally go in and -- and
3 gobble up things. And you may start to see some macrophages late in the first day,
4 but when they become numerous and they predominate in the response, then you're
5 talking two to three days. And it may -- that's the subacute phase I said may go on a
6 little longer.

7 Then the next point you see the word hemosiderin that I threw at you a
8 few minutes ago, and hemosiderin is the iron compound that we get from the
9 breakdown of the red blood cells. It's the breakdown of hemoglobin. And one of the
10 things you may see is hemosiderin that's already engulfed in a macrophage. It's
11 inside a cell that has gobbled it up. And if you have that kind of cell that has
12 gobbled up the hemosiderin, that's the word in parenthesis there. Those cells are
13 called siderophages and it takes even a little bit longer to get to the point of
14 siderophages as opposed to having hemosiderin just free in the tissues.

15 And the -- and the bold at the very bottom, positive iron staining, you
16 see I put the word blue in blue because when you look at the slide under the
17 microscope, the positive iron staining lights up blue and the rest of the background
18 ranges from pink to clear. So the blue becomes quite obvious to show you there's
19 positive staining there.

20 And you don't have to go back, but I -- it also said there what I've
21 already told you that 48 to 72 hours is -- is a very bare minimum -- that's your base
22 minimum before you start seeing hemosiderin or positive iron staining under the
23 microscope and there is literature that says even though you can see it that early
24 that in order to see it reliably or -- or see a lot of it, some people say it takes even
25 several more days.

1 Okay, now we've moved into I -- these are -- these are all photographs
2 that I took of the microscope slides from the autopsy of Brodie through my
3 microscope. So these are all his slides and in fact, what you're looking at now -- it
4 says scalp hemorrhage, subacute inflammation --

5 Q So we're actually looking at Brodie's cells?

6 A Yes. This is Brodie's tissue, this is Brodie's cells. What you're looking
7 at with the -- the mixture of basically pink and blue, this is the standard routine
8 staining for microscope slides that are -- is used by virtually all pathologists
9 everywhere.

10 You'll notice please at the lower left corner it says slide one. These are
11 the numbers assigned to the slides by the Clark County Coroner. Slide one and
12 slide two were two different areas sampled from the scalp hemorrhage. So just to
13 give you a background here, this is a fairly sort of a medium to high magnification.
14 The -- the kind of fat pink squiggles are part of the response or they're -- some of
15 those are collagen, the protein that makes the -- the connective tissue. But you see
16 -- even though they're not magnified very much, you see a lot of basically purple
17 dots scattered throughout there --

18 Q And just not to interrupt you, but you can actually hit the side --

19 A Ah.

20 Q -- screen and then make a circle.

21 A Okay.

22 MS. VON MAGDENKO: Your Honor, if I can approach the witness?

23 THE WITNESS: Actually if --

24 THE COURT: You may.

25 THE WITNESS: -- if we hit --

1 THE COURT: If you touch the screen, you can mark on it.

2 THE WITNESS: Oh, thank you.

3 BY MS. VON MAGDENKO:

4 Q I think if you go like that and then that.

5 A Okay.

6 Q And then that clears it.

7 A Excellent. So --

8 Q (Indiscernible) --

9 A So the little -- I'm going to put a few -- well, my arrows are -- here we
10 go. I'm trying to put a few arrows if -- you see I'm pointing at -- well, the first arrow is
11 not pointing at anything, but the top arrow, the bottom arrow you'll see that you --
12 you have little purple blobs, some of which have pink right around them. Each of
13 those purple blobs is the nucleus of a cell, an inflammatory cell, and in fact, if we hit
14 the next -- if you click next, there we go. I -- you see the -- the -- the label has come
15 in the box says neutrophils. Now the arrows are pointing to selected neutrophils.
16 Those are not all the neutrophils in the -- in the -- in the field that you're looking at
17 here, but those are just examples. And it may be hard for you to see from this
18 distance and I do have some other pictures we'll get to shortly that --

19 MS. VON MAGDENKO: Your Honor, can I bring the screen closer to the
20 jury? Right here?

21 THE COURT: Yeah, make sure you don't unplug anything. Is there enough --

22 THE WITNESS: Yeah, I don't think it's going to go very far.

23 MS. VON MAGDENKO: Okay. Is that -- can you all see that? In the back?

24 THE COURT: We have another screen up there. You want to turn that one
25 on?

1 MS. VON MAGDENKO: Yeah, can we turn that one on? Just so the jury
2 members over here can have a better view what the doctor's talking about.

3 THE WITNESS: I -- I do have some other pictures that are going to magnify
4 this more, but you'll see when we magnify it more each of the neutrophils that I've
5 put the arrow on now, it's nucleus looks like it's -- it's got multiple little labials. It
6 looks like a little cluster of grapes. That's the cardinal feature of a neutrophil or it's --
7 it's the easiest one to see. So --

8 BY MS. VON MAGDENKO:

9 Q And when you're talking about neutrophil, what's the age of a neutrophil
10 just for the jury? Because there's a lot --

11 A Neutrophils are those first responders.

12 Q Okay.

13 A These are things that start to be visible in the microscope within hours
14 and they're very prominent for a day or three, that kind of range.

15 Q And these are the grape looking ones?

16 A Little one -- look like little clusters of grapes.

17 Q Okay.

18 A If we hit the button one more time, please. Now you see I have also
19 pointed here with a label that says macrophages. Those are -- remember those are
20 the -- the second wave of responders, the gobbler cells. And if you look at the arrow
21 that's kind of to your lower left, you can see the -- the nucleus of the macrophage is
22 bigger and it's like a solid blob. And if you look at -- actually if you look at the arrow
23 for macrophage going straight up, the nucleus looks almost like a little kidney bean.
24 Doesn't look like a cluster of grapes, it looks like a little kidney bean. And these cells
25 are bigger than the neutrophils. They have a bigger pink area. That's the cell body

1 around it.

