

IN THE SUPREME COURT OF THE STATE OF NEVADA

Michael Alan Lee,
Petitioner/Appellant

VS.

Brian E. Williams, Sr., Warden High
Desert State Prison,
Respondent,

and

The State of Nevada,
Real Party in Interest

Supreme Court Case No.: 76330

Electronically Filed
Nov 27 2018 09:36 a.m.
PENNIX INDEX Brown
Clerk of Supreme Court

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Vol. III
Pages 401-600

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1 A Yes.

2 Q Where did you go?

3 A To the swimming pool.

4 Q And was anybody else with you when you were at the swimming pool

5 on Monday, June 13th?

6 A Yes.

7 Q Who was there?

8 A Jennifer Lee, her two boys and the defendant.

9 Q And did you see Brodie swimming that day?

10 A Yes.

11 Q How was Brodie acting when he was swimming that day?

12 A He was fine.

13 Q Did you notice his body, did you observe it while he was swimming?

14 A Yes.

15 Q How was he clothed?

16 A In swim shorts.

17 Q Did he have anything on the upper part of his body?

18 A No.

19 Q Did he have something that normally he would swim with, float devices?

20 A No, because they wouldn't let him have it at that pool.

21 Q That pool didn't permit it?

22 A Yes.

23 Q So what was -- how did that change, if anything, what you did or how

24 you observed Brodie when he was at the pool?

25 A He was just in his swim shorts and we stayed on the really shallow end.

1 Q Not normally where Brodie would go if he had his floaties on?

2 A Yeah.

3 Q Do you remember what time the three of you; that is, the defendant,
4 Brodie and yourself, returned home on Monday?

5 A Early afternoon, maybe 1:30, 2.

6 Q Okay. Did you go to work Monday afternoon?

7 A Yes.

8 Q Do you recall what time you went to work?

9 A Three.

10 Q Do you remember what time you came home?

11 A Probably 1:30, 2. Two -- I can't remember, early afternoon.

12 Q Do you recall working at four and coming home at 8:15?

13 A Yeah.

14 Q Was that shift four hours long?

15 A Yes.

16 Q Prior to your leaving, what was the condition of Brodie? What did you
17 see Brodie do when you left for work on Monday?

18 A I laid him down to take a nap.

19 Q And was he asleep when you left?

20 A Yes.

21 Q Who else was in the home when you left?

22 A The defendant.

23 Q No one else besides him and Brodie?

24 A No.

25 Q When you came home that evening just after 8:15, did you check on

1 Brodie?

2 A Yes.

3 Q Did you notice anything unusual about his appearance when you went
4 into his room to check on him?

5 A I gave him a kiss and he had a bruise on his forehead.

6 Q Can you show me where on the forehead his bruise was?

7 A I think in here (indicating) I gave him a kiss.

8 Q And you're pointing above -- and the forehead above the right eye; is
9 that correct?

10 A Yes.

11 Q Can you describe the bruise for me?

12 A Just a round like reddish bruise.

13 Q How big was it?

14 A Maybe dime.

15 Q Dime sized? Is that a yes?

16 A Quarter size. Yes.

17 Q And was it a severe bruise as far as the color that you saw?

18 A No.

19 Q What did you do, if anything, about asking the defendant what had
20 happened regarding that injury?

21 A I asked him what happened.

22 Q What did he tell you happened?

23 A That Brodie fell leaving his friend's house.

24 Q Do you know what his friend's name was?

25 A Danny Fico.

1 Q Had you met Danny Fico before?

2 A Yes.

3 Q How many times had you met Mr. Fico?

4 A Numerous.

5 Q What was the defendant's relationship with Mr. Fico from your

6 observation?

7 A They were best friends.

8 Q Did the defendant tell you any details about how Brodie fell?

9 A Not that I recall.

10 Q As you testify here today, you don't recall the details that he told you?

11 A Yes, as of today I can't -- I can't remember.

12 Q But you remember that he told you that Brodie fell at Danny Fico's

13 house?

14 A Yes.

15 Q Now Tuesday, June 14th --

16 MR. STANTON: Your Honor, may I approach?

17 THE COURT: You may.

18 [Bench conference begins at 3:58 p.m.]

19 MR. STANTON: (Indiscernible) through five?

20 THE COURT: Why don't we give them a very quick break to use the

21 restroom?

22 MR. STANTON: Yeah, whatever, I just want to know because I -- you know, I

23 could -- this is a natural place to break and then --

24 THE COURT: That's fine.

25 MR. STANTON: -- I didn't know if you were going to do another one before

1 we were done today.

2 THE COURT: Yeah, let's just give them a couple minutes. Are you going to
3 finish -- are you going to finish today?

4 MR. STANTON: The direct examination of her? Yeah, I think so.

5 THE COURT: Okay, we'll still have her for cross tomorrow?

6 MR. STANTON: Yes.

7 THE COURT: Okay.

8 [Bench conference ends at 3:58 p.m.]

9 THE COURT: Ladies and gentlemen, let's take just a quick 10-minute break
10 to use the restroom and to stretch. You're admonished not to converse amongst
11 yourselves or with anyone on any subject connected with the trial, do not read,
12 watch or listen to any report of or commentary on the trial, and do not form or
13 express an opinion on this trial. See you shortly.

14 [Jury out at 3:59 p.m.]

15 THE COURT: Okay.

16 [Off the record at 3:59 p.m.]

17 [Proceedings resumed at 4:12 p.m.]

18 [Outside the presence of the jury]

19 THE COURT: Okay, it looks like everyone is back in here so let's bring the
20 jury in.

21 [Pause]

22 THE MARSHAL: District Court XXIII jury is present.

23 [Jury in at 4:13 p.m.]

24 THE COURT: All right, the jury is back if you want to continue, Mr. Stanton.

25 MR. STANTON: Thank you, Your Honor.

1 BY MR. STANTON:

2 Q Ma'am, I believe we left off on Tuesday, June 14th. Do you recall
3 Brodie's demeanor and behavior when he woke up on that morning?

4 A Yes.

5 Q How was it?

6 A Very upset.

7 Q Very upset?

8 A Yes.

9 Q And how was he acting towards you and towards the defendant?

10 A He came running into the room just screaming and yelling and wanted
11 me to cuddle him.

12 Q Was that normal from Brodie?

13 A No.

14 Q Did you notice anything about his physical condition that morning when
15 he woke up?

16 A Yes.

17 Q Had his injuries that you had seen, the bruise on his forehead, had that
18 changed?

19 A Yes.

20 Q How did it look to you Tuesday morning?

21 A He had a lot more bruises.

22 Q Where were the other bruises?

23 A He had a couple bruises on his forehead. The bruise on his cheek was
24 a lot bigger and darker. And then he had -- his bottom lip was a little chapped.

25 Q Did he eat that morning?

1 A Yes.

2 Q What did he eat?

3 A Pancakes.

4 Q Pancakes? Keep your voice up --

5 A Sorry. Pancakes.

6 Q And did he have anything to drink?

7 A Yes.

8 Q Did there come a time that morning where you made plans, the family

9 in your apartment, to go somewhere that day?

10 A Yes.

11 Q Where did you plan to go?

12 A The Mandalay Bay Shark Reef.

13 Q And did you dress Jodie to go there?

14 A Brodie.

15 Q Brodie, I'm sorry.

16 A Yes.

17 Q And what did Brodie say, if anything, while you were dressing him?

18 A That his head hurt.

19 Q What were you doing about dressing him when he told you his head

20 hurt?

21 A Putting his t-shirt on.

22 Q Did the defendant say anything to you about taking Brodie outside into

23 the public that morning before you left your apartment?

24 A Yes. Yes.

25 Q What did he say?

1 A He said we -- it looks like -- he said he didn't want to really bring him
2 anywhere because it looked like we beat him.

3 Q And prior top going to the Shark Reef, did you stop someplace before
4 going there?

5 A Yes.

6 Q Where did you stop?

7 A America's Mart, the gas station.

8 Q Is that where the defendant worked?

9 A Yes.

10 Q When you arrived there and you got out of the car, did the defendant
11 say something to you about bringing Brodie into the store?

12 A Yes.

13 Q What did he say to you?

14 A That he didn't want me to bring him in.

15 Q Did he say why?

16 A Because of his bruises.

17 Q Did the defendant go into the convenience portion of the store with you
18 and Brodie?

19 A No.

20 Q Where did he go as far as you could observe?

21 A The car wash part.

22 Q Did you notice or recognize anybody inside the store when you and
23 Brodie went in?

24 A Yes.

25 Q Who?

1 A Danny Fico.

2 Q Danny Fico, the defendant's best friend?

3 A Yes.

4 Q Did he say anything to you?

5 A Yes.

6 Q What did he say?

7 A He commented on the bruises.

8 MR. ALTIG: I'm going to object. It's hearsay.

9 MR. STANTON: Judge, it's not offered for the truth of the matter.

10 THE COURT: Overruled.

11 BY MR. STANTON:

12 Q Go ahead. What did he say?

13 A He had a lot more bruises.

14 Q Danny Fico said that?

15 A Yeah.

16 Q He commented about Brodie's condition, the bruising on his face?

17 A Yes.

18 Q Could you see any other bruises besides bruises on Brodie's face when

19 you brought him in the convenience store?

20 A No.

21 Q Did you leave and go to the Shark Reef?

22 A Yes.

23 Q Do you remember what time you arrived at the Shark Reef?

24 A No.

25 Q Was it in the morning, noon or afternoon?

1 A Early afternoon.

2 Q Do you recall what, if anything, happened between Brodie and the

3 defendant when you arrived in the parking garage?

4 A Yes.

5 Q What happened?

6 A Brodie didn't want to hold his hand.

7 Q Didn't want to hold whose hand?

8 A The defendant's hand.

9 Q Did he complain about it? How did you know he didn't want to do it?

10 A He said no.

11 Q And what did you do?

12 A I told Brodie that he had to hold his hand.

13 Q And what did you tell Brodie you would do if he didn't hold the

14 defendant's hand?

15 A That we'd have to go.

16 Q Couldn't go to the Shark Reef?

17 A Yes.

18 Q Did he hold the defendant's hand?

19 A Yes.

20 Q For how long?

21 A Just through the parking garage.

22 Q What time did you leave the Shark Reef?

23 A Early afternoon.

24 Q Did you go somewhere after the Shark Reef?

25 A Yes.

1 Q Where?

2 A Circus Circus.

3 Q Why'd you go there?

4 A Just to have an outing.

5 Q Did you go someplace inside the Circus Circus to eat?

6 A Yes.

7 Q Where was that?

8 A McDonald's.

9 Q Was Brodie hungry at McDonald's?

10 A He just ate some French fries.

11 Q Was that normal for him?

12 A Yeah.

13 Q Was there anything unusual about his behavior at McDonald's or did an

14 event take place at McDonald's?

15 A Yes.

16 Q What was that?

17 A He wet through his pull-up.

18 Q And what kind of pull-up did you have on him?

19 A A swimmer one.

20 Q And when you first observed that, do you remember where you were

21 physically? What store or location?

22 A I'm sorry, what?

23 Q Do you remember where you were when you discovered that he had

24 wet himself?

25 A Yes, in McDonald's.

1 Q What was the defendant's reaction when you discovered he had wet
2 himself?

3 A He was annoyed.

4 Q Did he express that to you verbally?

5 A Yes.

6 Q What was he annoyed about?

7 MR. ALTIG: I'm going to object -- lack of foundation, lack of personal
8 knowledge and speculation.

9 MR. STANTON: Well, it's not speculation if she's a percipient witness and
10 hears the defendant tell him why he's annoyed which is --

11 MR. ALTIG: Then lack of foundation. We haven't gotten there yet.

12 MR. STANTON: She's standing right next to him at McDonald's.

13 THE COURT: I'm going to overrule it.

14 BY MR. STANTON:

15 Q You can go ahead and answer the question.

16 A Now I'm confused and forgot what the question --

17 Q Okay.

18 A I'm sorry.

19 Q You said the defendant was annoyed.

20 A Yes.

21 Q Did he express that to you?

22 A Yes.

23 Q How did he express it to you? What did he say?

24 A He was frustrated. He said he should be potty trained, why did he just
25 pee all over?

1 Q How did the defendant behave after the wetting incident when you were
2 walking to other locations?

3 A He just -- we were just ready to go.

4 Q Did he ever walk apart from you?

5 A Yes.

6 Q When was that?

7 A After we left McDonald's.

8 Q How was he walking away from -- what was the difference between
9 how you were walking when you were going through this area?

10 A He walked in front of us.

11 Q The defendant?

12 A Correct.

13 Q Where's Brodie?

14 A In the stroller.

15 Q Did Brodie ever fall asleep after Shark Reef when you were in this
16 area?

17 A No.

18 Q Sometime after the peeing incident and McDonald's, did he, Brodie, ask
19 you that he had to go to the bathroom again?

20 A Yes.

21 Q When was that?

22 A After McDonald's, before we walked out of Circus Circus.

23 Q And what did you do?

24 A Brought him in to go potty.

25 Q And did he go to the bathroom?

1 A Yes.

2 Q You said the defendant said that you're leaving. Was he normal

3 behavior or was he acting differently when he said we're leaving?

4 A Just angry, annoyed.

5 Q When you got to the car, what did you do with Brodie about his

6 clothing?

7 A Changed him.

8 Q Did you put anything on Brodie along his groin area?

9 A Yes.

10 Q What did you put on?

11 A A pink pull-up.

12 Q Why did you do that?

13 A Because his pull-up was sopping wet.

14 Q Okay. And is that the -- did you have any pull-ups to put on him at that

15 point?

16 A I had one in my trunk for my niece.

17 Q Okay. So it happened to be pink?

18 A Yeah.

19 Q How did Brodie respond when you put that on?

20 A He was excited that he could wear Lily's pink pull-up.

21 Q And where did you put Brodie in the car when you left the Shark Reef?

22 A In his car seat.

23 Q Is that -- what type of car were you driving?

24 A Ford Focus.

25 Q And where was Brodie physically in the car?

1 A The center seat in the back.

2 Q Was he in his car seat?

3 A Yes.

4 Q Was it the same car seat that was involved in the incident 20 days
5 prior?

6 A No.

7 Q Different car seat?

8 A Yes.

9 Q Where did you go after you left the Shark Reef?

10 A To the hair salon.

11 Q On the way from the Shark Reef to the hair salon, did Brodie fall
12 asleep?

13 A Yes.

14 Q Why did you go to the hair salon?

15 A Because they had overcharged me for my hair the day -- the day
16 before.

17 Q So you went to pick up that money?

18 A Correct.

19 Q And how did you leave the car based upon Brodie being asleep? Did
20 you do anything different when you got out of the car?

21 A I just -- I didn't slam the door, I just tried to shut it quietly so he wouldn't
22 wake up.

23 Q Did you go in the store?

24 A Yes.

25 Q How long were you in the store?

1 A Maybe 5, 10 minutes.

2 Q When you returned and you opened the door to your car, can you tell

3 us what you observed and what was going on inside the car when you got back?

4 A Brodie was screaming.

5 Q When you say screaming --

6 A He was --

7 Q -- was that loud?

8 A Yeah, he was upset. He was crying.

9 Q And did you ask the defendant what had happened?

10 A Yes.

11 Q What did he tell you?

12 A That he got mad when I got out of the car he woke up.

13 Q Where did you go after that?

14 A The bank.

15 Q That was for something that the defendant had to do there?

16 A Yes.

17 Q And then you went to someplace else. Where did you go?

18 A Best Buy.

19 Q As you walked into Best Buy, was there an incident with Brodie?

20 A Yes.

21 Q Can you describe that for me?

22 A He didn't want to walk. He wanted me to carry him.

23 Q Was that unusual?

24 A Yeah.

25 Q And what happened as far as carrying Brodie? Did that -- was there a

1 discussion with the defendant about carrying him?

2 A Yes.

3 Q And what happened in that discussion?

4 A He told me not to baby him.

5 Q Did you put Brodie down?

6 A Yes.

7 Q What was Brodie's reaction to the defendant as you were walking into
8 Best Buy?

9 A He didn't want him to touch him.

10 Q Did Brodie say anything to you that indicated at this time when you're
11 entering Best Buy that he was tired?

12 A Yes.

13 Q What did he tell you in the words that Brodie would use to tell you he
14 was tired?

15 A He said mamma night night.

16 Q Night night?

17 A Night night.

18 Q Is that Brodie's way of telling you as his mother that he was tired and
19 wanted to go to bed?

20 A Yes.

21 Q How many times did he tell you inside the Best Buy that he was tired
22 and wanted to go night night?

23 A Three, four.

24 Q Did you put Brodie in timeout as you were entering Best Buy because
25 of his behavior towards the defendant?

1 A Yes.

2 Q How was Brodie acting once you got into the store?

3 A He -- just tired. He didn't want to walk.

4 Q He didn't want to walk?

5 A No.

6 Q Did you carry him at times while you were in the store?

7 A Yes.

8 Q Did there come a time inside Best Buy when Brodie wanted to get a

9 movie?

10 A Yes.

11 Q Did you tell Brodie that if he did something you would get him that

12 movie?

13 A Yes.

14 Q What did you tell Brodie he had to do to get that movie?

15 A Be nice to Mike. They had to get along.

16 Q Did there come a time inside Best Buy when Brodie didn't do that?

17 A Yes.

18 Q Can you describe that for me?

19 A Mike went to walk up and Brodie got angry and told him no, no, no. So

20 I had to put his movie back.

21 Q You had to put what?

22 A His movie back.

23 Q He was throwing a fit when the defendant came up to him?

24 A Yes.

25 Q When you got home, where did you put Brodie inside your apartment?

1 A I put him in his bedroom.

2 Q Did you put -- turn --

3 A With his --

4 Q Go ahead. I'm sorry.

5 A With his cup and I turned his Bob the Builder on his --

6 Q Bob the Builder, what's that?

7 A A movie.

8 Q So Brodie's in his room and he's watching a movie?

9 A Yes.

10 Q How is he behaving when he's at home from what you observed?

11 A Better.

12 Q Did you cook dinner that evening?

13 A Yes.

14 Q What did you cook for dinner?

15 A I made lasagna.

16 Q Was Brodie hungry at dinnertime?

17 A He wouldn't really eat. He -- he wouldn't really eat.

18 Q How did you feed Brodie that night?

19 A I spoon fed him.

20 Q Spoon fed him? Is that yes?

21 A Yes.

22 Q Was that normal for you to spoon feed Brodie for evening meals or any

23 meals?

24 A Not usually.

25 Q He ate some lasagna?

1 A Yes.

2 Q And did you put him to bed?

3 A Yes.

4 Q Normal time or earlier than normal?

5 A A little early.

6 Q How were his injuries that you observed on Brodie when you put him to
7 bed that night?

8 A He just had his forehead -- the couple bruises on his forehead, the
9 bruise on his cheek was worse, and he had a little scuff under his lip (indicating).

10 Q Was the defendant at home when you and Brodie were eating?

11 A No.

12 Q Where was he?

13 A He left to go to the gas station.

14 Q To his place of employment?

15 A Correct.

16 Q Do you remember did you contact him there?

17 A Yes.

18 Q Did you tell him dinner was ready?

19 A Yes.

20 Q Did he come home right away?

21 A Shortly after.

22 Q Did you and him then eat dinner?

23 A Yes.

24 Q Did there come a time after Brodie's in bed and after dinner when you
25 told the defendant that you had to go for some errands that evening away from your

1 apartment?

2 A Yes.

3 Q What was the defendant's reaction to you telling him that that's what
4 you had to do?

5 A He asked why I didn't just do it earlier.

6 Q Was he upset --

7 A Yes.

8 Q -- irritated or normal?

9 A Upset.

10 Q What were the things that you needed to go do?

11 A I needed to go to my mom's and drop off papers from the car wreck that
12 had just came in the mail that night so she could fax them for me, and then I needed
13 to go get milk because Brodie had just ran out.