2 So this is just a demonstration. This is one small piece of that slide
3 magnified to a fair amount. A demonstration that we have a substantial number of
4 neutrophils and macrophages, hence my judgment that this is subacute
5 inflammation.

6 Q So the kidney bean shaped one, those are the two to three day old
7 ones?

8 A Yes.

9 Q So grapes are one to two days and the kidney bean shaped is two to
10 three days?

11 A Roughly, yes.

12 Q And these are minimum time periods?

13 A These are -- these are fair approximations. And again especially
14 because -- as I said, you can get a few macrophages early on, but because we're
15 looking at lots of them mixed in with the neutrophils, lots of macrophages -- and this
16 is representative of what I saw when I looked through all the slide. That's what
17 pushes us into calling this -- pushes me into calling this subacute and that's why I'm
18 now telling you that this is the -- this -- this alone is consistent with something that's
19 on the order of two to three days olds.

20 Q And so you have to have a lot of the kidney bean shaped ones?

21 A Yes.

22 Q And do you find a lot of the kidney bean shaped ones?

23 A I did. When I looked at the whole slide, I did. And in fact, I think we
24 have more examples coming up.

25 So this is another higher magnification from slide one and I think if you

1 push the button I think this one has labels also. Yes. See now I've put circles in
2 here circling clusters of macrophages. Those are not the only macrophages in the
3 picture, but the point of this picture is to tell you that as I look around, there are
4 many of them. Some places they're in clusters like this. This is why I've made the
5 judgment that this is subacute inflammation, the thing that gives you the two to three
6 day or a little older timeframe as opposed to acute.

7 Q So macrophage is the kidney bean which equal two to three days?

8 A Correct. When you see many of them, yes.

9 Q When you see many of them.

10 A Okay, let's go to the next one, please. See lower left we're still doing
11 slide one. Now, now you're going to see iron staining and you'll see most of the
12 background of the picture that you're looking at here is either clear or it's light pink
13 and you can -- you can see, even from a distance, there's blue showing up. There's
14 right down the center -- in the center and a little above it you can see some -- some
15 fairly obvious blue areas and if you notice, there's actually a little -- oops. My -- my
16 line's a little off on drawing on the screen, but to the left of this line in the upper
17 left-hand corner there's a little bit of a blue blush. There's blue here. There's some
18 blue blush over here. There's many other spots of blue that are faint and some that
19 are more obvious.

20 I -- if we hit the button, I forgot if I -- okay, I didn't -- I didn't put circles on
21 those. I did it on the screen for you. But again, picture on the screen now, slide
22 one, scalp hemorrhage, positive iron staining. I've now blown it up with a more
23 powerful lens. You're looking at it more closely. And again, you can see in lots of
24 places I'm making bad circles on the screen with my finger and I'm covering over
25 some of these, but I'll -- I'll take them out of the way in a second, but you see every

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1 one of these places I'm circling blue, blue, blue, blue, blue, more blue -- I haven't
2 circled all of the blue. Anyway --

3 Q So blue means two to three days old?

4 A Right. Positive iron staining tells us that we're identifying hemosiderin.
5 You don't get hemosiderin until at least 48 to 72 hours. Some books say 72 hours
6 minimum. You don't see it readily in the tissues under the microscope till at least
7 that timeframe. Some authorities say it's much easier to see it four to five days, but I
8 just want to be able to put a bare minimum on this as opposed to a precise
9 timeframe. So two to three days is the minimum to get iron staining like this.

10 Q And what's the maximum?

11 A Well, positive iron staining in some circumstances goes away in days or
12 weeks. In -- in some circumstances, the cells with the positive iron staining in them
13 hang around for years. There are some kinds of lesions, some parts of the body
14 where you can see positive iron staining in a long, old, healed lesion that's been
15 there for years, sometimes as long as 10 or 20 years, but this positive iron staining
16 is all in the context of a lesion that still has some hemorrhage, that still has
17 inflammation, so the positive iron staining in conjunction with the hemorrhage and
18 with the subacute inflammation is what puts us into that two to three day minimum
19 and it's consistent with certainly four, five, six days, that range.

20 Q And we've all been -- we've been looking at the head --

21 A Yes.

22 Q -- during this whole time period.

23 A And actually I -- I just have I think a few more of the head before we
24 move on to the peritoneum.

25 You'll see in the lower left now it says slide two. Slide two is the other

1 slide of the scalp hemorrhage. In this picture, you see the diagonal line going from
2 upper left to lower right. You can see how the -- the -- the picture is divided. The
3 left and lower left has those pink bands. That's collagen. That's connective tissue.
4 The right and upper right is -- is denser, darker red. That's blood. That's -- that's
5 hemorrhage. And one thing I can tell you is that the red blood cells in the upper
6 right are getting kind of smudgy. They're not crisp and clean and clear. That's
7 another indication of blood that's been there for a couple of days.

8 You have three of these roughly circular structures in the middle.
9 Those are blood vessels and in fact, in -- in two of them you can even see the red
10 blood cells inside the blood vessels that are looking a little crisper than the ones up
11 here in the upper right.

12 And clustered around the blood vessels, you'll see a bunch of
13 inflammatory cells. And you'll see that a bunch of them have that kidney bean
14 shape nuclei and that kind of thing and so this is just another example of subacute
15 inflammation now in the other slide of the scalp.

16 In fact, if we go to the next -- again, same theme. I won't belabor this.
17 This is now still slide two, but you can see the blue -- oh, I've changed colors. So
18 there's blue staining. There's blue staining down here as well near the bottom.
19 There's other areas of blue staining throughout here in the middle, but there's
20 positive iron staining, that's slide number two, and I think the next one is the same
21 thing so again, I won't drag this out, but again you can see blue in various parts --
22 I'm sorry, my arrows are not very good. You can see blue in various parts of this
23 picture as well. Positive iron staining, slide two.