14 Q And did you leave the apartment?

15 A Yes.

16 Q Did you make an offer to the defendant about taking Brodie with you?

17 A Yes.

18 Q What did you tell him?

19 A If he didn't want me to leave him, I'd just bring him.

20 Q You'd wake up Brodie and bring him with you?

21 A Yes. I didn't know if he was asleep yet, I'd just bring him.

22 Q And what did the defendant say?

23 A No, it's fine, just leave him.

24 Q So when you left that night; that is, Tuesday, the 14th of June, to run
25 these errands, Brodie is in bed, you had recently put him in, and the defendant's

1 inside your apartment?

2 A Yes.

3 Q Is there anybody else inside your apartment?

4 A No.

5 Q Do you remember how long you were gone from when you left to when
6 you arrived?

7 A Not even an hour.

8 Q Do you remember the precise number of minutes?

9 A Something like 56 minutes.

10 Q Why is it that you know almost to the minute how long you were gone?

11 A Because I told Mike I wouldn't be more than an hour, so I wanted to be
12 a smartass and time it.

13 Q And when you left your apartment, did there come a time where the
14 defendant called you soon after leaving there?

15 A Yes.

16 Q How long or where were you when you got the phone call from the
17 defendant?

18 A Not even out of the gate yet.

19 Q What did the defendant say to you?

20 A Told me to get batteries.

21 Q He wanted you to get batteries?

22 A Yes.

23 Q Did you go to your mother's?

24 A Yes.

25 Q Did you do what you had to do as far as faxing items there?

1 A I just handed them to her and left.

2 Q So your mom did that for you?

3 A Yes.

4 Q Where did you go there -- then?

5 A To the Smith's right by our house.

6 MR. STANTON: May I approach, Your Honor?

7 THE COURT: You may.

8 MR. STANTON: Counsel's observed State's Exhibit 41. I move for its
9 admission at this time.

10 MS. VON MAGDENKO: No objection, Your Honor.

11 THE COURT: Admitted.

12 [State's Exhibit 41 admitted]

13 BY MR. STANTON:

14 Q Showing you State's Exhibit 41, do you recognize this receipt?

15 A Yes.

16 Q Is this the receipt that you obtained pursuant to your testimony that you
17 just gave to the ladies and gentlemen of this jury?

18 A Yes.

19 Q Did you keep this receipt in your purse after you got it from Smith's?

20 A Yes.

21 Q After you left Smith's or at least on this trip, did you attempt to contact
22 the defendant again?

23 A Yes.

24 Q Why did you try to call the defendant?

25 A I can't remember. I think to ask if he needed anything else from the

1 store.

2 Q Did he answer your phone call?

3 A No.

4 Q Did there come a time on your way home when you're almost at home

5 where the defendant calls you?

6 A Yes.

7 Q What did he say to you when you picked up the phone?

8 A I think I had to call him back.

9 Q Okay.

10 A I didn't hear it.

11 Q And when you called him back, what was the defendant's comment to

12 you?

13 A I can't remember the exact words.

14 Q Was he upset?

15 A Yes.

16 Q And did you tell him that you're almost home and that it took 56

17 minutes?

18 A Yes.

19 Q When you got home, did you put the groceries away?

20 A Yes.

21 Q What's the defendant doing?

22 A Sitting on the couch.

23 Q What did you do after you put your groceries away?

24 A Took a bath.

25 Q Do you remember observing the door to your son's room?

1 A Yes.

2 Q What condition was the door to your son's room when you came home

3 that night?

4 A Shut.

5 Q Shut?

6 A Yes.

7 Q Completely shut closed?

8 A Yes.

9 Q Was the dog door or dog gate up?

10 A No.

11 Q Did you go to sleep in your bed that night?

12 A Yes.

13 Q Did the defendant?

14 A Yes.

15 Q Do you remember what time you went to bed?

16 A No.

17 Q Do you remember waking up that night into the early morning hours?

18 A Yes.

19 Q Do you remember what time of morning or evening it was?

20 A One a.m.

21 Q This would be now 1 a.m. on January 15th, Wednesday?

22 A Yes.

23 Q When you woke up, was the defendant in your bed?

24 A No.

25 Q After you noticed that, did you then see the defendant?

1 A Yes.

2 Q What was he doing?

3 A Walking in the bedroom.

4 Q What, if anything, did he say to you?

5 A That he went to use the bathroom -- Brodie's bathroom and it stinks.

6 He thinks he threw up.

7 Q Was it normal for the defendant to use, as you refer to, Brodie's

8 bathroom, the bathroom outside your master bedroom?

9 A No.

10 Q His normal behavior when he used the bathroom was to use the master

11 bathroom?

12 A Yes.

13 Q Did you go into the bathroom? His bathroom? Brodie's bathroom?

14 A I went to Brodie's room.

15 Q Okay. And what did you see about Brodie when you went into his

16 room?

17 A He was full of vomit. He was full of vomit.

18 Q Could you smell it?

19 A Yes.

20 Q Okay. What did you do after you saw Brodie in that condition?

21 A I walked him to his bathroom.

22 Q What did you do inside the bathroom?

23 A He threw up again. And then I just quickly wiped him off.

24 Q When you say you wiped him off, what did you wipe him off with?

25 A A washrag.

1 Q You're in the bathroom?

2 A Yes.

3 Q Was the light on?

4 A I -- yeah.

5 Q Did you see any injuries to Brodie at that time?

6 A Just the ones that I'd seen before.

7 Q Okay. Did you notice any new injuries?

8 A No.

9 Q Did you take a long time to examine Brodie?

10 A No.

11 Q Did you dress him again?

12 A No.

13 Q What did you put him in?

14 A He was just -- he was just in his diaper.

15 Q Where did you bring Brodie?

16 A To the couch in the living room.

17 Q Was it light or dark in the living room?

18 A Dark.

19 Q What did you do with Brodie when you got him in the living room?

20 A I put a towel down and laid him on the couch.

21 Q And what, if anything, were you and Brodie doing on the couch?

22 A I just leaned over and give him a kiss and I laid next to him for a

23 second.

24 Q Did there come a time where you -- soon thereafter that you believed

25 Brodie was asleep?

1 A Yes, almost immediately.

2 Q Did he complain about anything, the condition of his head, when you

3 were --

4 A Yeah, he told me his head hurt. Momma head -- his head hurt.

5 Q After Brodie fell asleep, did you leave the television on for him?

6 A Yes.

7 Q Was that normal for you to do with Brodie to help him fall asleep?

8 A Yes.

9 Q Did you go back into your bedroom into your bed?

10 A Yes.

11 Q What, if anything, did the defendant say to you when you got back into

12 your bed?

13 A Why did you just leave the TV on?

14 Q Was that a concern of the defendant?

15 A Yes.

16 Q Why?

17 A Because the power bill was higher that month.

18 Q How much was your power bill that month?

19 A A little bit over a hundred dollars.

20 Q So what did you do when he said that?

21 A I got up and went and turned the TV in the living room off.

22 Q What was the next time you remember after you going back into bed --

23 I'm assuming that you fell asleep?

24 A Yes.

25 Q Do you remember anything occurring or the next time that you

1 remember something occurring in your bedroom? What was that?

2 A The defendant carried Brodie in a fuzzy blanket to lay him next to me.

3 Q Do you remember what time that was?

4 A The sun wasn't up yet.

5 Q It was still dark?

6 A Yes.

7 Q Do you have any knowledge or did you look at a clock at all about what
8 time it was?

9 A No.

10 Q Did anything unusual occur about Brodie being in the bed with you at
11 that time?

12 A He wasn't usually in my -- I can't breathe.

13 Q Let me rephrase the question to you, Arica. Was there anything
14 unusual that occurred from the time the defendant came in with Brodie until you
15 woke up again sometime later that morning?

16 A Huh-uh.

17 Q Is that a no?

18 A No. I can't remember. No.

19 Q Nothing unusual happened?

20 A No, he just laid him next to me.

21 Q Now, you woke up sometime after that?

22 A Yes.

23 Q Was the time approximately 8:50 in the morning?

24 A Yes.

25 Q What did you first notice about Brodie when you woke up that final

1 time?

2 A It looked like he was going to fall off the bed.

3 Q And what did you do?

4 A I rubbed his back.

5 Q His back?

6 A Yes.

7 Q And what --

8 A I said Brodie --

9 Q I'm sorry?

10 A And I just said Brodie, buddy, and I rubbed his back.

11 Q I think you said that you rubbed his back?

12 A Yes.

13 Q Okay. Did you notice anything unusual when you rubbed his back?

14 A Yes.

15 Q What did you notice?

16 A He was cold.

17 Q Did you notice anything else about his body?

18 A He was just cold, so I jumped up -- something wasn't right and I ran
19 around the bed and his eyes were just cracked open (indiscernible) and I said
20 Brodie, Brodie.

21 Q Did you put him on the bedroom floor in your bedroom?

22 A 911 told me to because I called 911.

23 MR. STANTON: May I approach, Your Honor?

24 THE COURT: Yes.

25 BY MR. STANTON:

1 Q I -- we're almost done, Arica. I have in front of you Exhibit 80. I asked
2 you to review and to initial that CD if it was an accurate copy of the recording that
3 you made to Henderson 911; is that correct?

4 A Yes.

5 Q And you initialed it?

6 A Yes.

7 Q That's your initial on the cover of this or the actual CD itself?

8 A Yes.

9 Q And does that recording accurately depict what was said to you by
10 dispatch and what you said to them as you just described when you called 911 on
11 the morning of June 15th?

12 A Yes.

13 MR. STANTON: I move for its admission, Your Honor.

14 THE COURT: Objections?

15 MS. VON MAGDENKO: No objection, Your Honor.

16 THE COURT: That's fine, admit.

17 [State's Exhibit 80 admitted]

18 MR. STANTON: Arica, thank you very much and I pass the witness.

19 CROSS-EXAMINATION

20 BY MS. VON MAGDENKO:

21 Q Miss Foster, did Michael ever hit you?

22 A No.

23 Q You had testified that when you got back from getting the milk and the
24 batteries and the fax that his door was actually shut?

25 A Yeah.

1 Q Okay, do you remember testifying in court previously in this case?

2 A Yeah.

3 Q Okay. And you testified truthfully at that time?

4 A Yes.

5 Q And isn't it true that when you gave your testimony to the Court
6 previously, you told the Court you did not know whether or not his door was open or
7 shut?

8 A Possibly.

9 Q Okay. So -- and you were asked multiple times? Right?

10 A I don't remember.

11 Q Okay.

12 MS. VON MAGDENKO: Your Honor, if I can approach to refresh her
13 recollection? This preliminary hearing --

14 THE COURT: Yes, what are you referencing, please?

15 MS. VON MAGDENKO: The preliminary hearing transcript, page 103.

16 THE COURT: All right.

17 BY MS. VON MAGDENKO:

18 Q You can just look at the highlight portion.

19 A Okay.

20 Q Okay. And so you in fact actually don't remember whether or not his
21 door was open or closed when you got back, do you?

22 A I don't know.

23 Q You don't know. Okay. You had testified that Brodie normally -- when
24 you were at Best Buy, Brodie normally didn't want to be held? He wanted to walk on
25 his own?

1 A Yeah.

2 Q But didn't you testify earlier when you were at Circus Circus you had a

3 stroller?

4 A Yes.

5 Q Okay. So that day he wanted to be in his stroller at Circus Circus?

6 A It's a long walk.

7 Q Okay. And you -- he had been walking all day?

8 A Yes.

9 Q Okay. Because not only had you gone to Circus Circus, you went to

10 the Shark Reef, you went to Best Buy, and didn't he actually pee his pants three

11 times at McDonald's? Not just --

12 A No.

13 Q No?

14 A His pull-up was just sopping wet.

15 Q Okay, so you never said before that he peed his pants three times?

16 A I may have.

17 Q You may have?

18 A Uh-huh.

19 Q Okay. So you actually don't really remember what happened that day?

20 A I remember what happened that day.

21 Q Okay. So your story's different today?

22 A No.

23 MR. STANTON: Objection; argumentative, Your Honor.

24 THE COURT: Overruled.

25 BY MS. VON MAGDENKO:

1 Q So your story's different then?

2 A No.

3 Q Huh?

4 A No.

5 Q It's not. Okay. Then I'll refresh your recollection.

6 MS. VON MAGDENKO: Court's indulgence.

7 This is the June 21st, 2011 incident report, page 112. If I can
8 approach?

9 THE COURT: You may.

10 BY MS. VON MAGDENKO:

11 Q I'll show you where it is.

12 Right here talks about you're at Circus Circus and he peed.

13 A Uh-huh.

14 Q And then he actually peed again? Do you see that?

15 A Yes.

16 Q Okay. So now that your recollection is refreshed, he actually peed
17 multiple times while at McDonald's?

18 A When we were at McDonald's, I -- he stopped peeing halfway through
19 his pee. So I'm assuming he finished that first pee.

20 Q You didn't take him to the bathroom?

21 A Second, yes.

22 Q Okay. So he peed twice?

23 A Yes.

24 Q And Brodie hadn't had his -- was Brodie napping once a day at that
25 time?

1 A Usually.

2 Q For how long?

3 A I don't recall.

4 Q Okay. And that day, how long did he sleep for?

5 A Just a short time in the car.

6 Q Okay. Did you ever tell the police or anyone that you were getting --

7 you were thinking about getting a nanny cam for Michael?

8 A Yes.

9 Q You did?

10 A Yes.

11 Q When did you tell them that?

12 A In an interview that I had with Detective Collins.

13 Q When was that ?

14 A Probably our second interview.

15 Q We'll have to ask Detective Collins about that.

16 MR. STANTON: Your Honor, I object to counsel's ad hominem comments.

17 She's not testifying.

18 BY MS. VON MAGDENKO:

19 Q Okay. What -- and when you were in the car accident, what kind of car

20 were you driving?

21 A A Mercedes two-door --

22 Q How many hours a week were you working?

23 A Maybe 30 -- 20, 30, part time.

24 Q Part time. And how did you afford the Mercedes?

25 A With my paycheck.

1 Q Okay. It wasn't owned by Michael?

2 A No.

3 Q And isn't it true that two weeks prior to Brodie's death on June 27th, you
4 took Brodie to the doctor because you were concerned he was bruising too easily?

5 A Yes.

6 Q And at that time he was jumping off desks?

7 MR. STANTON: Your Honor, I think counsel misspoke. June 27th --

8 MS. VON MAGDENKO: I mean May 27th. I'm sorry, he's right.

9 MR. STANTON: -- Brodie's deceased.

10 BY MS. VON MAGDENKO:

11 Q And at that time was he jumping off the desks and jumping off chairs at
12 the doctor's office?

13 A Jumped off of the -- he was climbing on the exam table.

14 Q Okay. Do you consider that a desk?

15 A No, I consider it a exam table.

16 Q Okay, well isn't it true that when your statement was taken by the police
17 on June 21st, you said that yeah, he's jumping off the desk? He's doing this,
18 jumping off chairs?

19 A If that's what it says, then that's what I said.

20 Q Okay. So did you ask -- you said that after the tubes were put in his
21 ears, his balance was a little bit better.

22 A Correct.

23 Q Okay, but wasn't he still falling regularly?

24 A He would trip, yes.

25 Q Would he trip on his own feet?

1 A If he was running.

2 Q Is that a yes just --

3 A Yes.

4 Q Okay. Was it suggested to you that if his balance didn't approve that

5 you should take him to see a neurologist?

6 A By the ENT.

7 Q Is that a yes?

8 A Yes.

9 Q Would the dog knock Brodie down?

10 A Yes.

11 Q Would Brodie use his bicycle to get things?

12 A Yes.

13 [Colloquy between counsel]

14 MS. VON MAGDENKO: Court's indulgence.

15 [Colloquy between counsel]

16 BY MS. VON MAGDENKO:

17 Q And you said that you started noticing a lot of bruising when Jennifer

18 Lee started babysitting.

19 A Yes.

20 Q And how old were her children? At that time.

21 A A couple years older than Brodie.

22 Q And were they male or female?

23 A Male.

24 Q Okay. And were they calm children or were they rowdy, rambunctious?

25 A Rambunctious.

1 Q Okay. And you started noticing that bruising -- just so I get the timeline
2 right, Michael hadn't moved in with you yet, had he?

3 A Yes, he had.

4 Q He had? Okay, so Mike moved in and then Jennifer started
5 babysitting? I just want to make sure I have the timeline right.

6 A Sorry. Jen would babysit and then Mike and I moved in together.

7 Q Okay. So Jen started babysitting and then later Michael moved in?

8 A Yes.

9 Q And then while Jennifer was babysitting, you started noticing additional
10 bruises?

11 A Not until Michael and I moved in together.

12 Q Oh, okay. Okay. And you had testified earlier that while at Jen's
13 house, Michael -- I mean Brodie got a bruise inside his ear?

14 A He got a bruise on the top of his ear.

15 Q And that -- isn't it true that Brodie -- you testified in -- not testified, you
16 gave a statement to the police previously that Brodie always had bruising on his
17 forehead?

18 A Occasionally.

19 Q That wasn't my question.

20 A Sure, yeah.

21 Q So on Monday when Brodie has a bruise on his forehead, that's not
22 uncommon?

23 A No.

24 Q And isn't it true that Brodie would even knock his own head on his
25 dresser?

1 A Yeah.

2 Q And isn't it true that you had indicated to the police that you thought
3 Brodie needed to be in a bubble?

4 A Not to the police that I recall.

5 Q Okay.

6 A I told them I --

7 Q Let's -- let me refresh your recollection then.

8 MS. VON MAGDENKO: This is page 74 of the incident report, dated June
9 21st, 2011. It's the recorded interview of Arica Foster.

10 May I approach the witness, Your Honor, to refresh her recollection?

11 THE COURT: Yes.

12 BY MS. VON MAGDENKO:

13 Q And I'll just direct your attention to the bottom of the page.

14 A Uh-huh.

15 Q Does that refresh your recollection?

16 A Yeah, I told the detective that that's what I told them.

17 Q Okay. So you told the detective Brodie needs to be in a bubble? Is that
18 correct?

19 A In a conversation about if I told that to Mike and Jennifer Lee, yes.

20 Q Okay. So when you -- when Jennifer was babysitting the -- Brodie, he
21 had bruising?

22 A Yes.

23 Q And then Jen stopped babysitting him and then he had a different
24 babysitter, right?

25 A Yes.

1 Q And the bruising started up again?
2 A Couple weeks later.
3 Q Would Michael babysit Brodie?
4 A On Mondays.
5 Q Because you worked four to eight?
6 A Yes.
7 Q And isn't it true that Brodie would actually wake up with bruising on his
8 forehead?
9 A Yes.
10 Q When Brodie was on his four-wheeler, he tried to jump a curb?
11 A Yes.
12 Q Was he trying to jump down or up?
13 A He was trying to go up the curb.
14 Q Trying to go up the curb. And he fell forward?
15 A No.
16 Q He didn't? How did he fall?
17 A Side -- off sideways.
18 Q Which side?
19 A Left.
20 Q He fell to the left. Okay. And do you recall being interviewed by the
21 police on June 6 -- June 17th, rather, 2011?
22 A Yeah -- kind of. I was interviewed a lot.
23 Q You were interviewed a lot. Okay. And --
24 MS. VON MAGDENKO: Court's indulgence.
25 BY MS. VON MAGDENKO:

1 Q Isn't it true that on June 11th you actually told the police that when he
2 struck the curb, it sent him forward?

3 MR. STANTON: Your Honor, on June 11th, she never had any --

4 MS. VON MAGDENKO: I mean June -- June 17th. I'm sorry, there's a lot of
5 dates here. I apologize.

6 BY MS. VON MAGDENKO:

7 Q On June 17th when you were interviewed by the police, isn't it true that
8 you told them that Brodie went forward?

9 A I don't remember anymore.

10 Q You don't remember anymore?

11 THE COURT: Counsel, are we getting close to a stopping point?

12 MS. VON MAGDENKO: Yeah, we can stop. I can resume this tomorrow.

13 THE COURT: Okay.

14 Then ladies and gentlemen -- at 9:30?

15 THE CLERK: 9:30.

16 THE COURT: 9:30 tomorrow please. Again, you're admonished not to
17 converse amongst yourselves or with anyone on any subject connected with the
18 trial, do not read, watch or do any research on your own, and do not form or express
19 an opinion on this case. See you tomorrow.