24 Remember in the -- in the autopsy report the coroner said very, very
25 little positive iron staining in slide one and none in slide two. I'm finding plenty of it in

1 both.

2 Q And that's what you've shown to the jury?

3 A Yes, ma'am.

4 Okay. This transitions to the peritonitis, the remaining photographs.

5 Q Oh, actually I just wanted to ask you a question. These are two to days
6 -- two to three days prior to death the head injury took place?

7 A Minimum. Yes, ma'am.

8 Q And when is your understanding death occurred? So we can put this in
9 a timeframe for the jury so we know what --

10 A Right.

11 Q -- what days we're actually looking at on the slides then.

12 A Well, the -- the two to three days has to be before death. You know,
13 the -- the clock stops in the body at death. It's no longer responding with
14 inflammation. So as I understand it, that morning when he died, my understanding
15 from the investigation is that he was seen alive at 5:00 in the morning. He was
16 found dead at about 8:30 in the morning. So there's our window of time.

17 Q And that's Wednesday morning?

18 A I believe so. That was the -- I think that was the 15th if I -- if I --

19 Q Yes, a Wednesday, June 15th?

20 A Yes. The -- the date of death.

21 Q Okay.

22 A And so --

23 Q So we go back in time two to three days what -- what time are we
24 looking at then?

25 A We're looking at something that happened -- well, first of all, I've just

1 given you kind of the window of -- of death between roughly 5 a.m. and 8:30 a.m.
2 because we know -- we know he's alive at five. We know he's dead at 8:30. He's
3 described as having some stiffness when his mother discovers him, so rigor mortis
4 is starting to set in. That's consistent with passage of at least several hours from
5 death. So there's your -- there's your window of time. So if you go back -- the -- the
6 positive iron staining for instance means minimum 48 to 72 hours prior to that time
7 of death in the early morning hours, 6:00 roughly -- I'm not trying to tell you exactly
8 six, I'm just giving you a -- a number to hang your hat on. So 48 to 72 hours before
9 that is the minimum timeframe for the findings I've just shown to the jury.

10 Q So sometime prior to Monday morning then?

11 MR. STANTON: Your Honor, I object; ask and answered at least five times.
12 The rest is argumentative for counsel to make to the jury.

13 THE COURT: Overruled.

14 THE WITNESS: Yes, ma'am.

15 BY MS. VON MAGDENKO:

16 Q Okay. And if you can explain to the jury this next slide?

17 A Yes, the -- the -- the remaining photographs are all very similar to what I
18 showed you for the scalp except now we're dealing with the peritoneum or the
19 peritonitis. And so --

20 Q And where is the peritonitis located in the body?

21 A That's the -- the -- the -- the -- the linings of the surfaces of inside the
22 abdominal cavity. The peritoneum is -- is a thin glistening membrane that lines the
23 inside of the abdominal cavity and it also covers the surfaces of the organs that are
24 inside -- most of the organs that are inside the abdomen. So you have peritoneum,
25 this membrane that's thin and clear and glistening under normal circumstances

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1 cover all -- essentially all the surfaces inside the belly cavity. So peritonitis is the
2 inflammatory process that affects some of those membranes. Doesn't have to be
3 the whole cavity, but some or all.

4 So this is from slide 13 which is one of the slides the coroner labeled as
5 being from the peritoneum or the peritonitis and again without belaboring this, this is
6 back to the regular stain. You can see in here that there are indeed -- I'm going to --
7 well, the cell that I -- actually, this little cluster of cells here that I've sort of outlined,
8 those are actually neutrophils. And there -- there are several others of them floating
9 around in here.

10 Q The neutrophils are those grapes, the one to two days?

11 A Yes.

12 Q Okay.

13 A Now there's also -- the one closest to the tip of the arrow that I've just
14 given you there -- well, this one near -- right in the dead center of the -- of the field,
15 this one down the lower right that I've circled, those are macrophages. And there's
16 many of them around here. So the -- the point of this photograph is -- is not to pick
17 cell by cell by cell, it's for me to illustrate to you that I looked at the whole slide. I
18 saw some neutrophils, the first responder guys. I saw many macrophages, the
19 second wave of response. This is why the findings here are actually very similar
20 what I showed you and described in the scalp and this is why I've labeled it as
21 subacute inflammation because in my opinion that's what it is, and that's the phase
22 that again is consistent with two or three days or -- or older.

23 If we go --

24 Q Acute, subacute and chronic and this is the middle one?

25 A Correct.

1 Oh, and here I -- I -- I forgot when -- when counsel pushed the button.
2 Indeed, I have a label and arrows that point to many different macrophages here just
3 to illustrate the point.

4 Here again, another picture taken from slide 13 and there's a mixture
5 here of the first responders and the second wave of responders and so it's just
6 another illustration -- I think you undoubtedly have gotten the point by now so it's just
7 another illustration to demonstrate why I am calling this subacute inflammation.

8 And the next one.

9 Q And that -- and we're still looking at the abdomen right now?

10 A Yes. All the rest of these are titled peritonitis at the top and then they're
11 all the abdomen.

12 And so here we move over into iron staining. This -- again look at the
13 bottom left, it's slide number 13. You can see the blue roughly the middle of the -- of
14 the photograph. I don't have to circle it for you at this point. Positive iron staining,
15 minimum two to three days old. Go to the next one.