20 [Jury out at 4:58 p.m.]

21 THE COURT: All right, I know the witness is still on the stand, but is there
22 anything we need to address before we go off the record?

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

24 MS. VON MAGDENKO: No, Your Honor.

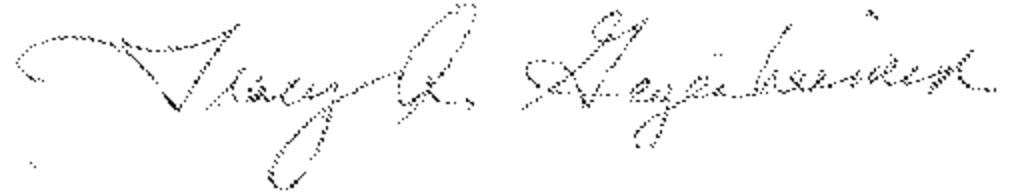
25 THE COURT: All right. See you tomorrow.

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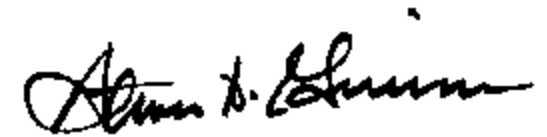
MS. VON MAGDENKO: Thank you.

[Proceedings concluded at 4:58 p.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.



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



CLERK OF THE COURT

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 7, 2014

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 4

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 Thursday, August 7, 2014 at 9:35 a.m.

2
3 [Outside the presence of the jury]

4 THE COURT: All right. The defendant is present and counsel's present for
5 both the State and the defense.

6 Mr. Stanton, you said you have a matter outside the presence?

7 MR. STANTON: Yes, Your Honor. Based upon the objection of counsel to
8 the photographs, I'd like to advise the Court that today we plan on showing several
9 witnesses the photographs of Brodie's external injuries at autopsy. And if I could
10 have just a moment to address Mr. Altig's comments.

11 Mr. Altig made reference to some violation of the court order. I think
12 the court order -- or the Court already ruled and understand that that issue was not
13 in front of them. In fact, the motion is to not permit the admission of certain autopsy
14 photographs.

15 Primarily in their motion and the relief that they requested was the
16 internal photographs which are obviously extremely graphic by the nature of what
17 they depict. Nowhere in there was the relief requested then up until Mr. Altig's
18 comments that somehow if evidence is admitted, there would be some sort of legal
19 basis on which the evidence could not be used with other witnesses. I'm aware of
20 no law that states that, because I don't think any exist. Once they're into evidence,
21 the State or any party, to include the defense, is entitled to use those photographs if
22 it's relevant and probative. And certainly today we're going to encounter several
23 witnesses where those injuries and their recognition of the injuries is critical.

24 THE COURT: Okay. And this has -- this is in addition to the discussion we
25 had yesterday and the Court's ruling?

1 MR. STANTON: Yes, Your Honor, I just -- and it's just as a matter of caution
2 to let the Court know that we are going to seek to use those photographs with
3 witnesses today.

4 MR. ALTIG: Yes, Your Honor. I do not recall the objection and the motion in
5 limine being to the internal photographs. They were objections to the autopsy
6 photographs which include photographs taken by the autopsy -- or the coroner's
7 investigator. All the photographs that were autopsy related, that was what the
8 objection was from.

9 If I remember Your Honor -- if I remember the State's response to that
10 objection and their responsive pleading was they needed to show those pictures in
11 order for the coroner to explain the injuries. Your Honor went ahead and allowed
12 the pictures in for that limited purpose so that the coroner could explain those
13 injuries.

14 Now what we have is we have them being displayed multiple times to
15 the jury through different witnesses that -- where they're not needed to explain any
16 injuries. They're, in my opinion, being used to bring an emotional response out of
17 the jury, a highly prejudicial response out of the jury. They're not probative with
18 these other witnesses of any particular fact.

19 And, Your Honor, as I remember yesterday, in fact, grandmother's
20 testimony, they put the pictures up, they go through each and every mark on the
21 body asking if these marks existed. The same evidence can be elicited without the
22 display of the photographs to the jurors. They don't need to be displayed to the
23 photographs to the jurors.

24 They asked the grandmother in their direct examination of her if she
25 had noticed -- she had bathed the child, yes. She had lotioned the child, yes. Did

1 you notice any injuries on them? No. They could have gone through the injuries
2 orally. They didn't have to display the pictures over and over and over again.

3 Our objection initially was that they were prejudicial in nature, they
4 weren't probative of anything. The State argued in response that they're probative
5 as to the coroner's testimony only, not as to these other witnesses. Now they're
6 being displayed over and over and over again, increasing the prejudicial effect.

7 I would at this point -- and I understand the Court's ruling from
8 yesterday and I'm not trying to be disrespectful or flippant or anything like that with
9 Your Honor. I'd never do that. But I would renew my motion for a mistrial. I
10 believe that the prejudicial effect of displaying the photographs over and over and
11 over again isn't something that can be undone. It's something that's happened.
12 There's no way to undo it.

13 Now they're talking about doing it over and over and over again, which
14 is not even what they responded to in their -- in the motion -- in their opposition to
15 our motion in limine. Their opposition to our motion in limine said they needed it for
16 the specific purpose of having the coroner testify and explaining the coroner's
17 testimony. And now here we are, because they got moved into evidence for that
18 purpose, the State's saying now let's open the door for me to use it for any and
19 every purpose I want to? I don't think that's accurate, and correct, Your Honor
20 admitted them by motion in limine for a particular purpose. They're being -- that
21 purpose is now being abused and overused.

22 THE COURT: Okay. The motion for mistrial is going to be denied. As I
23 previously indicated and as all counsel is aware, prior to a trial obviously I have
24 information regarding the facts in this case, but as to the relative theories of
25 prosecution, theories of defense, that really is what's developed over the course of

1 the trial and that is when I first become privy to the real -- how you guys intend to
2 handle each of your respective cases.

3 When the photographs came up, they came up by way of how the
4 State was going to lay a foundation for them and how they were going to get them
5 into evidence, and quite simply, laying the foundation was done by we have already
6 had testimony from the person who took the photographs and the person who --
7 you know, the person from the coroner's office that went out to the crime scene
8 took those photographs which were ultimately admitted into evidence, and then the
9 coroner's testimony that laid foundation for the photographs that were taken during
10 the course of the autopsy. So that's really where the discussion came up at the
11 time of trial.

12 I agree with Mr. Stanton in I don't know any rule that says once they're
13 -- foundation is laid, once they're properly moved into evidence, that they're not
14 allowed to be utilized at other parts of the trial. Obviously you've got to take care
15 not to just use them simply to inflame the jury, but the problem is here -- it's not
16 really the problem. It's clear now to this Court that the main hinge of this -- the
17 main crux of this case is the timing of when everything occurred. And thus far the
18 people that the State has presented the pictures to are people who can put the
19 timeframe in effect.

20 Quite clearly from the defense's opening, they -- the defense has a
21 different theory of what caused these injuries and everything else. The State
22 obviously has a different theory, so I think they're relevant to show the timing issues
23 of when the injuries occurred or when they became readily apparent to the naked
24 eye and this is the same ruling I gave yesterday. And I think they're more probative
25 than prejudicial.

1 MR. ALTIG: I understand, Your Honor. If I may, I think maybe part of the
2 problem based on your ruling is the fact that we had the coroner come and testify,
3 was not subject to cross-examination, because I think under cross-examination she
4 would admit that many of the bruises that the State is pointing to were three to four
5 days old. She said that in her coroner's report, under cross-examination that was
6 going to be elicited --

7 THE COURT: And you'll be able to cross her on that. That would go to
8 weight versus admissibility.

9 MR. ALTIG: Okay.

10 THE COURT: And obviously you'll have your own experts who will be able to
11 testify in that regard as well.

12 Are there other issues we need to address at this time?

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

14 THE COURT: By the defense?

15 MS. VON MAGDENKO: No, Your Honor.

16 MR. ALTIG: No, Your Honor.

17 THE COURT: All right. Please bring the jury in.

18 MR. STANTON: Your Honor, there's something up on the screen that hasn't
19 been admitted.

20 MS. VON MAGDENKO: This is just a PowerPoint presentation, Your Honor.
21 It's not going to be admitted into evidence. The prosecution used a PowerPoint in
22 their opening. It's just a similar PowerPoint.

23 MR. STANTON: Well, hold on a second.

24 THE COURT: Well you have to be able to lay a foundation for it.

25 MR. STANTON: Judge, we object to anything being shown to this jury that is

1 not evidence.

2 MS. VON MAGDENKO: They used a PowerPoint in their opening.

3 THE COURT: But this is examination. How are you going to use it?

4 MS. VON MAGDENKO: I'm just going to say, you know, ask her a question,
5 did Brodie have a knot in back of his head on Friday, June 3rd, yes or no?

6 MR. STANTON: Judge, that's improper.

7 THE COURT: I mean I think these are things that you could use in closing.

8 MS. VON MAGDENKO: Okay.

9 THE COURT: I just don't know how you would utilize them in examination.

10 And I mean, you're always welcome to use the -- I don't know, the boards over
11 there for demonstrative purposes to aid the jury, but this would not be appropriate --

12 MS. VON MAGDENKO: So I can use the whiteboard for demonstrative
13 purposes, but I can't use the computer for demonstrative purposes?

14 MR. STANTON: Your Honor --

15 MS. VON MAGDENKO: Is that your ruling?

16 THE COURT: There's a different way -- well -- yes.

17 MR. STANTON: Your Honor, I got to tell you, I'm deeply troubled, deeply
18 troubled, that we are in the middle of a murder trial and I have defense counsel
19 attempting to use a document that's not into evidence with no foundation laid and
20 she's standing here before the Court, it appears from the State, incredulous that
21 that's not going to be permitted. That is trial lawyer basics 101 and I am deeply
22 troubled that we're this far down the road and we're in a position where that
23 fundamental fact isn't obvious to the defense counsel.

24 THE COURT: All I can say is I've already said they're not going to be
25 allowed in the manner that's been presented.

1 MR. ALTIG: May I have a moment to speak with Ms. Von Magdenko, Your
2 Honor?

3 THE COURT: Yeah. That's fine.

4 MR. ALTIG: Thank you.

5 THE CLERK: Off, Judge?

6 THE COURT: It looks like it.

7 [Off the record at 9:45 a.m.]

8 [Back on the record at 9:46 a.m.]

9 THE COURT: Are you guys ready?

10 MS. VON MAGDENKO: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. STANTON: Thank you, Your Honor.

13 [Pause]

14 THE MARSHAL: District Court XXIII jury is present.

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

16 THE COURT: Okay, welcome back, ladies and gentlemen. When we left off
17 yesterday, Arica was on the stand. Arica Foster.

18 You want to bring her back in, please?

19 And I think we were ready for cross when we left off?

20 MR. STANTON: We were into cross, Your Honor.

21 THE COURT: Yeah. So if you want to get ready.

22 MS. VON MAGDENKO: I'm ready.

23 THE COURT: Okay.

24 MS. VON MAGDENKO: I need more space, Your Honor.

25 THE COURT: Okay.

1 MS. VON MAGDENKO: Right here.

2 THE COURT: I didn't know if you want to stand or not. That's -- stand at the
3 podium or not. It's up to you.

4 THE COURT: All right. Arica, ma'am, Ms. Turner (sic), when you were in
5 here yesterday, you were placed under oath. You're still under oath at this time.
6 Do you understand that?

7 THE WITNESS: Yes.

8 THE COURT: All right. Please sit down and make yourself comfortable.
9 Please begin whenever you're ready.

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

11 ARICA FOSTER

12 [resumed the stand and testified further as follows:]

13 CROSS-EXAMINATION CONTINUED

14 BY MS. VON MAGDENKO:

15 Q I know we were talking -- when we left off, we were talking about
16 Brodie's ATV accident, but I want to back up and kind of go in some order. So if we
17 go chronologically, on May 27th -- it's a Friday -- you took Brodie to the doctor
18 because he was bruising too easily; is that correct?

19 A I took him for the car accident.

20 Q You didn't tell the doctor that he was bruising too easily?

21 A I also told the doctors that he was bruising too easy, correct.

22 Q Okay, and what did the doctor say?

23 A He told me just to bring him and get some bloodwork done; that he was
24 rambunctious.

25 Q Okay. So this was just -- the doctor felt that this was normal?

1 A Yes.

2 Q Okay. And when the prosecution was asking you questions, he had
3 said that -- well he asked you a question and he said did the bruising in the months
4 prior to Brodie's death increase in severity, frequency and location?

5 A Okay.

6 Q And your response was yes?

7 A Yes.

8 Q And at that time by the time you took him to the doctor on May 27th,
9 that increase in severity, location and frequency had already happened, correct?

10 A Yes.

11 Q On Friday, June 3rd, and now this would be a week and a half prior to
12 Brodie's death, did Brodie have a knot on the back of his head?

13 A Do you have a calendar that I can look at, please?

14 MS. VON MAGDENKO: Can I show her my --

15 THE COURT: Do you have just a blank calendar?

16 MR. STANTON: It's evidence, Your Honor, Exhibit 77.

17 THE COURT: Okay. Want to use that?

18 MS. VON MAGDENKO: Yes, Your Honor.

19 THE COURT: I believe it shows what, June 2011?

20 MS. VON MAGDENKO: May I approach, Your Honor?

21 THE COURT: You may.

22 MS. VON MAGDENKO: Thank you.

23 BY MS. VON MAGDENKO:

24 Q I'll just let you hold onto that so it's easier for you. Okay. So that would
25 be Friday, June 3rd, a week and a half prior to your son's death.

1 A I believe so, yes.

2 Q Do you know how that bump on the back of his head happened?

3 A Brodie told me Bum hurt head.

4 Q Okay. Isn't it true that Mike actually called you at work infuriated that he

5 had a knot on the back of his head?

6 A Yes.

7 Q And isn't it true that Michael actually said, you know, you bring him to

8 your parents and now he's around all those kids and how could that have

9 happened?

10 A I'm not positive. I don't recall at this time.

11 Q You don't recall? You recall giving a statement to the police on June

12 21st, 2011?

13 A I recall speaking to the police, yes.

14 Q Okay.

15 MS. VON MAGDENKO: This is page 75.

16 Your Honor, may I approach to refresh the witness's recollection?

17 THE COURT: You may.

18 MS. VON MAGDENKO: Thank you.

19 BY MS. VON MAGDENKO:

20 Q And I'll direct your attention to the bottom of the page, this bottom

21 paragraph, if you could just read that to yourself to see if that refreshes your

22 recollection.

23 MR. STANTON: Counsel, you said page 75?

24 MS. VON MAGDENKO: Yes.

25 THE WITNESS: Okay.

1 BY MS. VON MAGDENKO:

2 Q Does that refresh your recollection?

3 A Yes.

4 Q And Michael told you, you know, you really need to go feel Brodie's
5 head?

6 A Yes.

7 Q He was so concerned? Is that true?

8 A He did tell me to feel his head. That's correct.

9 Q Okay. And this same Friday, Michael noticed it when he was actually
10 giving Brodie a bath, correct?

11 A Correct.

12 Q And was that -- and wasn't it true that Brodie actually still had sand in
13 his hair because grandma actually didn't wash his hair?

14 A Brodie had just had a bath before he left my mom's house.

15 Q There was -- was there still sand in Brodie's hair?

16 A I wasn't present to know if there was sand in his hair.

17 Q Is that what Michael told you?

18 A Yes.

19 Q Okay. Okay. And the Monday, if we -- actually -- actually Monday's --
20 he pulled the wood on himself and cut his upper lip?

21 A Correct.

22 MR. STANTON: Just so I can have the record clear, is -- could we have a
23 foundation as to the date of what Monday she's referring to? Thank you.

24 BY MS. VON MAGDENKO:

25 Q Actually, do you remember which Monday that was?

1 A I don't.

2 Q Okay. So was days before he was -- his death?

3 A It was weeks.

4 Q It was weeks. Okay.

5 A Or a week.

6 Q Okay. And was the wood jagged?

7 A No, not that I know of. I don't recall.

8 Q No or you don't recall?

9 A I don't recall.

10 Q Okay. So on page 78 of the same statement you gave to the police --

11 MS. VON MAGDENKO: Your Honor, may I approach the witness?

12 THE COURT: You may.

13 BY MS. VON MAGDENKO:

14 Q Do you see that? You say the wood is jagged?

15 A Yes.

16 Q Does that refresh your recollection that you told the police that actual

17 wood was jagged?

18 A Yes.

19 Q And that he cut the inside of his lip, right?

20 A No.

21 Q No. Okay. And you don't remember which Monday that was?

22 A That's correct.

23 Q So where -- was it the outside of his lip then?

24 A Correct.

25 Q Okay. You're positive?

1 A Positive because I brushed his teeth.

2 Q Okay.

3 MS. VON MAGDENKO: Same page, Your Honor, 78, may I --

4 BY MS. VON MAGDENKO:

5 Q Well actually you're positive so I don't have to refresh your recollection.
6 Isn't it true that the detective asked you on the inside of his lip and your response is
7 yeah, on his little lip right there? So the detective said inside and your response
8 was yeah?

9 A But I also said right under that, that I brushed his teeth and there was
10 nothing in his mouth.

11 Q I didn't ask about brushing his teeth. I asked was the cut on the inside
12 of the lip?

13 A As I recall, it was the outside.

14 Q Okay. So your statement to the police is different from what you
15 actually recall as you sit here today?

16 A No. Can you show me where I said that, please?

17 [Colloquy between counsel]

18 MS. VON MAGDENKO: Okay. Your Honor, may I approach?

19 THE COURT: Yes.

20 BY MS. VON MAGDENKO:

21 Q Just these two lines.

22 A But I also said right there, no, no, not his teeth, not on his gums two
23 sentences before that.

24 Q I didn't ask if he cut his teeth.

25 MR. STANTON: Your Honor, counsel's attempting to elicit testimony. This

1 witness is entirely proper in telling counsel the context of her answer and to put it in
2 her -- in proper context for the witness.

3 MS. VON MAGDENKO: Your Honor, I'm trying to get a yes or no response.
4 This goes to credibility of the witness. She tells the detective it was on the inside of
5 the lip. Today she tells the jury it's not, it's on the outside.

6 THE COURT: I believe she's answered this question multiple times.

7 MS. VON MAGDENKO: Okay. Well I'll move on.

8 BY MS. VON MAGDENKO:

9 Q So on the Friday before his death, Friday, June 10th, this is the last
10 weekend, does Brodie wake up with pinkeye?

11 A Yes.

12 Q Okay. And that's when you take him to the doctor?

13 A Correct.

14 Q And he prescribes Gentamicin drops?

15 A Correct.

16 Q And was your stepfather -- we'll just call him grandpa, if that's okay,
17 related to Brodie. Is -- did he come over that day and administer the drops --

18 A Yes.

19 Q -- in Brodie's eyes? Okay. And then Brodie was with the grandparents,
20 your mother and Brad Moshier -- I'm just going to call them grandparents if that's
21 okay with you -- Saturday and Sunday?

22 A Correct.

23 Q And so they would have been administering the drops to him?

24 THE COURT: Ma'am, can you speak up, please?

25 THE WITNESS: Yeah, sorry.

1 Yes.

2 BY MS. VON MAGDENKO:

3 Q Okay. When you took him to the pool on Monday, did he still have the
4 pinkeye?

5 A It was going away.

6 Q Did he --

7 A Yes.

8 Q Okay. And did the pool -- was it a public pool?

9 A Yes.

10 Q So going back to Friday, that's when he fell off of his quad, right?

11 A I don't recall if it was Friday or Thursday.

12 Q Okay. And this is where we -- actually we left off before, and if you're
13 not sure about which day it was, I want to make sure that you're sure on the date.
14 Okay, and you testified before in court on this matter.

15 A Yes.

16 Q And --

17 A Yes.

18 MS. VON MAGDENKO: It's page 115 of the preliminary hearing transcript.

19 Your Honor, may I approach to refresh the witness recollection?

20 THE COURT: Yes.

21 BY MS. VON MAGDENKO:

22 Q Actually I'll highlight this for you. I just highlighted here where you said
23 it was Friday.

24 A Okay.

25 Q Okay. Does that refresh your recollection?

1 A Yes.

2 Q Okay. So this -- the ATV accident happened on Friday. Did you take
3 him to the doctor -- so he had pinkeye and you immediately took him to the doctor?

4 A That morning, yes.

5 Q Okay. And then you came back and then he fell off his quad?

6 A I don't remember.

7 Q Okay. So you don't remember if he had -- if the doctor saw him before
8 or after the accident, correct?

9 A I'm not sure.

10 Q Okay. So you don't remember. You can't place that timeline?

11 A Correct.

12 Q Okay. And you testified yesterday that he fell to the side and hit his
13 cheek?

14 A Correct.

15 Q Right. But you had given a statement to the police two days after the
16 accident and told them that he had fallen forward and struck his face on the car.

17 A Incorrect.

18 MS. VON MAGDENKO: Okay, this is page 63.

19 Your Honor, may --

20 BY MS. VON MAGDENKO:

21 Q So when the police officer says that you said it sent him forward and he
22 struck his face on the car, the officer is incorrect?

23 A Yes.

24 Q Okay. And are the counters at your mother's house -- at grandma's
25 house, so we have some consistency, the same height as Brodie's forehead?

1 A Correct.

2 Q And was Brodie -- had Brodie injured himself on those counters before?

3 A Correct.

4 Q How often would that happen?

5 A On occasion.

6 Q Okay. And when you were previously asked by the detectives you

7 couldn't remember, but it was either Friday or Saturday prior to his death and you

8 weren't sure then. You had said that he had a bump on the back of the right side of

9 his head and you assumed that was from grandma's house?

10 A I don't recall. Is that the same weekend of Friday, the 3rd?

11 Q No, no, no, this -- no. No, this is just the weekend prior to his death

12 now.

13 A I don't remember that.

14 MS. VON MAGDENKO: This is page 62.

15 Your Honor, if I can approach to refresh --

16 MR. STANTON: Sixty-two of?

17 MS. VON MAGDENKO: -- the witness's recollection?

18 MR. STANTON: Which --

19 THE COURT: Sure.

20 MS. VON MAGDENKO: The incident report.

21 THE COURT: Yes.

22 MR. STANTON: Can I see what you're talking about?

23 May we approach?

24 THE COURT: You may.

25 [Bench conference begins at 10:02 a.m.]

1 MR. STANTON: This page of the incident report that counsel just showed me
2 is not a transcript. It's the officer's -- detective's report. So while I think that there's
3 leeway about what someone can use to refresh their recollection, I think it needs to
4 be clear that it's not a transcript of her statement, that in essence what we're doing
5 is we're going into a hearsay statement; that is, what the detective noted in his
6 report. That detective is going to testify today or tomorrow and I just would like the
7 record to be clear. And if we go too far, I'll be objecting that it's an improper basis to
8 refresh his recollection. It's a hearsay statement.

9 THE COURT: Okay, so just make sure you make a record of what you're
10 showing --

11 MS. VON MAGDENKO: Okay.

12 THE COURT: -- her, please.

13 MS. VON MAGDENKO: Okay.

14 [Bench conference ends at 10:03 a.m.]

15 BY MS. VON MAGDENKO:

16 Q So this is page 62 and it's a summary of the detective's statement that
17 you gave him on June 17th.

18 MR. STANTON: And just so the record is clear, this is not a transcript of the
19 defendant's -- or the witness's interview with the detective.

20 MS. VON MAGDENKO: Yes, this is the detective's summary.

21 THE COURT: And is prepare -- I just want to make sure it's prepared by the
22 detective?

23 MS. VON MAGDENKO: This particular one, yes.

24 THE COURT: Okay. Thank you.

25 BY MS. VON MAGDENKO:

1 Q You can just read that and see if it refreshes your recollection.
2 A I don't recall that.
3 Q Okay. So you don't recall telling this to the detective?
4 A Correct.
5 Q What time on Saturday did you drop Brodie off at grandma's?
6 A What date?
7 Q Everything now that I'm going to talk about, unless I say otherwise, will
8 be the weekend prior to his death --
9 A Okay.
10 Q -- so that Saturday. I apologize.
11 A Probably around 11, 11:30 a.m.
12 Q Okay. And then what time did you pick him back up Sunday?
13 A I got to my mom's about 7:30 at night, but I stayed there for a little
14 while.
15 Q Okay. What did you do Saturday?
16 A Went to work.
17 Q What time?
18 A I don't recall what exact time, after I dropped him off at my mom's.
19 Q And what time did you end work?
20 A Probably 8 p.m.
21 Q And there's a reason why you didn't go pick Brodie back up?
22 A Yes.
23 Q What was that reason?
24 A He stayed at my mom's on Saturday nights.
25 Q Always?

1 A Most likely, yes.

2 Q And why was that?

3 A Just to visit with my mom.

4 Q Did you tell the detectives any other reason?

5 A I don't know.

6 Q You don't know?

7 A I don't know.

8 Q Okay. This is actually a transcript -- this isn't a summary, this is a

9 transcript --

10 MS. VON MAGDENKO: Page 86.

11 THE COURT: Is it her transcript?

12 MS. VON MAGDENKO: Yeah, it's her transcript. This is not a summary.

13 THE COURT: Okay.

14 BY MS. VON MAGDENKO:

15 Q -- of a statement you gave on the 21st of June.

16 A Okay.

17 THE COURT: And that was given to police?

18 MS. VON MAGDENKO: The police took it.

19 THE COURT: Okay.

20 MS. VON MAGDENKO: It's question and answer format.

21 THE COURT: Okay.

22 MS. VON MAGDENKO: If I can approach the witness to refresh --

23 THE COURT: You may.

24 MS. VON MAGDENKO: -- her recollection?

25 THE COURT: You may.

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

2 BY MS. VON MAGDENKO:

3 Q Just this answer here.

4 Did you have a chance to read that?

5 A Yes.

6 Q Okay. So isn't it true that you told the detectives that the reason why
7 you dropped Brodie off there for Saturday night was so you and Michael could have
8 a night out?

9 A Yes, on occasion.

10 Q Well I'm not talking --

11 A Yes.

12 Q -- about occasion. So this is a man that you had said earlier that you
13 were thinking about getting a nanny cam for at the house?

14 A Yes.

15 Q But yet you still -- this Saturday you wanted to be alone with him?

16 A Yes.

17 Q On Sunday night -- again, this is the weekend prior to his death -- you
18 saw that there was actually pinpoint bruising on Brodie?

19 A Two, yes.

20 Q And it was because grandpa would play a game called typewriter on
21 him?

22 A Yes.

23 Q Did Brodie bruise that easily? If you just, you know, played a game like
24 this, he would bruise?

25 A No.

1 Q How hard was grandpa pressing?

2 A I don't know. I wasn't there.

3 Q Okay. Did grandpa play this game often?

4 A Just once in awhile.

5 Q Okay, but grandpa wasn't trying to hurt Brodie, was he?

6 A No.

7 Q How tall is grandpa? Approximately.

8 A Over six foot.

9 Q And how much does he weigh, approximately?

10 A I don't know.

11 Q Is he --

12 A Over 200 pounds. He's a big man.

13 Q Okay. He's a big man. Do you believe that grandpa intended to

14 actually bruise Brodie?

15 A Never.

16 MR. STANTON: Object as speculation. She'd have no idea what somebody

17 else intended.

18 THE COURT: Sustained.

19 BY MS. VON MAGDENKO:

20 Q On this Sunday night, that's the Sunday where Brodie had the scrapes

21 on his back from the curtain rods, right?

22 A Yes.

23 Q Okay. And on Monday, you also notice -- in addition to the top bruise

24 that was there a week before, you notice a bottom bruise on his lip, so he had both

25 top and bottom bruised, right?

1 A No.

2 Q No. What did he have on the bottom?

3 A It was chapped.

4 Q Okay. So --

5 A And I don't recall the top of his lip being damaged at that point in time.

6 Q We already went over that before.

7 Okay, this actually is the summary. Okay.

8 THE COURT: From the detective?

9 MS. VON MAGDENKO: Yeah.

10 BY MS. VON MAGDENKO:

11 Q So would you dispute then the detective -- on page 63, the detective

12 saying that you said I asked her about the bruise on the bottom lip and she said that

13 he sucks his bottom lip? The detective asked you about a bruise on the bottom lip.

14 Do you dispute the detective's summary of your statement?

15 A No.

16 Q So Brodie did have a bruise on the bottom of his lip?

17 A It was chapped. Correct.

18 Q No, that wasn't my question. The detective --

19 A No, it wasn't a bruise.

20 Q So you disagree with the detective's characterization?

21 A Yes.

22 Q Okay. And you testified yesterday that you saw Brodie after you got

23 home from work on Monday? Is that accurate?

24 A If --

25 Q This would have been yesterday, what you said yesterday. I just want

1 to make sure, because it was a lot and I just want to be clear.

2 A I don't remember. I'm sorry.

3 Q Well okay, then I'll ask a different way. Did you actually see Brodie on
4 Monday when you got back from work?

5 A I don't recall right now. I'm sorry.

6 Q Okay. That's okay. Well you testified in the preliminary hearing --

7 MS. VON MAGDENKO: Page 88.

8 Q -- that you did not actually see Brodie when you got home on Monday
9 from work.

10 MS. VON MAGDENKO: Your Honor, if I can approach?

11 THE COURT: You may.

12 BY MS. VON MAGDENKO:

13 Q This is the -- when you testified in court previously, just the highlighted
14 portions.

15 A Correct.

16 Q Okay. So when you testified before, you actually didn't see Brodie
17 Monday when you got back from work? You took him to the pool that Monday and
18 he had additional injuries from the pool, right?

19 A No.

20 Q So if the detective said that's what you said, the detective would be
21 incorrect?

22 A Correct.

23 Q Tuesday morning -- this is the last full day -- Brodie said his head hurt,
24 right?

25 A Yes.

1 Q Okay. Did he say Michael hit him?

2 A No.

3 Q Okay. And this is the day that you went to -- I'll call it the car wash even

4 though there's a lot there?

5 A Yes.

6 Q And at the car wash there is like a deli type of thing; is that correct?

7 A Yes.

8 Q And a gas station?

9 A Yes.

10 Q Okay. And this is the day where you had the conversation with Michael

11 because Brodie was just so bruised?

12 A Yes.

13 Q Okay. And you had said I have nothing to hide, he's two, he fell?

14 A Yes.

15 Q So Michael hadn't caused these bruises?

16 A I don't know. I wasn't there.

17 Q Well you told the detectives that the bruises came from Brodie falling.

18 A That's what Michael told me.

19 Q What did you tell the detectives?

20 A I told the detectives that the defendant said he fell leaving Danny Fico's

21 house.

22 Q All the bruises happened that -- at Danny Fico's house?

23 A The ones that I hadn't described previously, yes.

24 Q Wasn't it just one additional forehead bruise?

25 A No.

1 Q No. So Danny's going to testify that it was more than that that --

2 MR. STANTON: Objection to the form of the question.

3 MS. VON MAGDENKO: I'll withdraw.

4 BY MS. VON MAGDENKO:

5 Q So you -- when you told the detectives that, you were just referring to --
6 what were you referring to?

7 A I'm sorry, I'm not understanding what you're asking.

8 Q You told the detectives that in response to Mike's statement, you said I
9 have nothing to hide, he's two, he fell.

10 A Yes.

11 Q Okay. You didn't tell the detectives, well, Mike told me he fall -- he fell,
12 did you?

13 A In a previous statement, yes.

14 Q So which injuries were from Monday then?

15 A Everything besides -- I had only seen a small bruise on his forehead --
16 The last time I had seen him before his face was -- had more bruises was a small
17 bruise on his forehead, a tiny shading under his eye and a very faint dime size on
18 his cheek.

19 Q Okay, so you're saying that all these additional bruises were present
20 then Tuesday morning?

21 A Yes.

22 Q Okay. Where were you on Monday -- so just the timeline, Monday you
23 take him to the pool?

24 A Yes.

25 Q And then what do you do?

1 A I go to work.

2 Q For how long?

3 A Four hours.

4 Q Four hours. And where -- and did Michael take Brodie to Danny's
5 house to see a baseball game?

6 A He said that, yes.

7 Q Okay. And were there other children present?

8 A I wasn't there.

9 Q Is it your understanding that other children were present?

10 MR. STANTON: It would object that that would be an irrelevant question.

11 MS. VON MAGDENKO: Your Honor, it's relevant if other children -- these
12 are --

13 THE COURT: I'll allow you to ask it. Overruled.

14 BY MS. VON MAGDENKO:

15 Q Were other -- is it your understanding that other children were present?

16 A Yes.

17 Q Okay, and whose children were they?

18 A Jennifer Lee's.

19 Q Okay. And these are the same children that you described were rough
20 and tumble?

21 A Yes.

22 Q Okay. And -- well you can't actually remember if you saw him Monday
23 night or not, but you saw him Monday -- Tuesday morning. And he had -- well he
24 had the facial injuries you already went over so we won't have to go over them
25 again. When were your days off at that time during this time period this week?

1 A Tuesday, Wednesdays.

2 Q Okay, Tuesday, Wednesday. So all day on Tuesday is your day off?

3 A Correct.

4 Q The only time that you were -- you had left Brodie alone with Michael

5 was in the car when you went to get your refund at the salon and when you went for

6 those 56 minutes to get your -- the milk, right?

7 A As far as I recall, yes.

8 Q And how long were you in the salon for? How many minutes was that?

9 A I don't recall exactly how many minutes.

10 Q Can you approximate? An hour, 15 minutes, five minutes?

11 A Five, 10 minutes.

12 Q So this is Tuesday. Did you go to the gas station Tuesday morning?

13 A Yes.

14 Q Okay. And there you -- did you buy some juice for Brodie?

15 A Yes.

16 Q Did you use cash?

17 A I don't recall.

18 Q Or did you use food stamps?

19 A I don't recall.

20 Q You don't recall.

21 MS. VON MAGDENKO: Page 109 of the transcript. It's not a summary, Your

22 Honor.

23 MR. STANTON: I would object, Your Honor, as relevance.

24 MS. VON MAGDENKO: This goes to credibility of the witness.

25 MR. STANTON: May we approach?

1 THE COURT: Uh-huh.

2 [Bench conference begins at 10:17 a.m.]

3 MS. VON MAGDENKO: Your Honor, the witness testified she owned a
4 Mercedes, and yet now she's saying she has food stamps. It goes to the credibility
5 of how someone who owns a Mercedes is eligible for the food stamp program --

6 THE COURT: You're impeaching with an extrinsic matter.

7 MS. VON MAGDENKO: Goes to credibility.

8 MR. STANTON: Well --

9 MS. VON MAGDENKO: If she's going to lie to the food stamp people --

10 MR. STANTON: You can't establish that she's lied to the thing. That's a
11 collateral matter.

12 THE COURT: I mean collateral, but -- you can't impeach with a collateral
13 matter.

14 MS. VON MAGDENKO: Okay. Can I ask her if she -- well, that's fine. This
15 happened the day he died.

16 MR. STANTON: I'm sorry?

17 MS. VON MAGDENKO: She just -- this is the Tuesday. She just goes into
18 the gas station and gets the juice with the food stamps.

19 MR. STANTON: Yeah.

20 MS. VON MAGDENKO: Can I ask that question?

21 MR. STANTON: She already did. It's --

22 MS. VON MAGDENKO: Okay.

23 MR. STANTON: It's completely irrelevant how she bought the juicebox. All
24 it's attempting to do is to somehow impugn her character in front of the jury which is
25 not permitted. What's the relevance about how she bought the juicebox?

1 MS. VON MAGDENKO: Well Judge already made a ruling.

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

3 BY MS. VON MAGDENKO:

4 Q So if we go back to Tuesday, you wake up in the morning and Brodie
5 says his head hurts.

6 A Yes.

7 Q Do you ask him what happened?

8 A No.

9 Q Do you take him to the doctor?

10 A No.

11 Q And what do you do instead, you go to the gas station?

12 A Yes.

13 Q And then where do you go?

14 A Shark Reef.

15 Q Okay. And isn't it -- you testified earlier that Brodie didn't even want to
16 be around Michael at all that day, right?

17 A Yes.

18 Q Isn't it true that Brodie actually let Michael pick him up to see the fish at
19 the Shark Reef?

20 A Yes, he did.

21 Q And that's not someone not wanting to be around him, is it?

22 A He threw a fit about it.

23 Q Did you actually say that when you testified previously in a court of law?

24 A I don't recall.

25 Q You don't recall.

1 MS. VON MAGDENKO: All right, this is page 123 the preliminary hearing
2 transcript.

3 Your Honor, may I approach to refresh the witness's recollection of the
4 transcript?

5 THE COURT: Preliminary hearing?

6 MS. VON MAGDENKO: Yes.

7 THE COURT: Yes.

8 BY MS. VON MAGDENKO:

9 Q And you can just read the highlighted portion. Or anything above or
10 below it.

11 A (No audible response.)

12 Q So when you were under oath in a court of law before testifying on this
13 same issue, you didn't tell anyone that Brodie threw a fit, did he -- did you?

14 A Not at that time, no.

15 Q Okay. And that was done in November 2011?

16 A Correct.

17 Q After Shark Reef, where did you go?

18 A Circus Circus.

19 Q Was that the Adventuredome or just the Midway?

20 A We walked around everywhere.

21 Q Okay. Did you ride any rides?

22 A No.

23 Q Okay. And Brodie actually didn't want to eat his McDonald's, did he?

24 A He ate some.

25 Q Did you tell the detectives that?

1 A I don't recall.

2 MS. VON MAGDENKO: This is page 111 of a transcript.

3 It's not a summary, Your Honor. May I approach and refresh the
4 witness's recollection?

5 THE COURT: It's a transcript from the preliminary hearing, or the statement
6 she gave to the police?

7 MS. VON MAGDENKO: Statement she gave the police.

8 THE COURT: Yes, you may.

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

10 BY MS. VON MAGDENKO:

11 Q And what I'm referring to is this line here.

12 A Okay.

13 Q Does that refresh your recollection?

14 A Yes.

15 Q So Brodie didn't want to eat his McDonald's that day, right?

16 A Correct.

17 Q And he didn't want to eat his lasagna dinner that night either, right?

18 A Correct.

19 Q And after Circus Circus, that's when you went to the bank, the salon
20 and Best Buy?

21 A Correct.

22 Q And you said that Brodie didn't want to be around Michael that day,
23 right?

24 A Correct.

25 Q And wasn't Brodie actually cranky towards you too?

1 A No.

2 MS. VON MAGDENKO: This is a preliminary hearing transcript, Your Honor,
3 page 94 --

4 THE COURT: Okay.

5 MS. VON MAGDENKO: -- to 95. May I approach the --

6 BY MS. VON MAGDENKO:

7 Q Actually you testified no so I don't have to refresh. Isn't it true that in a
8 court of law previously you were asked under oath if Brodie was cranky to you on
9 Tuesday and you said yeah?