16 This is another one from slide 13. It's also peritonitis and it's a little
17 harder to see although just above the center there's three small dots that are or
18 three small areas that are blue. Here on the about the middle of the left border, I
19 just draw a circle that unfortunately covered it. I will erase that in a second. Blue.
20 Here just about the middle of the right border circled blue. There's actually a few
21 other spots that are tiny. Here's one about where I just made this green -- let me try
22 to make a circle. There's a tiny blue dot in there, lower right, that I just circled.

23 So there's positive iron staining in slide 13. It's the same phenomenon.
24 It's the same meaning as I gave you for the -- for the scalp. Minimum two to three
25 days old and consistent with older.

1 If we go to the next one, please. This is a higher magnification -- and
2 again I think it's fairly obvious so I'm not even going to circle, but you can see tiny
3 blue dots and actually one thing I do want to circle. The one that's just about in the
4 middle that I'm circling now and here's one to our right that I'm circling now. The
5 one in the middle is the most obvious. That blue staining, the positive iron staining
6 is inside a macrophage. That's what I told you they're called siderophages. Takes a
7 little longer for the hemosiderin that you see is positive iron staining to get gobbled
8 up by the cells. So again, bare minimum, two to three days old in order to have
9 those findings. Oops.

10 Q But with that with the cell within the cell, how long does that take, that
11 special thing we saw?

12 A Well it's -- it's the product within the cell rather than a cell within a cell,
13 but it's the --

14 Q Okay.

15 A Again, at least three days. Some people would say longer, but I'm
16 trying to work with a -- with a minimum here and be conservative.

17 If we go to the next. Okay, now we've gone over to slide 16. I just
18 wanted to show you this is another slide of the peritonitis which -- if I can just refer to
19 the autopsy report very briefly, I want to make sure I don't misrepresent Dr. Gavin's
20 work.

21 In slide 13 of the peritonitis that we just showed several pictures from,
22 she said very rare single cells having the positive iron staining. I think I've just
23 shown you that they aren't rare, there were many I found.

24 Number 16 -- slide 16 where we have gone now, she only described
25 neutrophils, the acute inflammatory response. She did not describe other

1 inflammation and she did not comment -- I don't think she did an iron stain on that
2 one. So here is a photograph and I think I have maybe this one and one other, but
3 again, the -- the blue should be fairly obvious right in the middle of the photograph.
4 So positive iron staining, minimum two to three days old. This is slide 16.

5 If we go to the next one, please. Here again, this is an area from slide
6 16, iron staining now the -- the blue is -- well, the -- the most obvious blue is still
7 fairly small and I'm putting a circle around it. It's just about dead center in the
8 photograph. There is actually a little bit of blue here to our left in that cell and I think
9 -- I think that's all that I can show you on the screen, but the point is there is positive
10 iron staining in slide 16 and it also tells me that in conjunction with all the other
11 findings, that this is a subacute inflammatory response. This is something that has
12 to be at least several days old in order to have this finding.

13 I think that may be the last if -- yes.

14 Q And with respect then to summarize the -- the head and the abdomen
15 had a minimum age of injury and what was that age for both of them?

16 MR. STANTON: Objection; ask and answered.

17 THE COURT: Overruled.

18 THE WITNESS: Two to three days and they're consistent with even being
19 longer, four to five days, six days, that range. But minimum two to three.

20 MS. VON MAGDENKO: Court's indulgence.

21 THE COURT: Uh-huh.

22 [Colloquy between counsel]

23 BY MS. VON MAGDENKO:

24 Q Is there anything that we haven't gone over that's in your report that you
25 like to explain to the jury?

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1 MR. STANTON: Objection, Your Honor. That's an improper question.

2 THE COURT: Sustained.

3 BY MS. VON MAGDENKO:

4 Q Is there -- did you come to any other conclusions?

5 A Well if I can refer to my report briefly. I think the biggest issue that I
6 dealt with was the aging of those injuries that I just demonstrated.

7 Oh. Yes, the -- the other area that I addressed in my report and -- and
8 conclusions or opinions that I offered really has to do with -- well two things. One is
9 that there was mention of traumatic brain injury which in my opinion did not
10 contribute to his death. I believe the abdominal process was actually the injury that
11 caused his death. And the -- the mild traumatic brain injury is keeping company with
12 the impact sites to the head that I've just shown you have evidence of being several
13 days old or older and it's not the type of injury that would be expected to cause
14 death. And so in my opinion, I don't disagree with the diagnosis. I -- my
15 interpretation is that the head injury did not actually contribute to causing his death.

16 And the other thing that I addressed in my report was the -- the clinical
17 presentation of this sort of injury, the -- meaning particularly the transected intestine
18 and the peritonitis. And although it seems logical -- it seems self-evident that a child
19 with that kind of injury would be rapidly symptomatic, in fact if you look at the
20 literature on blunt abdominal trauma in children, intestinal injuries can be very
21 difficult to diagnose.

22 And so whether the child is symptomatic or not, even when brought to
23 medical attention, intestinal injuries such as perforations or even on occasions a
24 transection like this may not be extremely obvious clinically and in fact, the literature
25 has reference to difficulty in making such a diagnosis and the literature even has

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1 some examples of delayed diagnosis.

2 I found one case reported that a child with a very similar injury to
3 Brodie, a transection of the intestine, who -- in whom it didn't get figured out, they
4 didn't really discover the injury for five days. That is a child who was symptomatic in
5 the interim. He didn't have five days of looking perfectly normal and all of a sudden
6 boom. I'm -- I'm not trying to tell you that, but I think the -- the important point that I
7 made in my report and that I -- that I wanted to offer is that an injury such as this will
8 not necessarily disable this child immediately or even within a few hours. This child
9 can go a day, this child under some circumstances can even go several days before
10 it gets diagnosed correctly.