10 A I'm not sure. If that's what it says, then I testified that.

11 Q Okay, so your testimony is changed then? Because on -- when the
12 prosecution asked you -- when I just asked you, you said no.

13 A Okay.

14 Q So my statement's correct, your testimony has changed; is that correct?

15 A Yes.

16 Q And isn't it true that after Best Buy you went home and you said
17 everybody was having a great time?

18 A Yes.

19 Q And after -- did Michael get a promotion that night when he went to
20 work?

21 A No, I -- I don't know.

22 Q You don't -- okay. Well after he came back -- this is Tuesday night --
23 you -- you made dinner for the defendant, right?

24 A I made dinner for household, yes.

25 Q Okay. And he was part of your household?

1 A Correct.

2 Q Okay. And you had already put Brodie to bed by the time Michael came

3 home?

4 A I put him in his bed, yes.

5 Q Okay. And that's when you went for the milk and the fax?

6 A Correct.

7 Q And isn't it true that when Michael called you the first time for batteries

8 he sounded fine?

9 A Yes.

10 Q And when he called a second time, he asked what was taking so long

11 and you had said he was just irritated?

12 A Yes.

13 Q Not angry?

14 A Correct.

15 Q So yesterday when you testified he was angry, that would be an

16 incorrect statement that you told the jury?

17 A I think of it as a similar -- irritation, annoyed, angry. To me it would be

18 the same type of a --

19 Q So to you irritation is the same as anger?

20 A Yes, to me at times it is.

21 Q Well I'm not talking about at times. I'm talking about that --

22 A Yes. The same thing.

23 Q Okay. Isn't it true that you told the police that Michael always thought

24 you were gone forever if you did anything?

25 A Yes.

1 Q And when you came home after getting the milk, Michael was sitting on
2 the couch?
3 A Correct.
4 Q Was he angry on the couch?
5 A I don't recall.
6 Q You don't recall?
7 A No.
8 Q Was he watching TV?
9 A I would assume.
10 Q So I don't want you to assume.
11 A I don't know.
12 Q You don't know. Okay. Had Michael -- was Michael drunk that night?
13 A I don't know.
14 Q Did you see him drinking a 40.
15 A Nope.
16 Q Okay, was Michael high on drugs that night?
17 A Not that I'm aware of.
18 Q Did you see him --
19 A No.
20 Q And you two -- you and Michael went to bed in the same bed that night?
21 A Yes.
22 Q At 10:30?
23 A Correct.
24 Q Before you went to bed, was there any blood on Michael?
25 A Not that I saw.

1 Q Okay. And in the middle of the night at approximately 1 a.m., Michael
2 wakes up and says he used the hall bathroom, smelled vomit, and alerted you?

3 A Correct.

4 Q And isn't it true that Michael regularly used that hall bathroom?

5 A I don't recall.

6 Q So you don't recall if you said that -- if Michael had told you he would
7 use that bathroom?

8 A I don't recall.

9 Q Okay.

10 MS. VON MAGDENKO: Your Honor, this is the actual transcript, it's not a
11 summary, of the statement she gave to the police on the 21st of June, page 101.

12 THE COURT: Okay.

13 MS. VON MAGDENKO: May I approach?

14 THE COURT: Yeah, that's fine. And I appreciate you clarifying between the
15 preliminary hearing and then the statement given to the police so we have a clear
16 record.

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

18 BY MS. VON MAGDENKO:

19 Q Just direct your attention to the bottom of the page.

20 Did you have a chance to read that?

21 A Yes.

22 Q Okay. Does that refresh your recollection?

23 A I'm not really sure what the two have to do with each other, I'm sorry.

24 Q But Michael using the hall bathroom was normal?

25 A I didn't get that out of that, I'm sorry.

1 Q Okay, well I'll ask you was Michael using the hall bathroom normal?
2 A No. I don't know.
3 Q You don't know?
4 A I don't believe so, no. We had a bathroom in our bedroom.
5 Q And did you tell the detectives after you got the new bed, Michael would
6 wake Brodie up to use the bathroom?
7 A Correct.
8 Q Okay. That bathroom wasn't in Brodie room, it was in the hallway,
9 right?
10 A Correct.
11 Q Okay. And after -- at 1 a.m., you notice there's throw-up everywhere,
12 right?
13 A In his bedroom, correct.
14 Q Okay. And then you take Brodie to the bathroom and he vomits again?
15 A Yes.
16 Q Okay. And Brodie told you again like he had told you that morning that
17 his head hurt?
18 A Yes.
19 Q Did you take him to the doctor?
20 A No.
21 Q Did you actually remind Brodie that he had the flu?
22 A No. Not that I recall.
23 MS. VON MAGDENKO: This is page 119 of the June 21st transcript. It's not
24 a summary, Your Honor. May I approach the witness and refresh her recollection?
25 THE COURT: Yes.

1 BY MS. VON MAGDENKO:

2 Q What I'm going to show you is a statement you gave to the police days
3 afterwards. It's the top here. Sorry, it's hard to read.

4 A Okay.

5 Q Does that refresh your recollection?

6 A Yes.

7 Q And that you did in fact remind Brodie that he had the flu?

8 A I said that in there, yes.

9 Q Okay, and that was an accurate statement?

10 A Yes. To my knowledge at that time it was.

11 Q And how long he had the flu for?

12 A That was the first time he had thrown up that night.

13 Q That wasn't my question. How long had he had the flu for?

14 A He hadn't.

15 Q You reminded Brodie he had the flu --

16 A I said okay, baby, you have the flu.

17 Q Okay, so you thought that was brand new?

18 A Yes.

19 Q Okay. Isn't it true you told the detectives that approximately a week
20 prior to death Brodie had a bout with diarrhea?

21 A I said weeks before, I believe.

22 MS. VON MAGDENKO: This is page 62. This actually is the summary of the
23 detective. May I --

24 BY MS. VON MAGDENKO:

25 Q You said today it was weeks, but would you disagree with the detective

1 and his assessment you said that Brodie had diarrhea about a week before he died?

2 A Can I view what context it was in that I was saying it?

3 Q Sure.

4 MS. VON MAGDENKO: May I approach, Your Honor?

5 THE COURT: Yes.

6 BY MS. VON MAGDENKO:

7 Q What I'm referring to is down there.

8 So isn't it true according to the detective you had said about a week
9 before he died he had a bout with diarrhea? Brodie that is?

10 A I believe in a taped interview I had said weeks before, so I'm going to
11 disagree.

12 Q All right. So you disagree with the detective's summary?

13 A Yes.

14 Q Okay. So you're saying that Brodie just had -- when you told Brodie,
15 you know, remember you have the flu, that that was brand new?

16 A Yes.

17 Q So in the weeks prior to his death, he didn't have the flu?

18 A No.

19 Q Okay. You're under oath now --

20 A Yes.

21 Q -- and you were under oath in November of 2011 when there was
22 another court hearing on this matter, right?

23 A Yes.

24 Q And isn't it true that when you were under oath then, you actually told
25 the court that he had flu-like symptoms a couple weeks before his demise?

1 A I said he had diarrhea, I believe.

2 Q Question was: Now, you had told I believe it was the detectives that
3 Brodie had had --

4 MR. STANTON: Page, counsel?

5 MS. VON MAGDENKO: One fourteen.

6 Q -- some flu-like symptoms a couple weeks before his demise, correct?

7 And your answer was yes.

8 A I believe and I said diarrhea somewhere.

9 Q The question was did he have flu-like symptoms and your answer was
10 yes.

11 A Yes.

12 Q Okay. So the flu-like symptoms wasn't new to this night, was it?

13 A Yes, it was, the vomiting was.

14 Q I didn't ask about vomiting, I said the flu-like symptoms. So the flu-like
15 symptoms were not new when you reminded Brodie he had the flu --

16 A They were new.

17 Q Was the flu new?

18 A Yes.

19 Q But you told the court the flu wasn't new?

20 A No, I told the court --

21 MR. STANTON: Objection; ask and answered and we're now argumentative.

22 THE COURT: Sustained. She's responded to the question.

23 MS. VON MAGDENKO: Okay.

24 BY MS. VON MAGDENKO:

25 Q And Michael was there to help you, right?

1 A When?

2 Q In caring for Brodie?

3 A Yes.

4 Q And Michael would give Brodie a bath?

5 A When Brodie let him.

6 Q Okay, so Brodie would let him give him a bath?

7 A Not usually, only on occasion.

8 Q Did you tell the detectives that?

9 A At some point, yes.

10 Q When the detectives interviewed you on June 21st, 2011, did you

11 mention it then?

12 A I don't know, but I did mention it to Detective Collins.

13 Q Okay.

14 MS. VON MAGDENKO: This is page 72 of the transcript. It's not a summary,

15 Your Honor. Can I approach the witness and refresh her recollection?

16 THE COURT: Yes.

17 BY MS. VON MAGDENKO:

18 Q I'll just direct your attention to this portion.

19 A Yes, that was in the month, the -- after we had been together for a

20 month, living together, that he offered to pick him up and give him baths.

21 Q Okay. And you didn't mention at that time to the police that when he let

22 him?

23 A At some point I did, not at that very time right there because we were

24 talking about the very first month that we'd been living together was the context --

25 Q How long did the detective interview you for on that day?

1 A I don't recall the exact length of time.

2 Q Was it -- can you approximate?

3 A No.

4 Q You were there. Was it five minutes, an hour, two hours?

5 A I don't recall.

6 Q Isn't it true that the interviews lasted over two hours?

7 A If that is what that says, then that's correct.

8 Q Okay. So according to this, it started at -- this is military time --

9 MR. STANTON: Your Honor, counsel's reading from a document that's not in

10 evidence. It's improper and object.

11 MS. VON MAGDENKO: She said if that's what it says. I'm trying to refresh

12 her recollection.

13 MR. STANTON: Okay. Well that may be her answer, but it's still -- the rules

14 of evidence apply that if -- you can't read from a document and admit something

15 that's not into evidence. If counsel would like to --

16 MS. VON MAGDENKO: I'll withdraw it.

17 BY MS. VON MAGDENKO:

18 Q Does two hours sound approximately correct?

19 MR. STANTON: If counsel -- I'm still making my objection on the record. If

20 counsel wants to admit the transcript, the State has no objection to the entirety of

21 the transcript of all of these to be admitted.

22 THE COURT: Okay. You withdrawing the question?

23 MS. VON MAGDENKO: Yes.

24 THE COURT: Correct. Then move on, please.

25 BY MS. VON MAGDENKO:

1 Q Does two hours sound like an accurate time period?

2 A I don't know.

3 Q Okay. What time would Michael usually get up in the morning?

4 A Before the sun came up.

5 Q What time does the sun come up?

6 A I don't know right now. I don't know -- I can't remember exact times of

7 what time the sun comes up.

8 Q Does approximately 5 a.m. sound accurate?

9 A Probably around there, 4:30, 5 a.m.

10 Q Okay. And what time do you usually get up at this time period?

11 A After eight.

12 Q And what time would Brodie wake up?

13 A Usually around seven or eight.

14 Q Okay. So when Brodie wakes up, you're still sleeping?

15 A It depends on the date.

16 Q Usually?

17 A I'd usually get up when he got up.

18 Q Well you testified that you usually got up after eight.

19 A I --

20 Q Right?

21 A I -- yeah.

22 Q Okay, and Brodie usually got up before eight, between 7:30 and 8?

23 A Correct.

24 Q So that means Brodie's awake but you're still sleeping?

25 A He'd come and get me when he woke up.

1 Q But you're -- if he wakes up at 7:30 and you don't wake up till 8:30, that
2 means you're still sleeping for an hour?

3 A Not unless he comes and gets me.

4 Q So sometimes he would get you?

5 A Most the time he would come and get me.

6 Q Okay. And who normally put Brodie to bed?

7 A It depended on the night.

8 Q So sometimes Michael would put Brodie to bed?

9 A If I wasn't there, yes.

10 Q And Brodie would let Michael put him to bed?

11 A I wasn't there.

12 Q But you as the mother would let Michael put Brodie to bed?

13 A I would let Michael watch him, yes.

14 Q Okay. Isn't it true that Brodie thought that the baby monitors were
15 walkie talkies?

16 A I don't know. It's possible.

17 Q Okay. And that does it -- you said it's possible. Did you guys ever play
18 Marco Polo?

19 A Yes.

20 Q Okay.

21 MS. VON MAGDENKO: This is page 102 of the transcript. It's not a
22 summary. If I can refresh the witness's recollection. And it's the same, it's the June
23 21st, it's the only -- may I approach?

24 THE COURT: Yes.

25 BY MS. VON MAGDENKO:

1 Q I'll just direct your attention to that.

2 A Okay.

3 Q So in the statement you gave to the detective, does it refresh your
4 recollection that you told the detective Brodie thought that the baby monitors were
5 actually walkie talkies to play with?

6 A Yes, he would walk up to it and say Marco and I'd say Polo. He wasn't
7 touching it though.

8 Q Did you tell the police that?

9 A I don't recall. I believe we went over it in an interview with Detective
10 Collins that I had never seen him touch the monitors.

11 Q You told the detective that it was within reach of Brodie?

12 A Correct.

13 MS. VON MAGDENKO: Your Honor, I have a series of photos that have not
14 been admitted into evidence. I would like permission to approach the witness and
15 have her review them. I've already --

16 THE COURT: Show them to the State, please.

17 MS. VON MAGDENKO: I already gave them to him yesterday.

18 MR. STANTON: Yes, Your Honor.

19 THE COURT: All right, you may.

20 MS. VON MAGDENKO: Thank you, Your Honor. And these are Defendant's
21 Proposed Exhibits A through M.

22 BY MS. VON MAGDENKO:

23 Q And these are not autopsy photos, they're just family photos.

24 A Okay.

25 Q I just want you to look at these photos and just review them to yourself

1 personally and tell me when you're done if they're fair and accurate of what they
2 depict and when they were taken if you know.

3 A (Witness complies.)

4 Don't know what this one's from.

5 Q Okay. And that's Proposed Exhibit B. Aside from -- so A and then C
6 through M, do you recognize these photos?

7 A Yes.

8 Q And are they a fair and accurate depiction of what they show?

9 A What are you referring to?

10 Q Well let's take this photo. Do you know who took it?

11 A Yes.

12 Q Who took it?

13 A I did.

14 Q Okay. And is the photo altered in any way?

15 A No.

16 Q You know, is -- okay. And that's what I'm asking about all the pictures.
17 Are any of the photos altered?

18 A No.

19 Q Okay. So they're all fair and accurate at the time they were taken?

20 A Yes.

21 Q Okay. And they were taken by you?

22 A Yes -- most of them.

23 Q Okay.

24 A Some of them were not.

25 Q But had you seen these photos before?

1 A A couple of them, yes, some of them, no.

2 Q Okay. Which photos had you seen before? Which ones did you take?

3 MR. STANTON: Your Honor, might I recess or suggest a recess and maybe
4 to assist counsel, we can streamline this process during the break with the witness
5 in laying some foundation and then we can I think officially get to the admission of
6 these documents.

7 THE COURT: Are you at a point where we can take a break?

8 MS. VON MAGDENKO: Sure, yeah.

9 THE COURT: All right, ladies and gentlemen, let's take a 10-minute break.
10 You're admonished not to converse amongst yourselves or with anyone on any
11 subject connected with the trial, do not read, watch or form an opinion on this trial.
12 Come back in 10, please.

13 [Jury out 10:44 a.m.]

14 MS. VON MAGDENKO: Are these the ones you took? You don't know?

15 THE WITNESS: I don't want to talk about it until everybody's back.

16 MS. VON MAGDENKO: Okay.

17 MR. STANTON: Did you ask her a question? Might I suggest that you -- if
18 you're trying to move these admission and I'm assuming you're attempting to lay the
19 foundation through this witness --

20 [Colloquy between the Court and the clerk]

21 MR. STANTON: -- to move your exhibit in.

22 MS. VON MAGDENKO: Uh-huh, yes.

23 MR. STANTON: Is that correct?

24 MS. VON MAGDENKO: Yes.

25 MR. STANTON: Then maybe we can spend this time -- this witness can tell

1 us whether or not she knows the date and we can write the date underneath the
2 photographs, the ones that she knows. Let that assist you in doing it and then if you
3 do that and she makes those statements, then I'll stipulate to their admission.

4 MS. VON MAGDENKO: Okay.

5 MR. STANTON: Okay? Want to do it that way?

6 MS. VON MAGDENKO: Yeah.

7 [Off the record at 10:44 a.m.]

8 [Proceedings resumed at 11:01 a.m.]

9 [Outside the presence of the jury]

10 THE COURT RECORDER: We're on the record.

11 MR. STANTON: We're ready.

12 THE MARSHAL: District Court XXIII jury is present.

13 [Jury in at 11:02 a.m.]

14 THE COURT: All right, the jury is back and looks like everyone is present if
15 you'd like to continue?

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

17 MR. STANTON: Your Honor, there was a series of photographs during the
18 break that I, counsel went over with the witness. To the extent that she can identify
19 photographs with a date or an approximate date, those dates have been put on the
20 bottom -- I handwrote the dates with the concurrence of defense counsel and the
21 State has no objection to those exhibits into evidence.

22 THE COURT: Is that correct?

23 MS. VON MAGDENKO: Yes, Your Honor.

24 THE COURT: All right. Please continue.

25 MS. VON MAGDENKO: Thank you.

1 THE CLERK: Counsel, can you get the exhibit?

2 MS. VON MAGDENKO: They're A, B, C, D, E, F, I, L and M.

3 [Defense Exhibits A, B, C, D, E, F, I, L and M admitted]

4 BY MS. VON MAGDENKO:

5 Q What I'm going to show is what's been marked as Defense Exhibits A
6 through F, I, L and M, and you've had a chance to look at those? Is that correct?

7 A Yes.

8 Q And you've actually had a chance to actually approximately date those
9 photos?

10 A Correct.

11 [Colloquy between counsel and the court recorder]

12 MS. VON MAGDENKO: The court reporter's going to turn the Elmo on so we
13 can show them to the jury.

14 THE COURT RECORDER: It should be on. Oh, you know what, press that
15 red -- where the red button -- there. Just a moment.

16 BY MS. VON MAGDENKO:

17 Q Okay. And so this picture you approximate was taken in December of
18 2010?

19 A Correct.

20 Q And where was this photo taken?

21 A In the back yard of my mom's house.

22 Q Okay. And actually the State showed you some other photos of
23 Brodie's room. Do you recall that?

24 A No.

25 Q There's been certain documents that have been admitted into evidence

1 and one of them is a photo of Brodie's room and this is State's Exhibit 19. Do you
2 recognize this photo?

3 A Yes.

4 Q Okay. And these are Brodie's toys and bed?

5 A Yes.

6 Q And are these tricycles?

7 A Yes.

8 Q And a other two-year-old age appropriate wheelie thing?

9 A Yes.

10 Q Okay. And what age was this rated for?

11 A I don't recall.

12 Q Okay. And isn't it true that the -- his four-wheeler is about three to four
13 times the size of these other small trikes?

14 A It's probably two times the size of the dump truck.

15 Q Dump truck. Okay. And then he actually has a bicycle there?

16 A Yes.

17 Q And here's a photo that's been marked as Defense Exhibit B. And
18 actually there actually is no date on this one. I just want to make sure.

19 MS. VON MAGDENKO: May I approach the witness?

20 THE COURT: You may.

21 BY MS. VON MAGDENKO:

22 Q Is this a photo you had --

23 A I said I didn't know what that one --

24 Q Okay.

25 A -- was; I hadn't seen it in the past.

1 MS. VON MAGDENKO: Just take off B.

2 THE CLERK: B.

3 BY MS. VON MAGDENKO:

4 Q And this photo is Defense Exhibit C, and this was taken, according to
5 you, approximately in the summer of 2010?

6 A Correct.

7 Q Where was this taken?

8 A In Montana.

9 Q And Brodie was standing on his bike?

10 A A friend's bike, yes.

11 Q Oh, it's pink. I guess it's not his bike. Was that something he would do
12 routinely?

13 A Yes.

14 Q And State's Exhibit -- Defense Exhibit D is a photo and who is this
15 photo of?

16 A Brodie and the defendant.

17 Q Okay. It's kind of dark but Brodie's on Michael's shoulders?

18 A Correct.

19 Q And so Brodie let Michael put him on his shoulders?

20 A This is before we lived together. Correct.

21 Q At this time?

22 A At this time, yes.

23 Q Okay. Was Brodie -- was Michael walking around with Brodie on the
24 Strip like this?

25 A Yes.

1 Q And this is Defense Exhibit E, and according to you this was taken in
2 2010?
3 A Correct.
4 Q Where was this taken?
5 A At the living room of my mom's house.
6 Q Why was Brodie on the table?
7 A Because he put the chair up there.
8 Q Brodie did that himself?
9 A Yes. Sorry.
10 Q And this is Defense Exhibit F.
11 A Yes.
12 Q And you said that this happened in April of 2011?
13 A Yes.
14 Q Brodie has some cuts on his face. How did that happen?
15 A I was using the restroom and he was with -- in the hallway running with
16 a bottle, said Michael, and he fell on it, said the defendant. I didn't witness it.
17 Q So just in the bathroom. He comes out and then --
18 A No, I was using the bathroom, the door was shut. I wasn't present
19 when it happened. I came out of the bathroom to Brodie screaming. The defendant
20 said he had tripped and fell running with the water bottle.
21 Q Okay. Did you take him to the doctor after this?
22 A No.
23 Q And this is Defense Exhibit I.
24 A Yes.
25 Q Is that Michael and Brodie together?

1 A Yes.

2 Q And when was this taken?

3 A Shortly after we moved in together.

4 Q Okay. And there again Michael -- Brodie is letting Michael hold him?

5 A Yes.

6 Q And this is Defense Exhibit L. When was this taken?

7 A Can you tell me what the bottom of the picture says, please?

8 Q Oh, I'm sorry, 2009.

9 A It was taken in 2009.

10 Q And there's bruising on Brodie's forehead, cheek and the side. Do you

11 see that?

12 A Those are bug bites.

13 Q Those are bug bites?

14 A Correct.

15 Q And this is Defense Exhibit M.

16 A Correct.

17 Q And this was taken in 2009?

18 A Correct.

19 Q Whose quad is that?

20 A My actual father's.

21 Q Your actual father's. Brodie has a bruise on his cheek then?

22 A It's a sunburn.

23 Q It's a one spot sunburn?

24 A Yes. The rest of his cheeks are a little pink too.

25 Q Okay. This is Exhibit I again. What were you doing that day?

1 A Walking downtown. Freemont Street.

2 Q That's all you had done that day?

3 A I don't recall. I had friends in town.

4 Q For what? Was it anything special?

5 A My friend's wedding.

6 Q Okay. So you had testified yesterday that you were considering moving
7 out and living separately from Michael?

8 A Correct.

9 Q And Michael was actually -- he had a conversation with his sister that
10 you found out about --

11 A Yes.

12 Q -- that he wanted to move out?

13 A He denied it.

14 Q Okay. But that was your -- you thought that?

15 A I don't know what I thought.

16 Q Well you said yesterday that he was planning -- he may have planned
17 to move out --

18 A I said we had had a conversation. I had asked him about a text
19 message that he didn't know I read in between his sister and him.

20 Q Did he --

21 A She --

22 Q Go ahead. I'm sorry, I don't mean to interrupt --

23 A She had made a comment about since he had bought a bed that we
24 were still going to live together.

25 Q And you didn't tell him that you went through his text messages?

1 A No. I told him a birdie flew on my shoulder and told me.
2 Q So you just made up a story?
3 A I said a bird flew on my shoulder and told me.
4 Q And that's also the babysitting. When you didn't want Jen to babysit
5 Brodie anymore, you made up a story to her too, right?
6 A No, it was the truth. My sister would babysit for free.
7 Q I thought you said yesterday that --
8 A I didn't want to hurt her feelings so I said my sister would babysit for
9 free. That's not a lie. My sister would babysit for free, ma'am.
10 Q You just didn't tell the whole truth?
11 A Correct.
12 Q And how old was your sister at that time?
13 A My sister?
14 Q At that time.
15 A Twenty-eight.
16 Q Was she working?
17 A I don't recall. I believe so.
18 MR. STANTON: And just so the record can be clear, this witness has two
19 sisters --
20 MS. VON MAGDENKO: Amanda.
21 MR. STANTON: Thank you.
22 BY MS. VON MAGDENKO:
23 Q You think she was working?
24 A I don't really recall.
25 Q Where did she work?

1 A She's a registered nurse.

2 Q Okay. At any point did she get fired from her job?

3 MR. STANTON: Objection; relevance.

4 MS. VON MAGDENKO: She -- Brodie's in the care of someone who may
5 have been fired from their job as a nurse.

6 THE COURT: Sustained.

7 MS. VON MAGDENKO: Okay.

8 BY MS. VON MAGDENKO:

9 Q And during that weekend before Brodie's death that Sunday, did you go
10 get your -- you got your hair and nails done and relaxed?

11 A Correct.

12 Q Did Brodie ever complain of any rib pain prior to his death?

13 A No.

14 Q And when you would bathe Brodie, you wouldn't actually bathe him, you
15 would just let him play in the bathtub; is that correct?

16 A It depends on the last time he had a bath.

17 Q So sometimes you would and sometimes you wouldn't?

18 A Correct.

19 MS. VON MAGDENKO: Court's indulgence.

20 [Colloquy between counsel]

21 BY MS. VON MAGDENKO:

22 Q Just so the record's clear, on Tuesday morning prior to his death, he
23 was all bruised up from prior, right?

24 A I'm sorry, repeat the question?

25 Q Tuesday --

1 A Okay.

2 Q -- that morning he says his head hurts and he has so many bruises you

3 and Mike have a fight about taking him out in public because he's so bruised up.

4 A Yes.

5 Q So from Tuesday to Wednesday morning, he did not incur any

6 additional bruising; is that correct?

7 A I don't recall right now, not that I'm aware of.

8 Q Okay.

9 A Not that I --

10 Q Not that you're --

11 A Not that I -- not that I can think of at this time, no. So from -- you mean

12 from Tuesday morning when I had visually seen him --

13 Q Yeah.

14 A -- until he passed away I hadn't seen any more bruises that I noticed,

15 no.

16 Q Okay. Because Wednesday morning around 1 a.m., you took him into

17 the bathroom, took off his shirt and turned on the light?

18 A Correct.

19 MS. VON MAGDENKO: No further questions.

20 THE COURT: Redirect?

21 MR. STANTON: Thank you, Your Honor.

22 MS. VON MAGDENKO: Oh, these are the State's exhibits.

23 REDIRECT EXAMINATION

24 BY MR. STANTON:

25 Q Arica, I want to have you look at Exhibit 77, the month of June, and

1 specifically direct your attention to obviously Wednesday, the 15th, and --

2 MR. STANTON: May I approach the witness, Your Honor?

3 THE COURT: Yes.

4 BY MR. STANTON:

5 Q Showing you what has been marked as State's Exhibit 5. Do you
6 remember when this photograph was taken in relationship to what we're looking at in
7 the month of June?

8 A I believe that that was the Friday -- Friday morning, the 10th.

9 Q And is that how Brodie looked like on that morning? It's an accurate
10 depiction of him on that day?

11 A Correct.

12 MR. STANTON: Move for 5 into evidence.

13 MS. VON MAGDENKO: No objection, Your Honor.

14 THE COURT: Admitted.

15 [State's Exhibit 5 admitted]

16 BY MR. STANTON:

17 Q What's Brodie doing in this photograph?

18 A Working out.

19 Q Do you notice anything on his face?

20 A Just a tiny little bruise on his cheek.

21 Q And do you know whether or not this would have been before or after
22 the Power Wheel incident?

23 A This would have been after.

24 Q Counsel asked you a series of questions about your prior statements to
25 detectives.

1 A Okay.

2 Q Let me just start off broadly. Do you remember how many times,
3 separate interviews within the first week after Brodie's death that you gave with the
4 police?

5 A I believe three or four.

6 Q And you gave -- that's the total number of interviews you gave in this
7 case. In other words, there weren't any more after approximately a week; is that
8 correct?

9 A Are you talking on the record or off?

10 Q On the record.

11 A On the record I believe we did -- it was mainly that first week, week and
12 a half time period, four I believe.

13 Q Now, counsel asked you questions about flu-like symptoms and
14 diarrhea.

15 A Yes.

16 Q Do you remember those questions?

17 A Yes, sir.

18 Q She showed you a preliminary hearing transcript.

19 MR. STANTON: Once again I'm referring counsel to page 114.

20 BY MR. STANTON:

21 Q I believe it was your testimony that you had described that there was
22 diarrhea some weeks before?

23 A Correct.

24 MR. STANTON: May I approach the witness, Your Honor?

25 THE COURT: Yes.

1 BY MR. STANTON:

2 Q Directing your attention to page 114 --

3 A Okay.

4 Q -- and lines 12, which is the question posed to you and your answer.

5 Now I'm going to read the question to you. The question was: Now, you told I
6 believe it was detective that Brodie had some flu-like symptoms a couple of weeks
7 before his demise, correct? What was your answer?

8 A Yes.

9 Q So this is a couple weeks before.

10 A Okay.

11 Q And then you say did you take him to the pediatrician? What's your
12 answer?

13 A I don't remember.

14 Q Okay. And were you concerned about his flu-like symptoms? What
15 was your answer?

16 A Yes.

17 Q And by flu-like symptoms, what would -- would that be a fever? And
18 what was your answer?

19 A No, sir, diarrhea.

20 Q And then the question: Diarrhea. How about any vomiting? What's
21 your answer?

22 A No, sir.

23 Q Counsel asked you questions about whether or not you told the
24 detectives that you went into Brodie's room on Monday night. I'm looking for my
25 calendar here. Monday night. Do you recall that?

1 A Yes.

2 Q Okay.

3 MR. STANTON: Page 103.

4 [Colloquy between counsel]

5 MR. STANTON: May I approach the witness --

6 THE COURT: Yes.

7 MR. STANTON: -- Your Honor?

8 It's 103 on mine. I think it's 102 on counsel's or 101.

9 BY MR. STANTON:

10 Q Could you just read the area that I have highlighted there, just to
11 yourself.

12 A Okay.

13 Q Now what did you tell Detective Collins about Monday evening and
14 going on and checking Brodie when you got home from work?

15 A That I had went in, checked on him and gave him a kiss on his
16 forehead.

17 Q And did you notice then the bump and bruise on his forehead?

18 A Correct.

19 Q Now you previously testified that that night, Monday, you confronted the
20 defendant about how he got that bruise?

21 A Yes.

22 Q And what was his explanation on Monday evening about how he got
23 that bruise?

24 A That Brodie had fell down leaving Danny Fico's house.

25 Q You were not obviously at that party?

1 A Correct.

2 Q How generally in these three interviews -- do you recall being
3 interviewed the June 15th?

4 A Yes.

5 Q And you were also two days later on the 17th?

6 A Correct.

7 Q And then on the 21st the following week?

8 A Correct.

9 Q Could you describe what your mental state was when you were being
10 interviewed by the detectives?

11 A Distraught. Confused. Heartbroken.

12 Q Now counsel asked you a question about your prior preliminary hearing
13 testimony. Could you describe how different as far as the details of questions that
14 were ask of you the preliminary hearing versus here at trial? Is it different?

15 A Yes.

16 Q Much different?

17 A Yeah.

18 Q A lot more detail now than then?

19 A Correct.

20 Q Okay. Counsel --

21 MR. STANTON: One twenty-three. May I approach?

22 THE COURT: You may.

23 BY MR. STANTON:

24 Q -- asked you a question about did not -- or you did not testify at the
25 preliminary hearing about letting Michael or the defendant -- Brodie letting the

1 defendant around him at the Shark Reef. Do you see that testimony on 123?

2 A Yes.

3 Q The question was never ask of you at the preliminary hearing about
4 whether there was a problem about Brodie and Michael, the defendant, being
5 around each other?

6 A Correct.

7 Q Were you there to answer the questions that were posed to you at the
8 preliminary hearing?

9 A Yes.

10 Q So let me ask you a series of questions about Monday night into
11 Tuesday morning about the bruising.

12 A Okay.

13 Q You testified I believe that the bump was what you observed when you
14 kissed Brodie Monday night?

15 A Correct.

16 Q Tuesday morning there's a lot more bruising?

17 A Correct.

18 Q Where do you recognize physically on Brodie that bruising is on
19 Tuesday?

20 A On Tuesday morning, correct?

21 Q Tuesday morning.

22 A His eyes were a lot darker. His cheek bruise was a lot darker. Under
23 his lip right here was like the scab from him sucking looked a lot worse and then he
24 had numerous bruises on his forehead.

25 Q And as far as Tuesday, now the 14th of June, did there come a time

1 after you got back to your home -- after you prepared lasagna and put Brodie to bed,
2 did you have an opportunity to see Brodie completely naked during that time period?

3 A I -- I don't recall seeing him naked.

4 MR. STANTON: Nothing further.

5 THE COURT: Anything else before she's excused?

6 MS. VON MAGDENKO: Yes, I just have a few follow-up questions.

7 RECROSS EXAMINATION

8 BY MS. VON MAGDENKO:

9 Q In the picture where Brodie's working out, that was Friday. That's
10 before he went to grandma's?

11 A Yes.

12 Q And that's before where on Tuesday morning he has all these bruises
13 on him?

14 A Yes.

15 Q Okay. Did the detectives give you an opportunity before you came in to
16 review your prior statements?

17 A Yes.

18 Q Did you review them prior to coming in?

19 A I looked over them once, yes.

20 Q Brodie was able to speak, wasn't he?

21 A He knew words. He was just learning to put the sentences and stuff
22 together.

23 Q Isn't it true that he could say things like mom, no, I got cash in my
24 backpack?

25 A He says cash in my packpack.

1 Q Really? So when you were interviewed by the police on June 21st, and
2 there's an actual transcript on page 113, and you say, quote: But I went to grab his
3 walkie talkie and he kept telling me, quote, mom, no, I got my cash in my backpack,
4 I got cash in my backpack --

5 A He would have said cash in my packpack. He called his backpack his
6 packpack.

7 Q Is that what you told the police?

8 A I would have told them like I just did you right now, because he never
9 said clear words like that, no.

10 Q Okay. So when detective -- when -- actually this isn't the detective's
11 summary, this is actually a typewritten -- it's an audio recording transcribed --

12 A But it's kind of hard to type out packpack.

13 Q So you're saying the transcriptionist changed your word?

14 A Possibly, backpack, packpack.

15 Q All right, but everything else is accurate; mom, no, I got my cash in my
16 backpack or packpack?

17 A He would have said something similar to that just shorter, correct.

18 Q So what you told the police was incorrect? Your quoting Brodie is
19 incorrect?

20 A The quoting -- I would have just said it in my own words, yes.

21 Q Okay, so what you told the police was incorrect?

22 MR. STANTON: That's asked and answered, Your Honor, objection.

23 THE COURT: Sus- --

24 BY MS. VON MAGDENKO:

25 Q Isn't it --

1 THE COURT: She's moving on.

2 BY MS. VON MAGDENKO:

3 Q Isn't it true that you also told the police that Brodie could say things like
4 hey momma, can I have some coffee?

5 A He would have said it shorter though.

6 Q Okay, so what you actually told the police was not correct?

7 A Can I read what I put in the context I put it in, please?

8 BY MS. VON MAGDENKO:

9 Q Sure, this is page 105 --

10 [Colloquy between counsel]

11 Q -- of a transcript of June 21st, 2011. If I can approach.

12 A Yes.

13 Q So what you told the police was accurate?

14 A That time, yes, it was.

15 Q Brodie could form a sentence so complex he can say hey, momma, can
16 I have some coffee?

17 A He wouldn't say it that clear, but yes, he would say it.

18 Q So Brodie was able to communicate to you?

19 A Yes.

20 Q What was the square footage of your apartment at the time of this
21 incident?

22 A I don't know --

23 Q Approximately?

24 A Don't know.

25 Q Was it a standard two-bedroom apartment?

1 A Yes.

2 Q Does 900 square feet sound approximate?

3 A Somewhere in there, yes.

4 Q Were any of the rooms soundproofed?

5 A No.

6 Q That night when Michael puts Brodie in the bed with you, is that at
7 approximately 5 a.m.?

8 A I don't know what time it was, approximately.

9 Q When you testified under oath before in a court of law, do you recall
10 saying Michael usually goes to work at around 5 a.m. and that day he put Brodie in
11 the bed with you around that time --

12 A Yes.

13 Q -- approximately? Yes.

14 A I remember saying that he goes to work around 5 a.m.

15 Q Okay. And that that morning -- and the follow-up question was did
16 Michael put Brodie in the bed? Do you recall that?

17 A Yes, I recall Michael putting Brodie next to me.

18 Q Okay. And at that time, do you believe that happened around 5 a.m.?

19 A It was very early in the morning. The sun wasn't up yet. So I'm
20 assuming it would be around somewhere between 4:30, 5 a.m.

21 Q Perfect, so it's your testimony that sometime on the morning -- early
22 morning hours of Wednesday, June 15th, that Michael put Brodie alive in your bed
23 sometime between 4:30 and 5 a.m.; is that correct?

24 A I said Michael laid him next to me in bed. I --

25 Q Do you know if Brodie was alive or not?

1 A No, because I wasn't holding him.

2 Q So you --

3 A The defendant was.

4 Q So you didn't tell the police that at that time Brodie told you he loved

5 you?

6 A I believe I said that the morning that Brodie passed away.

7 Q So the --

8 A I don't recall. Now I don't remember.

9 Q But at the time when it was fresh in your mind, you told the police that

10 when Michael put Brodie in the bed with you sometime between 4:30 and 5 a.m., he

11 said that he loved you?

12 A That morning when I was distraught, that is what I said.

13 Q Okay. And was that accurate?

14 A I don't know anymore. I don't know.

15 Q Now you don't know whether or not your memory's correct?

16 A That's the only time that I ever said it was that morning. There was a lot

17 going on. I just woke up to my dead child. I don't know.