11 Q Thank you.

12 MS. VON MAGDENKO: I have no further questions.

13 THE COURT: Mr. Stanton, do you mind if we just take a five -- just a short
14 break?

15 MR. STANTON: Certainly, Your Honor.

16 THE COURT: To use the restroom, please?

17 Ladies and gentlemen of the jury, again, please come back at 2:30.
18 You're admonished not to converse amongst yourself or with anyone on any subject
19 connected with the trial, do not read, watch or listen any report of or commentary on
20 the trial by any medium of information, and do not form or express an opinion on this
21 case. See you in a bit.

22 [Jury out at 2:21 p.m.]

23 THE COURT: All right. Thank you.

24 Do you need water or need to use the restroom?

25 THE WITNESS: I would love a glass of water, Your Honor.

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1 THE COURT: Okay.

2 [Off the record at 2:22 p.m.]

3 [Proceedings resumed at 2:32 p.m.]

4 THE MARSHAL: District Court XXIII jury is present.

5 [Jury in at 2:33 p.m.]

6 THE COURT: All right, whenever you're ready to begin your cross.

7 MR. STANTON: Thank you, Your Honor.

8 THE COURT: And again, Doctor, you are still under oath, sir.

9 THE WITNESS: Yes, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. STANTON:

12 Q Counsel ask you about the length of time you've devoted to this and
13 that you said 30 hours. What is your hourly rate that you charge for your testimony?

14 A In this --

15 MR. ALTIG: I'm going to object at this point, Your Honor, to the -- may we
16 approach?

17 THE COURT: Uh-huh.

18 MR. ALTIG: Thank you.

19 [Bench conference begins at 2:34 p.m.]

20 MR. ALTIG: Characterization of the question he's being paid for his
21 testimony. He's not being paid for his testimony. He's being paid for consultation
22 and his work.

23 THE COURT: They're allowed to inquire on that. It goes to bias.

24 MR. STANTON: Yeah. Thank you.

25 MS. VON MAGDENKO: (Indiscernible) --

1 MR. STANTON: Are you objecting? Is this your witness or his witness?

2 MS. VON MAGDENKO: Can I -- I can't (indiscernible). He's being paid by
3 the county. So is that going to come out --

4 MR. ALTIG: You can ask him on redirect.

5 MR. STANTON: Well he's not paid by the county --

6 THE COURT: It's not going to come out who he is paid by, but how much he
7 gets paid goes to his bias.

8 MS. VON MAGDENKO: Okay.

9 [Bench conference ends at 2:34 p.m.]

10 BY MR. STANTON:

11 Q Go ahead, sir, you can answer my question.

12 A Well, my hourly rate for my -- the time and -- and my consulting -- I
13 mean I don't know if the question implied being paid for an opinion, but for the time I
14 spend, this is at a reduced rate of \$350 an hour.

15 Q That's your reduced rate? And then you have an hour or daily rate for
16 your testimony in court, correct?

17 A I typically do a flat daily fee at \$3,500 a day for court, which is less than
18 what it would be if we were doing all the hours.

19 Q Now, you mentioned at the very end of your testimony some comments
20 about literature and in the case where you talked about a two-and-a-half-year-old
21 child having an injured duodenum and that the child was symptomatic during the
22 time period but it went undiagnosed. Do you recall that testimony?

23 A Yes, sir.

24 Q And you refer to that in your report that you prepared in this case that --
25 a particular article, correct?

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1 A Yes, sir.

2 Q And one of those -- for our discussion here and for the record, one of
3 the authors was a gentleman by the name of Osuka, O-s-u-k-a; is that correct?

4 A Yes, sir.

5 Q Now, this isn't a study in the sense of this was looking at a number of
6 examples of injured children to abdomen, correct?

7 A Correct.

8 Q This was a paper written as it relates to one child?

9 A Yes, it's -- it's a type of paper that's called a case report.

10 Q And the etiology in that report of that child's abdominal injury was what?

11 A I have it with me. You know what, I don't actually recall if they did
12 identify specifically -- I recall that it discussed blunt abdominal trauma.

13 Q They removed the child to another hospital, sir --

14 A Yes, sir.

15 Q -- along with the -- so that the mother's live-in boyfriend who had
16 shoved the child onto the corner of a coffee table. Does that refresh your
17 recollection?

18 A Yes, sir.

19 Q Now, the -- you're not a pediatrician; in other words, you don't treat
20 living children, correct?

21 A Correct.

22 Q But you are familiar as a forensic pathology (sic) about the
23 symptomatology of a child of this age who had a completely transected duodenum.
24 Would that be accurate?

25 A Yes, sir.

1 Q Those symptoms would be loss of appetite?

2 A Likely, yes.

3 Q Abdominal pain?

4 A Well, there's different kinds of pain. There will be some kinds of pain at
5 different times during the process. By the way, the answers are yes or no or true,
6 but these -- not all of these will happen in every child and some of them may happen
7 at different times in the same child.

8 Q So abdominal pain?

9 A Sometimes abdominal pain commonly will result at some point. Yes.

10 Q Lethargic? Child becomes sleepy?

11 A That's very -- very possible also, yes.

12 Q And a loss of appetite. Vomiting.

13 A Yes, sir.

14 MR. STANTON: No further questions.

15 THE COURT: Redirect?

16 MS. VON MAGDENKO: No questions, Your Honor.

17 THE COURT: All right. Is the Doctor free to go?

18 MS. VON MAGDENKO: Yes, Your Honor.

19 THE COURT: Thank you, Doctor, for your time. You're free to go, sir.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Any more witnesses today?

22 MR. ALTIG: No, Your Honor.

23 THE COURT: Are you resting at this time?

24 MR. ALTIG: Yes, we're resting, Your Honor.

25 THE COURT: All right. And you moved all your evidence into -- exhibits into

1 evidence?

2 MS. VON MAGDENKO: Yes, Your Honor.

3 THE COURT: Okay.

4 Counsel, are you ready for the Court to proceed with the jury
5 instructions?

6 MR. STANTON: Yes, the would ask the Court to charge the jury.

7 THE COURT: All right.

8 MR. ALTIG: Court's indulgence one moment, please.

9 [Colloquy between counsel]

10 MR. ALTIG: Thank you, Your Honor.

11 THE COURT: Hi. Are you ready?

12 MR. ALTIG: Yes, Your Honor.

13 THE COURT: Counsel?

14 All right, ladies and gentlemen, at this point both the State and the
15 defense have rested. So at this point we're going to do what we talked about the
16 very beginning of the trial. Over the next probably 30 minutes I'm going to read you
17 the law in this case. These are called the jury instructions. Now there's a lot of
18 information that I'm going to read to you. If there is something you don't catch, don't
19 worry about it because you'll have a copy of these instructions to take with you to
20 the jury room.

21 Ladies and gentlemen of the jury, it is now my duty as Judge to instruct
22 you in the law that applies to this -- hold on a second.

23 Come here, counsel.

24 [Bench conference begins at 2:40 p.m.]

25 THE COURT: Should we have penalty in here?

1 MR. STANTON: No. No. Could you just strike that and just --

2 THE COURT: Yeah.

3 MR. STANTON: Yeah, thanks.

4 MR. ALTIG: Thank you.

5 [Bench conference ends at 2:40 p.m.]

6 THE COURT: All right. Ladies and gentlemen of the jury, let me start again.
7 It is now my duty as Judge to instruct you in the law that applies to this hearing. It is
8 your duty as jurors to follow these instructions and to apply the rules of law to the
9 facts as you find them from the evidence. You must not be concerned with the
10 wisdom of any rule of law stated in these instructions. Regardless of any opinion
11 you may have as to what the law ought to be, it would be a violation of your oath to
12 base a verdict upon any other view of the law than that given in the instructions of
13 the Court.

14 Number 2. If, in these instructions, any rule, direction or idea is
15 repeated or stated in different ways, no emphasis thereon is intended by me and
16 none may be inferred by you. For that reason, you are not to single out any certain
17 sentence or any individual point or instruction and ignore the others, but you are to
18 consider all the instructions as a whole and regard each in the light of all the others.
19 The order in which instructions are given has no significance as to their relative
20 importance.

21 Number 3. An Information is but a formal method of accusing a person
22 of a crime and is not of itself any evidence of his guilt.

23 In this case, it is charged in an Information that on or between June 13,
24 2011 and June 15, 2011 the defendant committed the offenses of murder, a
25 category A felony pursuant to NRS 200.010, 200.030, and 200.508, and child abuse

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1 and neglect with substantial bodily harm, a category B felony pursuant to NRS
2 200.508 and NRS 200.060, in the following manner, to wit:

3 Number -- Count 1, murder. Did, on or between June 14, 2011 and
4 June 15, 2011, then and there, without authority of law and with malice
5 aforethought, willfully and feloniously killed Brodie Aschenbrenner, a child being
6 approximately two years of age, by subjecting the said Brodie Aschenbrenner to
7 acts of child abuse, to-wit: by striking the said Brodie Aschenbrenner in the
8 abdominal area and/or did cause blunt force trauma to Brodie Aschenbrenner's
9 abdominal area in an unknown manner, all of which resulted in the death of said
10 Brodie Aschenbrenner.

11 Count 2, child abuse and neglect with substantial bodily harm. Did, on
12 or between June 13, 2011 and June 14, 2011, wilfully, unlawfully, feloniously, and
13 knowingly neglect, cause, or permit a child under the age of 18 years, to-wit: Brodie
14 Aschenbrenner, being approximately two years of age, to suffer unjustifiable
15 physical pain and substantial bodily harm, by striking the said Brodie Aschenbrenner
16 in the head and/or did cause blunt force trauma to Brodie Aschenbrenner's head in
17 an unknown manner.

18 It is the duty of the jury to apply the rules of law contained in these
19 instructions to the facts of the case and determine whether or not the defendant is
20 guilty of the offenses charged.

21 Number 4. Murder is the unlawful killing of another -- of a human being,
22 with malice aforethought, either express or implied. The unlawful killing may be
23 effected by any of the various means by which death may be occasioned.

24 Number 5. Malice aforethought means the intentional doing of a
25 wrongful act without legal cause or excuse or what the law considers adequate

1 provocation. The condition of mind described as malice aforethought may arise
2 from anger, hatred, revenge or from particular ill will, spite or grudge toward the
3 person killed. It may also arise from any unjustifiable or unlawful motive or purpose
4 to injure another, proceeding from a heart fatally bent on mischief or with reckless
5 disregard of consequences and social duty. Malice aforethought does not imply
6 deliberation or the lapse of any considerable time between the malicious intention to
7 injure another and the actual execution of the intent but denotes an unlawful
8 purpose and design as opposed to accident and mischance.

9 Number 6. Express malice is that intention to unlawfully take away the
10 life of a human being, which is manifested by external circumstances capable of
11 proof. Malice may be implied when no considerable provocation appears, or when
12 all the circumstances of the killing show an abandoned and malignant heart.

13 Number 7. There are certain kinds of murder which carry with them
14 conclusive evidence of malice aforethought. One of these classes of murder is
15 murder committed in the perpetration or attempted perpetration of child abuse.
16 Therefore, a killing which is committed in the perpetration of child abuse is deemed
17 to be murder in the first degree, whether the killing was intentional or unintentional
18 or accidental. This is called the Felony-Murder Rule. The intent to perpetrate or
19 attempt to perpetrate child abuse must be proven beyond a reasonable doubt.
20 You're instructed that child abuse is a felony.