18 Q Do you believe that the detective wrote it down wrong?

19 A I don't know.

20 MS. VON MAGDENKO: No further questions.

21 MR. STANTON: No further questions of this witness, Your Honor.

22 THE COURT: Thank you, ma'am, you're free to go.

23 She's released from subpoena though?

24 MR. STANTON: On behalf of the State, yes, Your Honor.

25 THE COURT: Yes. Do you have her under subpoena?

1 MS. VON MAGDENKO: We don't, Your Honor, not at this time.

2 THE COURT: All right. Thank you.

3 Who's your next witness, counsel?

4 MR. STANTON: Brad Moshier.

5 THE COURT: Okay.

6 [Pause]

7 THE MARSHAL: Please remain standing. Please raise your right hand and
8 be sworn in by our clerk.

9 BRAD MOSHIER

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

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

13 THE WITNESS: Brad Moshier, B-r-a-d, last name is M-o-s-h-i-e-r.

14 MR. GIORDANI: May I --

15 THE COURT: Whenever you're ready.

16 MR. GIORDANI: Thank you, Judge.

17 DIRECT EXAMINATION OF BRAD MOSHIER

18 BY MR. GIORDANI:

19 Q Mr. Moshier, I'm showing you State's Exhibit 3. Do you recognize the
20 people in that photo?

21 A Yes.

22 Q Who's the little boy there?

23 A My grandson, Brodie.

24 Q Is that Brodie Aschenbrenner?

25 A Yes.

1 Q Who's holding Brodie?

2 A Arica.

3 Q Who's Arica to you?

4 A My stepdaughter.

5 Q Are you married to her mother?

6 A Yes, Merridee.

7 Q And who is that?

8 A Merridee.

9 Q And is that Merridee Moshier at this point?

10 A Yes.

11 Q Are there other siblings in the family?

12 A Yes.

13 Q And who are they?

14 A Alayne Opie, Amanda Butler, and Morgan Moshier.

15 Q How long have you been in Ms. Moshier's life?

16 A Fifteen years now.

17 Q So were you around Arica, Alayne and the siblings around that same

18 timeframe?

19 A Yes.

20 Q Do you consider them children of yours?

21 A Yes.

22 Q Were you around Brodie when he was around his mother? Did you see

23 them interact?

24 A Yes, they lived with us from October timeframe of 2010 until they

25 moved in with Mike.

1 Q And you mentioned Mike. Do you mean Michael Lee?

2 A Yes.

3 Q Do you see that person in the courtroom?

4 A Yes.

5 Q Can you point to him and describe an article of clothing he's wearing

6 today --

7 A He's wearing a gray suit, white shirt.

8 MR. GIORDANI: Record reflect identification, Judge?

9 THE COURT: It will.

10 MR. GIORDANI: Thank you.

11 BY MR. GIORDANI:

12 Q So you said they -- Arica and Brodie lived with you.

13 A Yes.

14 Q And did they also live with Merridee?

15 A Yes.

16 Q Was there other people living in the household around that time period?

17 A Yes, my daughter, Amanda, her husband, John Butler, and their kids

18 had to move in with us for a while.

19 Q Fair to assume you were around Brodie when he was around Arica on a

20 number of occasions?

21 A Yes.

22 Q Showing you State's 4. Does that about sum up their relationship?

23 A Yes.

24 Q When did you meet the defendant you just identified here in court?

25 A When my daughter started dating him late -- I can't remember what

1 year, late fall --

2 Q And you mentioned October earlier of 2010. Does that sound fair?

3 A No. It was December year before Brodie's death.

4 Q Okay, so --

5 A So he --

6 Q -- that would have been December of 2010? Since Brodie, I represent
7 to you, died on June 15th of 2011.

8 A Yes.

9 Q Okay. Now before you met the defendant and before he came into
10 Arica and Brodie's life, you said you were around Arica and Brodie together?

11 A Yes.

12 Q Did you see Brodie alone? Did you ever watch him?

13 A Yes, I babysat him all the time.

14 Q What's all the time mean?

15 A Be on the weekends when his mom was working, when his -- when
16 Merridee and Arica would go out to do something. I mean, if -- if I was home and
17 Brodie was home and nobody else was there, I mean I was babysitting him.

18 Q Okay. What type of kid was Brodie if you spent that much time?

19 A Just rambunctious little guy. Always active, always doing something.
20 Hundred miles an hour. The only time he wasn't moving was when he was sleeping.

21 Q Did Brodie have any nicknames?

22 A Bambam.

23 Q What's the history behind that?

24 A Him and his -- his cousin, Lily, they were Bambam and Pebbles. Brodie
25 was always playing with a baseball bat or a stick and so he'd pound things and then

1 Lily was Pebbles. Just the two of them together was -- remind you of Bambam and
2 Pebbles from the cartoon.

3 Q Okay. So the name Bambam came about because he would carry
4 around a bat?

5 A Yeah.

6 Q And not because he would bam his head into things?

7 A No.

8 Q Okay. Did you yourself play with Brodie?

9 A All the time.

10 Q Wrestle with him like a grandpa would?

11 A Yeah.

12 Q Did you -- do you know the word typewriter --

13 A Yeah.

14 Q -- or the game typewriter?

15 A My wife would get mad at me because Brodie was really ticklish in the
16 chest and armpit area so I'd just kind of like (indicating) do that type of motion on his
17 chest and his armpits and he'd just laugh.

18 Q Did he ever indicate that he was in pain when you played typewriter?

19 A No.

20 Q And you mentioned that your wife, Merridee, would get mad at you.
21 What do you mean by that?

22 A She says I was leaving little like bruises, but I didn't -- you know, it
23 wasn't -- wasn't intentional. It was just playing with him and she said I played little
24 too rough sometimes.

25 Q Okay. And the game typewriter, that is limited to the chest and body --

1 A Yes.

2 Q You don't typewrite on someone's forehead?

3 A No.

4 Q Okay. And again, Brodie didn't indicate ever that he was in pain when
5 you played typewriter --

6 A No, he was always laughing.

7 Q When you said that it would leave bruises, are we talking every time
8 you played typewriter or just once or twice?

9 A Once or twice, but Merridee would notice them and yell at me.

10 Q Okay. Close in time to Brodie's death, did you see any bruises from
11 specifically the typewriter game?

12 A No.

13 Q So this is in the past that we're discussing --

14 A Yes.

15 Q Okay. You mentioned the defendant came into Arica and Brodie's life
16 around December of 2010?

17 A As far as I can remember, yeah.

18 Q Okay. Can you describe for the ladies and gentlemen of the jury
19 Michael, the defendant's relationship with Arica?

20 A They seemed to be having a good time together. There was I mean
21 never any fights that I could see. They just --

22 Q And is -- I -- I'm sorry to cut you off, but is this the beginning of the
23 relationship you're describing?

24 A Yeah. You know, there was never any issue that I could see. They
25 were both busy with their lives so they were just sort of, you know, dating.

1 Q Did Michael, to your knowledge, have any kids of his own?

2 A No. Not that I know of.

3 Q Did there come a point where you noticed a change in the defendant
4 and Arica's relationship?

5 A Probably the spring of that year there was some issues. I know -- I
6 think Arica would come over and talk to Merridee about stuff, but you know, I just
7 didn't pay too much but there was issues --

8 Q Okay.

9 A -- that any young couple might have.

10 Q And when you say spring of that year, do you mean the year of 2011
11 Brodie's death?

12 A Yes.

13 Q So Brodie dies in June. You're talking about two to three months prior
14 to Brodie's --

15 A Yes.

16 Q -- death? To your knowledge, was one of the sources of contention
17 Brodie or anything about Brodie?

18 A Not that I can remember. I mean there might have been, but I can't say
19 for sure.

20 Q All right. Did you ever see Brodie and Mike interact?

21 A Yes.

22 Q What was their relationship --

23 A At the beginning, it was -- you know, they were like buddies. They --
24 they'd play, they were always goofing around. Mike would watch Brodie sometimes
25 and he would like see you papa, I'm going with Mike, he's my buddy, later.

1 Q And is that in the beginning of the relationship --

2 A That was in the beginning.

3 Q Did there come a point when you saw the relationship between the
4 defendant and Brodie change?

5 A Yes. There was --

6 Q When was that?

7 A Towards when they -- when Arica and Brodie moved in with Mike into
8 an apartment, towards the end just before Brodie's death there was periods that
9 Mike would come to pick up Brodie because Arica was working and Brodie would
10 start crying and then he would get this look on his face. It's kind of hard --

11 Q Take your time.

12 A It's kind of hard to describe, but he would get this look of like fear
13 towards him the last week or so. If Mike picked him up, he would just be like scared.

14 Q And you knew Brodie, you were around him very often?

15 A Yes.

16 Q And to the best of your ability you're describing the look on Brodie's
17 face as fear?

18 A Yes.

19 MS. VON MAGDENKO: Objection, Your Honor; calls for speculation about
20 Brodie's mental state.

21 THE COURT: Sustained.

22 MR. GIORDANI: Fair enough.

23 MS. VON MAGDENKO: I'd ask --

24 BY MR. GIORDANI:

25 Q That was a couple weeks prior to --

1 MS. VON MAGDENKO: I'd ask that that be stricken then. The jury
2 admonished disregard that.

3 THE COURT: Ladies and gentlemen, please disregard the last statement by
4 the witness.

5 Please continue, counsel.

6 MR. GIORDANI: Thank you, Judge.

7 BY MR. GIORDANI:

8 Q And there came a time when the dynamic between the defendant and
9 Brodie changed?

10 A Yes.

11 Q And did you say that that was a couple weeks or couple months prior to
12 Brodie's death?

13 A Probably a couple weeks.

14 Q Okay. Did there also come a point in time when you started to notice a
15 specific set of bruises that you didn't notice ever previously?

16 A There was some bruising along the diaper line. My wife said it looked
17 like they were fingerprints and she showed me --

18 MR. ALTIG: Objection; hearsay.

19 BY MR. GIORDANI:

20 Q Don't --

21 THE COURT: Sustained.

22 BY MR. GIORDANI:

23 Q Yeah. Don't tell me what she told you. I want to know what --

24 A Well, I seen them.

25 Q -- you observed.

1 A I mean she showed them to me.

2 Q Okay.

3 A So they were small size of like a finger might make on something, but
4 there was no -- you really couldn't tell if they were or if he had fallen on something.

5 Q Okay. So at that time you weren't really suspicious; is that fair?

6 A Yes.

7 Q Okay. You were around Brodie very often. Did you see injuries on him
8 on a regular basis?

9 A Yes.

10 Q And can you describe those types of injuries?

11 A He had, you know, bruising on his shins, his knees. He had one on his
12 forehead that -- like a week prior to his death, he had -- when we first moved in
13 house he was able to walk under the counters. And he had been growing. So one
14 day he was at our house and just kind of turned around and caught the corner of the
15 counter like right in the forehead.

16 Q Okay.

17 A And we had just been talking about, you know, making sure he didn't
18 bruise himself.

19 Q Okay. And that was one occasion you described. Did you see that on
20 any other occasions?

21 A He came to the house with a little mark on his cheek and Arica told us
22 about him riding his battery-operated toy and hitting the curb and falling.

23 Q Okay. And I want to step back a second. The time that you described
24 when Brodie reacted strangely when the defendant came to pick him up, do you
25 know what I'm talking about ?

1 A Yes.

2 Q Did Brodie verbalize anything to you, yes or no?

3 A No. I mean, Brodie still wasn't, you know, making complete sentences

4 so would be, you know, short one or two words, I'm hungry, tubby --

5 Q What do you mean by tubby?

6 A Bath time was their tubby time.

7 Q Okay. So Brodie couldn't verbalize full sentences or at least didn't

8 when he was around you?

9 A No.

10 Q Okay. I want to move to a few specific dates. First is going to be

11 Friday --

12 [Colloquy between counsel]

13 Q -- Friday, June 10th. I'm going to show you a calendar here. Can you

14 see that up on your screen?

15 A Yes.

16 Q Do you remember around 10 a.m. in the morning what occurred at that

17 time?

18 A I was at work at a part-time job and I got a text from the wife asking me

19 what time I got off and could I go --

20 MR. ALTIG: Objection; hearsay.

21 THE COURT: Sustained.

22 MR. GIORDANI: It's not for the truth, Judge, it's just for what he did in

23 response to the text.

24 THE COURT: All right.

25 MR. GIORDANI: Thank you, Judge.

1 BY MR. GIORDANI:

2 Q You can answer that.

3 A She asked me what I was doing for work -- or what time I was getting
4 off work and I said, you know, about the -- I told her what time I usually got off work
5 was about 10. She asked me if I can go babysit Brodie at the house.

6 Q And is that because Merridee was working at the time or --

7 A Yes.

8 Q -- otherwise --

9 A Merridee was working, Arica had to go to work and Brodie had pinkeye.

10 Q Okay. So you were aware at that point that Brodie had pinkeye?

11 A Right.

12 Q Okay. Did you go over to Arica's house?

13 A Yes, after I went home, changed my clothes, got on some different
14 clothes, got my truck because I'd been riding my motorcycle that day, so I had to
15 change vehicles and I went over to Arica's house.

16 Q Do you remember what time approximately that you arrived on Friday?

17 A 11:30 timeframe.

18 MR. GIORDANI: May I approach the --

19 THE WITNESS: 11:30, 12, somewhere in there.

20 BY MR. GIORDANI:

21 Q 11:30, 12 timeframe?

22 A Yeah.

23 MR. GIORDANI: May I approach the witness, Judge?

24 THE COURT: Yes.

25 BY MR. GIORDANI:

1 Q At some point did you go and pick up a prescription with Brodie?

2 A Yes.

3 Q And I'm showing you State's 40. Do you recognize that?

4 A Yes.

5 Q Okay. Is that that prescription that you picked up for Brodie?

6 A Yes.

7 Q And what was that for?

8 A His eye drops, his pinkeye.

9 Q Okay.

10 MR. GIORDANI: And this has been previously admitted, Judge. May I
11 publish?

12 THE COURT: Yes.

13 BY MR. GIORDANI:

14 Q And are those Gentamicin eye drops?

15 A Yes.

16 Q And you went and picked those up?

17 A Yes, I went to the Walmart, Stephanie and American Pacific.

18 Q And did you take Brodie with you?

19 A Yes.

20 Q So you were in charge of Brodie that day?

21 A Yes. All day. All day.

22 Q Okay. What did you do after you went and picked up Brodie's
23 prescription?

24 A We went back to his house and I gave him his first dose of medicine.

25 Q How did you do that?

1 A Trying to hold down a two and a half year old, you have to kind of
2 restrain them and then -- because you got to have one eye (sic) open an eye and
3 one eye (sic) to put the drops in. He was moving around so I just kind of wedged
4 him between my legs and kind of held him with my legs and then put the eye drops
5 in.

6 Q Okay. And were you successful? Did you --

7 A Yes.

8 Q Did you get them in? But Brodie I assume didn't like that?

9 A No, they're painful because of the infection in the eye and the drops.

10 Q What'd you do after you put his first dose of eye drops in that day?

11 A He had a nap. And then -- it was couple hour nap. We -- I kind of laid
12 on the couch. He woke up couple hours later, woke me up --

13 Q And let me stop you for a second. You're still at Arica's house?

14 A Yes.

15 Q You put him down around what time?

16 A It was probably after one or after because of when -- when the
17 medication was going to be due or when it was going to be ready and then -- so he's
18 -- yeah --

19 Q Around one?

20 A --- about one --

21 Q Okay.

22 A -- or there.

23 Q And you said he slept for a couple hours?

24 A Yes.

25 Q And did he sleep in his room?

1 A Yes.

2 Q Did you have a typical I guess protocol you went through when you put
3 him down for a nap or did he just flop down on the bed?

4 A I made sure he had a dry diaper on and then just put him in his bed and
5 usually he'd just hang out with his music on. And then I just went out and laid on the
6 couch.

7 Q And you mentioned a diaper. Was Brodie still in diapers all the time?

8 A No. There was a little bit of time that he would be out of a diaper, you
9 know, hanging out playing at our house. And where -- he was starting to do the
10 potty training phase where you're trying to get him out of a diaper as long as
11 possible.

12 Q Okay. And to the best of your recollection, when did that potty training
13 phase begin? If you can recall. If not, that's okay.

14 A Probably a couple weeks or a month prior to his death.

15 Q Okay. What time did Brodie wake up approximately?

16 A About three, three-ish, somewhere in that timeframe.

17 Q And you said he came to get you?

18 A Yeah.

19 Q Okay. You still on the couch?

20 A Yes.

21 Q What did you do after that?

22 A We just kind of hung out. He was playing with different toys. He was
23 playing -- there -- they had some exercise equipment and they had one the bands
24 that you stand on and can do exercise with.

25 Q Okay.

1 A So he -- I kind of showed him how to play with that.

2 Q How was Brodie's appetite that day?

3 A It was fine. He ate snacks all day and had some pizza when we had

4 dinner.

5 Q So he ate snacks during the day?

6 A Yes.

7 Q What types of snacks?

8 A Crackers, Goldfish or whatever little crackers they had, fruit snacks.

9 Q Okay. Seem to you that that was his typical appetite?

10 A Yeah.

11 Q Showing you State's 5, already admitted. Is that that rubber band you

12 were talking about?

13 A Yes.

14 Q And this is on Friday, June 10th?

15 A Yes.

16 Q He was playing around? Is that fair?

17 A Yes.

18 Q After -- or in the afternoon, did you give Brodie another dose of his eye

19 drops?

20 A Yes, just before I went home.

21 Q And were you present and anyone else?

22 A I believe Arica and Mike were home by then.

23 Q When did Arica and Mike get home?

24 A About 8:00 that night.

25 Q Did they arrive separately or together?

1 A It was about the same timeframe in -- they were in different cars, but it
2 was about the same timeframe.

3 Q So what time do you ultimately leave that residence?

4 A Probably 8:30-ish. I mean I didn't stay long. Soon as they got home, I
5 showed them how I'd given him the medicine and then taken off.

6 Q So you actually instructed them on how to get those drops in his eyes?

7 A Yeah, if you're one on one with him, he -- he was a little wiggle worm so
8 you had to kind of hold him down.

9 Q So Friday, June 10th, you leave around 8 p.m.?

10 A Yes.

11 Q On that day, did you ever see any signs of a loss of appetite in Brodie?

12 A No.

13 Q Did you ever see any signs of abdominal pain whatsoever?

14 A No.

15 Q Did he ever give you any indication he had head pain?

16 A No.

17 Q Did he ever vomit?

18 A No.

19 Q Did he ever have diarrhea?

20 A No.

21 Q Did he ever do anything that indicated to you that you should be
22 concerned about Brodie's health on Friday, June 10th?

23 A No.

24 Q Moving to the next day, Saturday, June 11th. Did you see Brodie in the
25 morning that day?

1 A Yes.

2 Q When was that?

3 A Eleven o'clock or so.

4 Q How did you see him that day?

5 A Arica brought him over so we could watch him.

6 Q Was that a typical thing?

7 A Yes. On Saturday we'd watch him most weekends, and we had Lily

8 that weekend too.

9 Q Okay. Who was present in your home when she dropped Brodie off?

10 A Myself, Merridee and Lily.

11 Q What types of things did you do that morning?

12 A We cleaned the house, basically from top to bottom. We were doing

13 like spring cleaning.

14 Q And is that you and Merridee?

15 A Yes.

16 Q Both cleaning?

17 A Yes.

18 Q What were the kids doing?

19 A They were playing in the living room and playroom that we had set up

20 and then they were also out in the back yard.

21 Q Were they ever out of earshot from you or Merridee?

22 A No. We always knew where they were.

23 Q You always knew where they were? And it was common that you let

24 them play alone separately?

25 A Yeah, there was -- our back yard was pretty childproof. They had their

1 toys and -- back there.

2 Q And was Brodie with you all day that day?

3 A Yes.

4 Q Did there ever come a point where you heard Brodie scream from the
5 back yard or indicate to you in any way that he was in pain?