21 Number 8. A person who willfully causes a child who is less than 18
22 years of age to (a) suffer unjustifiable physical pain or mental suffering as a result of
23 abuse or, (b) to be placed in a situation where the child may suffer physical pain or
24 mental suffering as the result of abuse is guilty of the offense of child abuse.

25 Number 9. A person who's responsible for the safety or welfare of a

1 child and who (a) permits or allows that child to suffer unjustifiable physical pain or
2 mental suffering as a result of abuse, or (b) to be placed in a situation where the
3 child may suffer physical pain or mental suffering as the result of child abuse is
4 guilty of child abuse.

5 Number 10. Abuse means physical or mental injury of a non-accidental
6 nature or negligent treatment or maltreatment of a child under the age of 18 years,
7 under circumstances which indicate that the child's health or welfare is harmed or
8 threatened with harm. Allow means to do nothing to prevent or stop the abuse of a
9 child in circumstances where the person knows or has reason to know that the child
10 is abused. Permit means permission that a reasonable person would not grant and
11 which amounts to a neglect of responsibility attending the care, custody and control
12 of a minor child.

13 Number 11. Substantial bodily harm is defined as (a) bodily harm
14 which creates a substantial risk of death or which causes serious, permanent
15 disfigurement or protracted loss or impairment of the function of any bodily member
16 or organ; or (b) prolonged physical pain.

17 Number 12. Physical injury means permanent or temporary
18 disfigurement or impairment of any bodily function or organ of the body. Mental
19 injury means an injury to the intellectual or psychological capacity of the emotional
20 condition of a child as evidenced by an observable and substantial impairment of the
21 ability of the child to function within a normal range of performance or behavior.

22 Number 13. The law declares that one who inflicts an injury on another
23 and thereby accelerates his death shall be held criminally liable -- I'm sorry,
24 criminally responsible therefor. If any life at all is left in a human body, even the
25 least spark, the extinguishment of it is as much homicide as the killing of the most

1 vital being.

2 Number 14. In arriving at a verdict in this case as to whether the
3 defendant is guilty or not guilty, the subject of penalty or punishment is not to be
4 discussed or considered by you and should in no way influence your verdict. If your
5 verdict is murder in the first degree, you will at a later hearing consider the subject of
6 penalty or punishment.

7 Number 15. To constitute the crime charged, there must exist a union
8 or joint operation of an act forbidden by law and an intent to do the act. The intent
9 with which an act is done is shown by the facts and circumstances surrounding the
10 case. Do not confuse motive -- I'm sorry, do not confuse intent with motive. Motive
11 is what prompts a person to act. Intent refers only to the state of mind with which
12 the act is done. Motive is not an element of the crime charged and the State is not
13 required to prove a motive on the part of the defendant in order to convict.
14 However, you may consider evidence of motive or lack of motive as a circumstance
15 in the case.

16 Number 16. The defendant is presumed innocent unless the contrary is
17 proved. This presumption places upon the State the burden of proving beyond a
18 reasonable doubt every material element of the crime charged and that the
19 defendant is the person who committed the offense. A reasonable doubt is one
20 based on reason. It is not mere possible doubt but is such a doubt as would govern
21 or control a person in the more weighty affairs of life. If the minds of the jurors, after
22 the entire comparison and consideration of all the evidence, are in such a condition
23 that they can say they feel an abiding conviction of the truth of the charge, there is
24 not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility
25 or speculation. If you have a reasonable doubt as to the guilt of the defendant, he is

1 entitled to a verdict of not guilty.

2 Number 17. Although you're to consider only the evidence in the case
3 in reaching a verdict, you must bring to the consideration of the evidence your
4 everyday common sense and judgment as reasonable men and women. Thus, you
5 are not limited solely to what you see and hear as the witnesses testify. You may
6 draw reasonable inferences from the evidence which you feel are justified in light of
7 common experience, keeping in mind that such inferences should not be based on
8 speculation or guess.

9 A verdict may never be influenced by sympathy, prejudice or public
10 opinion. Your decision should be the product of sincere judgment and sound
11 discretion in accordance with these rules of law.

12 Number 18. The evidence which you are to consider in this case
13 consists of the testimony of the witnesses, the exhibits, and any facts admitted or
14 agreed to by counsel.

15 There's two types of evidence; direct and circumstantial. Direct
16 evidence is the testimony of a person who claims to have personal knowledge of the
17 commission of the crime which has been charged, such as an eyewitness.
18 Circumstantial evidence is the proof of a chain of facts and circumstances which
19 tend to show whether the defendant is guilty or not guilty.

20 The law makes no distinction between the weight to be given either
21 direct or circumstantial evidence. Therefore, all the evidence in the case, including
22 the circumstantial evidence, should be considered by you in arriving at your verdict.

23 Statements, arguments and opinions of counsel are not evidence in the
24 case. However, if the attorneys stipulate to the existence of a fact, you must accept
25 the stipulation as evidence and regard that fact as proved.

1 You must not speculate to be true any insinuations suggested by a
2 question asked to a witness. A question is not evidence and may be considered
3 only as it supplies meaning to the answer.

4 You must disregard any evidence to which an objection was sustained
5 by the Court and any evidence ordered stricken by the Court. Anything you may
6 have seen or heard outside the courtroom is not evidence and must also be
7 disregarded.

8 Number 19. The credibility or believability of a witness should be
9 determined by his manner upon the stand, his relationship to the parties, his fears,
10 motives, interests or feelings, his opportunity to have observed the matter -- the
11 manner to which he testified, the reasonableness of his statements and the strength
12 or weakness of his recollections. If you believe that a witness has lied about any
13 material fact in the case, you may disregard the entire testimony of that witness or
14 any portion of his testimony which is not proved by other evidence.

15 Number 20. It is a constitutional right of a defendant in a criminal trial
16 that he may not be compelled to testify. Thus, the decision as to whether he should
17 testify is left to the defendant on the advice and counsel of his attorney. You must
18 not draw any inference of guilt from the fact that he does not testify, nor should this
19 fact be discussed by you or enter into your deliberations in any way.

20 Number 21. A witness who has special knowledge, skill, experience,
21 training or education in a particular science, profession or occupation is an expert
22 witness. An expert witness may give his opinion as to any matter in which he is
23 skilled. You should consider such opinion -- such expert opinion and weigh the
24 reasons, if any, given for it. You are not bound, however, by such an opinion. Give
25 it the weight to which you deem it entitled, whether that be great or slight, and you

1 may reject it, if in your judgment the reasons given for it are unsound.

2 Number 22. Although you're to consider only the evidence in the case
3 in reaching a verdict, you must bring to the consideration the evidence your
4 everyday common sense and judgment as reasonable men and women. Thus, you
5 are not limited solely to what you see and hear as the witnesses testify. You may
6 draw reasonable inferences from the evidence which you feel are justified in the light
7 of common experience, keeping in mind that such inferences should not be based
8 on speculation or guess.

9 A verdict may never be influenced by sympathy, prejudice or public
10 opinion. Your decision should be the product of sincere judgment and sound
11 discretion in accordance with these rules of law.

12 Number 23. When you retire to consider your verdict, you must select
13 one of your number to act as a foreperson who will preside over your deliberation
14 and will be your spokesperson here in court.

15 During your deliberation, you will have all the exhibits which were
16 admitted into evidence, these written instructions and form of verdicts which have
17 been prepared for your convenience.

18 Your verdict must be unanimous. As soon as you've agreed upon a
19 verdict, have it signed and dated by your foreperson and then return with it to this
20 room.

21 Number 24. If during your deliberation you should desire to be further
22 informed on any point of law or hear again portions of the testimony, you must
23 reduce your request to writing signed by the foreperson. The officer will then return
24 you to court where the information sought will be given to you in the presence of,
25 and after notice to, the District Attorney and the defendant and his counsel.

1 Playbacks of testimony are time consuming and are not encouraged
2 unless you deem it a necessity. Should you require a read back, you must carefully
3 describe the testimony to be played back so the court recorder can arrange her
4 notes. Remember the Court is not at liberty to supplement the evidence.

5 Now you're going to listen to the arguments of counsel who are going to
6 endeavor to aid you to reach a proper verdict by refreshing in your minds the
7 evidence and by showing the application there to the -- to the law. But whatever
8 counsel may say, you'll bear in mind that it is your duty to be governed in your
9 deliberation by the evidence as you understand it and remember it to be and by the
10 laws as given to you in these instructions with the sole, fixed and steadfast purpose
11 of doing equal and exact justice between the defendant and the State of Nevada.

12 Now, counsel, I think you're anticipating starting closings tomorrow,
13 correct?

14 MR. STANTON: Yes, Your Honor.

15 MR. ALTIG: Yes, Your Honor.

16 THE COURT: All right. So ladies and gentlemen, I've now given you the law
17 that applies in this case. We're going to come back tomorrow at 9:30 in the --
18 tomorrow at 9:30 in the morning and this is what's going to happen. The State's
19 going to present its closing argument. Thereafter the defense will present its closing
20 and the State will have the opportunity to also present a rebuttal. Once that's
21 completed, you'll be taken back to the jury room to deliberate.

22 So ladies and gentlemen, until I see you tomorrow at 9:30, you're
23 admonished not to converse amongst yourself or with anyone on any subject
24 connected with the trial, do not read, watch or listen any report of or commentary on
25 the trial by any medium of information, including without limitation television,

1 newspaper, radio, internet, and do not form or express an opinion on this case. See
2 you tomorrow. Thank you.

3 [Jury out at 2:57 p.m.]

4 THE COURT: All right. Is the jury -- and I just want to make sure that you
5 guys agree to the verdict form that you provided me?

6 MR. ALTIG: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. ALTIG: And Your Honor --

9 THE COURT: Thank you.

10 MR. ALTIG: --I think on the record I believe you might want to admonish the
11 defendant and inquire of him as to his right to testify. Do you need to do that on the
12 record?

13 THE COURT: We already did that.

14 MR. ALTIG: Did you?

15 MR. STANTON: We did, Your Honor. I think the -- what the concern is, is
16 kind of the record speaks for itself that obviously he didn't and so I think the -- I just
17 ask counsel that they've have plenty of time to discuss that with their client. I think
18 he's already been canvased in that regard as well.

19 THE COURT: I know that I canvased him and obviously he --

20 MR. ALTIG: Okay.

21 THE COURT: -- chose not to take the stand and testify.

22 MR. ALTIG: Right. Okay. Okay. I just wanted to make sure.

23 ...

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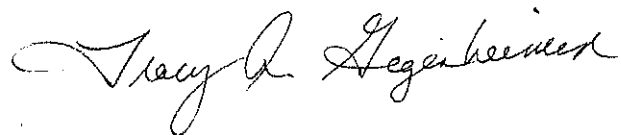
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1 THE COURT: All right. Thank you.

2 MS. VON MAGDENKO: Thank you, Your Honor.

3 [Proceedings concluded at 2:57 p.m.]

4 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
5 proceedings in the above-entitled case to the best of my ability.

6 

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8 Tracy A. Gegenheimer, CER-282, CET-282
9 Court Recorder/Transcriber

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No. 66963

Appellant,

vi.

THE STATE OF NEVADA,

Respondent.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th day of Sept, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

HOWARD S. BROOKS
KEDRIC A BASSETT

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

MICHAEL A LEE
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PO Box 650
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BY

Employee, Clark County Public Defender's Office