6 A No.

7 Q Around that time, Saturday morning -- I'm sorry, moving to Saturday
8 night, did you notice any injuries on Brodie?

9 A No.

10 Q Did you bathe him that night?

11 A Yes.

12 Q And by you, do you mean you alone?

13 A Yes.

14 Q What do you do when you bathe Brodie?

15 A We -- well we -- I had the two grandkids, Brodie and Lily, so we take
16 them up to our master bedroom bathroom at the time and they would take a bath
17 together, play, and I'd wash their hair because they were in the sandbox so they had
18 hair -- sand in their hair so we had to scrub their heads.

19 Q So fair to assume they're completely nude head to toe?

20 A Yes.

21 Q And you mentioned washing their hair.

22 A Yes.

23 Q Did you wash Brodie's hair that night?

24 A Yes.

25 Q Did you press on the skull?

1 A Yeah. Scrubbed it. Fingers deep in it.

2 Q Did he ever indicate to you that he was in pain in any way in his head

3 area?

4 A No.

5 Q Talking about the injuries that you saw, do you remember seeing a

6 small bruise on Brodie's forehead that day?

7 A Yes.

8 Q And is that the bruise you mentioned previously you thought was from

9 the counter?

10 A Yes.

11 Q At that time when you saw him on Saturday, was that bruise fading?

12 A Oh yeah. It was probably a week old.

13 Q Did he also have some discoloration under his eyes?

14 A Yes.

15 Q And do you know what that was from?

16 A From pretty much rubbing his eyes all the time. He had the pinkeye.

17 Q And don't let me put words in your mouth. I said discoloration. Are we

18 talking two major black eyes or just discoloration?

19 A Discoloration. It was more of like the dark colors you'd get underneath

20 your eyes from not sleeping -- as an adult, the kind of black eyes that you get.

21 Q Okay. Did Brodie have any bruises to your recollection to his lower

22 legs?

23 A Couple maybe on his shins from playing, but --

24 Q Was that a common thing?

25 A Yeah.

1 Q And I'll call them the typical Brodie bumps and bruises?

2 A Yes.

3 Q Nothing that stood out to you?

4 A No.

5 Q At some point did Brodie go to bed at your home that night?

6 A Yes.

7 Q Was Merridee home at that time?

8 A Yes.

9 Q What time was that?

10 A Usually the kids would go to bed at about 8, 8:30 at the latest.

11 Q And I'm specifically referring to that Saturday, June 11th, still.

12 A Yes.

13 Q Was it around that typical 8:00 time?

14 A Yes.

15 Q And did you put Brodie to bed, if you recall?

16 A I think I put one of them, either Brodie or Lily -- we kind of took one into

17 one room and Lily into another room. So they were separate so we'd just grab them

18 and they went to their beds and we got them settled in.

19 Q And you saw Brodie that day from 11 a.m. all the way up until 8 p.m.?

20 A Yes.

21 Q Or around 8:00. At any point during that day, did Brodie vomit?

22 A No.

23 Q Did he show signs of head injury?

24 A No.

25 Q Any signs of abdominal pain?

1 A No.

2 Q Any lack of balance?

3 A No.

4 Q Any exhaustion or overly exhaustion?

5 A No.

6 Q Anything that indicated to you that he was sick or injured significantly?

7 A No.

8 Q Did you see Brodie the next morning on Sunday, June 12th?

9 A Yes, Brodie -- I could hear him from his room and our bedroom was

10 open and he'd call out my name.

11 Q And did he call you specifically?

12 A He called -- he called me papa. So he was yelling out papa and then I

13 finally went and checked on him and I was hoping he'd lay back down, but he didn't

14 so I just changed his diaper and we ended up getting up. Just me and him.

15 Q What'd you do that morning with your grandson?

16 A I went down, started making coffee. He wanted to start eating. You

17 know, he'd eat from time he woke up to time he went to bed so it was yogurt or

18 some kind of snack that he wanted.

19 Q And that's Saturday morning. Did you say what time Brodie woke up or

20 woke you up?

21 A That was actually Sunday morning.

22 Q I'm sorry.

23 A And I think the first time I heard him call my name was like 6:30, 7

24 timeframe.

25 Q And you mentioned Brodie's appetite was voracious?

1 A Yeah. I mean it was -- normally he'd eat -- get a yogurt out and just sit
2 on the coffee table and eat his yogurt watching cartoons.

3 Q So on that Sunday did he eat on a number of different occasions?

4 A Yes.

5 Q Did he eat meals -- full meals or was it more like snacking throughout
6 the day?

7 A It was -- I don't know if we made breakfast, but if we didn't make him
8 full-on breakfast, he would have been snacking all day and then lunch.

9 Q And at some point Alayne, your daughter-in-law, she comes over and
10 picks Brodie up --

11 A Alayne's my stepdaughter.

12 Q Stepdaughter, I apologize. And she comes over and picks Brodie up
13 that day?

14 A Brodie and Lily.

15 Q What time was that, if you can recall?

16 A 11:30, 12:00.

17 Q In the morning?

18 A Yes.

19 Q Okay. So when we're talking about the snacking, we're referring to a
20 four and a half hour period from 7 a.m. to about 11:30 --

21 A Yes.

22 Q -- a.m.? When Alayne picked Brodie and Lily up, what did you do? Did
23 you stay home?

24 A Yes, I stayed home, finished working on the house, yard work, stuff that
25 I didn't do when the kids were there.

1 Q At some point did Alayne bring those kids home?

2 A Yes.

3 Q And what time was that?

4 A 4:30, 5. I really wasn't watching the time.

5 Q Okay. If you recall --

6 A It was later -- it was late afternoon.

7 Q 4:30, 5. Was dinner being cooked that night?

8 A Yes, I made hamburgers.

9 Q And do you recall if Brodie ate burgers that night?

10 A Yeah.

11 Q So you saw him eat burgers?

12 A Yes.

13 Q And that's Sunday night?

14 A Yes.

15 Q Did there come a time that you gave Brodie a bath or someone gave

16 Brodie a bath that night as well?

17 A My daughter and my wife did. Alayne and Merridee.

18 Q So you weren't present for his bath time that night?

19 A No, I was just sitting on the couch watching TV.

20 Q And we're talking about Saturday, June 11th?

21 A Sunday.

22 Q Okay. So we're talking about Sunday. Let me step back a second and

23 clarify a couple things. So Saturday during the day, where is Brodie all day?

24 A With us. With me and Merridee.

25 Q At some point on that day did -- okay. I apologize. So we're talking

1 about Sunday. Sunday's the day that Alayne comes, picks them up.

2 A Yes.

3 Q Sunday night, get home at five?

4 A Or so, yes.

5 Q Approximately? And that's the night that the burgers are made?

6 A Yes.

7 Q I lost my train of thought. I apologize. So on that night, you didn't give
8 them the bath?

9 A No.

10 Q Brodie and Lily? After the bath time with Alayne and Merridee, what
11 happened?

12 A About that time Arica came into the -- or came home -- came back to
13 the house to pick up Brodie and the -- Merridee and Alayne and Arica were talking
14 and the grandkids, after they had bathed, went back outside and decided they were
15 going to play in the sandbox again.

16 Q Okay. Do you recall what time they left that evening, Sunday?

17 A It was probably an hour after Arica got there so 6:30, 7 timeframe, 7:30.

18 Q Okay. Did you say goodbye?

19 A Yeah.

20 Q Say goodbye to Brodie?

21 A Yes.

22 Q Was that in fact the last time you saw Brodie alive?

23 A Yes.

24 Q On that day, Sunday, did you ever see any indication of head injuries to
25 Brodie that caused you concern?

1 A No.

2 Q Any vomiting?

3 A No.

4 Q Any diarrhea?

5 A No.

6 Q Any abdominal pain?

7 A No.

8 Q Falling?

9 A No.

10 Q I want to step forward a couple of days to Wednesday, June 15th.

11 What were you doing that day?

12 A I was -- I was at school and I got a phone call from one of my daughters

13 and she said Brodie's -- she said Brodie's gone. And I was -- I asked her what she

14 meant by Brodie's gone and she goes dad --

15 MR. ALTIG: I'm going to object at this point, it's hearsay.

16 MR. GIORDANI: It's not for the truth, Judge, it's just to show how he learned

17 of it and what his reaction is and what he does next.

18 THE COURT: Re-ask it a different way.

19 BY MR. GIORDANI:

20 Q What time was it that you learned of your grandson's death?

21 A Early morning. I don't remember the time I -- I -- that whole morning,

22 the time -- time was kind of a blur.

23 Q Okay.

24 A But I was at school and usually we'd start school at like nine. So it was

25 after 9:00.

1 Q Based upon learning of this information, what did you do?

2 A I grabbed my books and just bolted out of the building and drove as fast
3 as I could over to Arica's house.

4 Q When you got to Arica's house, who was there? To the best of your
5 memory.

6 A Arica, Amanda, the police, fire --

7 Q Let me ask you this: Was the defendant there?

8 A I don't know if he was there when I got there or he showed up soon
9 after I -- I just don't remember.

10 Q Okay. At some point in the day though, did you come into contact with
11 the defendant?

12 A Yes.

13 Q And was that later on in the day when you went to pick clothes up for
14 Arica?

15 A No, he was actually -- when we were still at the house -- before they
16 took Brodie's body out of the house, we were all waiting around, because we really
17 didn't know what was going on or what the whole -- how they were going to do
18 everything and so we were just sitting outside the apartment --

19 Q Okay.

20 A -- and Mike was there.

21 Q Later on in the day, did you go to pick clothes up for Arica at her
22 apartment?

23 A Yeah.

24 Q Did you go back --

25 A Yes, we -- we'd finally gotten Arica over to our house. We'd settled

1 down. Then we finally got word that we could go back into the apartment to get
2 personal items for Arica and Mike had to get some personal items too.

3 Q And when you say got word, is that from officers or detectives of the
4 Henderson Police Department?

5 A Yes.

6 Q So at that point they were done with their search to your recollection?

7 A Yes.

8 Q Did you go to the apartment?

9 A Yes. Me and Mike went over.

10 Q When you got there, were there any documents that you had not seen
11 before?

12 A There -- on the kitchen table there was like paperwork that said they
13 had searched the house --

14 MR. ALTIG: I'm going to object. It's hearsay, best evidence.

15 THE COURT: Sustained.

16 MR. GIORDANI: Well, Judge, can I respond?

17 THE COURT: Sure.

18 MR. GIORDANI: I'm not asking what the documents actually said. I just want
19 to know what type of document it was and who left it. I don't need to know --

20 THE COURT: You can use it for that purpose.

21 MR. GIORDANI: Thank you, Judge.

22 BY MR. GIORDANI:

23 Q What was the documents that was -- what were the documents that
24 were left on the table?

25 A There was I believe two pieces of paper. One -- they were both from

1 the Henderson police. One was like a paper saying that it was --

2 Q And don't tell me what it says.

3 A Right. It --

4 Q Let me ask you this: Do you know if the papers that were left on the
5 table were search warrants?

6 A Yes.

7 Q And search warrant returns? Meaning the items that they had taken
8 from the home --

9 MR. ALTIG: I'm going to object that now he's leading.

10 MR. GIORDANI: I was trying to avoid the objectionable information that he
11 didn't want in, and that's why I was leading into that area.

12 THE COURT: Watch the form of the question.

13 MR. GIORDANI: Understood.

14 BY MR. GIORDANI:

15 Q So to your knowledge, was the documents that were left on the table a
16 search warrant?

17 A Yes.

18 MR. ALTIG: I'm going to object again, its leading. It also lacks foundation.

19 THE COURT: It is leading, but he's already testified the answer was yes a
20 few questions ago.

21 MR. GIORDANI: Thank you, Judge.

22 BY MR. GIORDANI:

23 Q Did you read the items? And don't tell me what they said.

24 A I looked at the list.

25 Q Okay. Did the defendant look at the list?

1 A Yes.

2 Q Did you witness that?

3 A Yes.

4 Q Did he read the list to your knowledge?

5 A Yes.

6 Q Did he flip pages?

7 A I think they were just single piece -- single pages, they weren't that you

8 would have had to like flip through.

9 Q Did there come a point in time where you were aware that Arica went

10 and spoke to the Henderson Police Department?

11 A Yes.

12 Q During that time, did you receive communications from the defendant?

13 A Yes.

14 Q What type of communications were they?

15 A I was waiting out -- they didn't take me back, they took Merridee and

16 Arica back in the back of the building into an office. I was waiting in lobby and Mike

17 called me on my cell phone.

18 Q How many times did he call you?

19 MS. VON MAGDENKO: Your Honor, I'd object to relevancy.

20 MR. GIORDANI: Your Honor, this --

21 MR. STANTON: May we approach?

22 THE COURT: Yes, you may.

23 [Bench conference begins at 12:09 p.m.]

24 THE COURT: Yeah.

25 MR. GIORDANI: Judge, this is extremely relevant. The defendant called him

1 on a number of different occasions while Arica was being interviewed and was
2 probing for information asking what she was saying, why is she taking so long. It's
3 extremely relevant to show that --

4 THE COURT: Okay.

5 MS. VON MAGDENKO: That's hearsay.

6 MR. GIORDANI: It's the defendant's statements. The defendant calling and
7 asking for information. It's the defendant's --

8 THE COURT: That wouldn't be hearsay if it's the defendant's statements.

9 MR. GIORDANI: Right. That's what I'm asking for is the defendant's
10 statements --

11 THE COURT: If that's what you're going to ask, then it's okay.

12 MR. GIORDANI: -- specific --

13 THE COURT: Objection will be overruled.

14 [Bench conference ends at 12:10 p.m.]

15 BY MR. GIORDANI:

16 Q When Arica was in speaking with the police, how many times did the
17 defendant call you?

18 A Once, maybe twice.

19 Q Okay. When he called you, what was he saying or asking?

20 A He was asking me what I knew, what had they told us, what evidence
21 did they have.

22 Q Was he seeking information in his questions of you?

23 A By the way and what he was asking, yes.

24 Q Did you yourself ultimately speak to Henderson detectives?

25 A After they -- yeah, they called me back in the room.

1 Q Okay. At some point on June 24th, did you actually give a recorded
2 interview with them?

3 A Yes.

4 Q A lengthy interview?

5 A Yes.

6 Q And cooperate fully?

7 A (No audible response.)

8 Q I want to move forward about a weekend from Brodie's death. At some
9 point did you go back to that apartment to pick some items up?

10 A Yes.

11 Q What were those items?

12 A I went back to pick up some clothes for Brodie so that the mortuary
13 could -- could dress him so that we could have a final --

14 MR. ALTIG: At this point I'm going to object as to the relevancy, Your Honor.

15 THE COURT: What is the relevancy?

16 MR. GIORDANI: Should we approach?

17 THE COURT: Sure.

18 [Bench conference begins at 12:11 p.m.]

19 MR. GIORDANI: When he gets to the apartment, the defendant's sister and
20 Danny Fico, the defendant's best friend, were there collecting his items, but the
21 follow-up question to this is was there a viewing, did you attend the viewing, were
22 there bruises on Brodie -- and I'm not going to show him the photos, but were there
23 bruises postmortem that you hadn't seen before. I'm trying to avoid showing the
24 photos again and make duplicative --

25 THE COURT: Why do you need to ask about what was at the apartment?

1 What's relevant to that?

2 MR. GIORDANI: Because he went to pick up the clothes for the viewing. Jen
3 and Danny were there and she's going to say that she -- he's going to say that Jen
4 showed absolutely no emotion whatsoever. And Jen is a hostile witness to us. As
5 you know, she's testifying later today.

6 MS. VON MAGDENKO: Your Honor, if I just may about the viewing, when
7 there's a viewing, there's makeup on --

8 MR. GIORDANI: And I was going to lay the foundation for that.

9 THE COURT: So all that's to ask about Jennifer's expressions. So how he's
10 perceiving --

11 MR. GIORDANI: That single question, yes. I can move on to the follow-up
12 question of the viewing, but I wanted to lay foundation for what was going on during
13 that time.

14 THE COURT: I -- yeah. I don't think that's relevant when it was at the
15 apartment --

16 MR. GIORDANI: Okay.

17 THE COURT: -- unless they were doing something to the evidence which it
18 sounds like they were not.

19 MR. GIORDANI: They were collecting Michael's clothing.

20 THE COURT: But they weren't doing anything else unusual.

21 MR. GIORDANI: Fair.

22 THE COURT: Then move on.

23 MR. GIORDANI: Okay.

24 [Bench conference ends at 12:13 p.m.]

25 BY MR. GIORDANI:

1 Q Mr. Moshier, you mentioned a viewing -- there was a viewing held for
2 Brodie?

3 A Very small, private, just the family.

4 Q And when you say just the family, do you mean your family?

5 A Yes.

6 Q Okay. Did you view Brodie's body at that time?

7 A Yes.

8 Q And that was about a week after his death?

9 A Yes, after they had released his body.

10 Q Did you notice any bruising on Brodie that was different from when you
11 last saw him on Sunday?

12 A Yeah, they had put some makeup on him, but the bruises on his face
13 were still pretty extensive and then he had a bruising on his left ear.

14 Q And that ear bruise, did that stand out to you?

15 A Yeah. It was like straight -- it was a straight line right across the top of
16 his ear. So the top of his ear was bruised, but it was like a straight line. It wasn't --
17 there was no jagged edge or anything, it was like a straight line.

18 Q And that bruise you did not see the last time you saw Brodie alive on
19 Sunday, June 10th?

20 A That's correct.

21 Q 12th.

22 MR. GIORDANI: No further questions, Judge. I'll pass the witness.

23 THE COURT: Cross. Are you going to be a little while with this witness?

24 MS. VON MAGDENKO: Not too long, Your Honor.

25 THE COURT: Okay. It's 12:15. The only reason I was asking I was trying to

1 figure out when to break the jury.

2 [Colloquy between counsel]

3 CROSS-EXAMINATION

4 BY MS. VON MAGDENKO:

5 Q You just testified, sir, that when you last saw Brodie alive, he did not
6 have a bruise on his left ear?

7 A That's correct.

8 Q Do you recall being interviewed by the police after Brodie's death?

9 A Yes.

10 Q And do you recall that took place on June 24th, 2011?

11 A Yes.

12 Q Prior to today's testimony, did you have a chance to meet with the
13 detectives and go over what you had told them prior?

14 A I was provided a copy.

15 Q Did you read it?

16 A Yes.

17 Q Isn't it true that when you were interviewed by the police, you told them
18 that he had in fact a bruise on his left ear that was identical the one he had a month
19 and a half prior? Isn't that true?

20 A Yes.

21 Q Okay, so your testimony the jury five seconds ago was incorrect?

22 A No.

23 Q No? When you last saw Brodie alive, he had a bruise on his left ear,
24 correct?

25 A No.

1 Q So when you told the police that, they -- you were making an incorrect
2 statement?

3 A No. The -- I believe the statement says that he had a bruise a month
4 and a half prior.

5 Q No. It says he had a bruise on his left ear and it was identical to the
6 one that he had a month and a half prior.

7 A Yes. When I seen him laying on the -- at the mortuary after his death,
8 he had a bruise on his left ear which was identical to the one that had healed which
9 was over a month and a half ago.

10 Q The detectives didn't ask you about the mortuary and what you saw at
11 the mortuary, did they? They were asking you what you saw the last time you saw
12 him alive. Weren't they?

13 A I thought they were asking me if I was -- the bruises.

14 Q Right. So they wanted to know what bruises Brodie had the last time
15 you saw him. Right?

16 A The last time I saw Brodie --

17 Q Alive.

18 A Okay, the last time I saw Brodie, he was at the mortuary and that's
19 when I seen all the bruises.

20 Q You never mentioned the mortuary to the detectives when you talked to
21 them back in June, right? This is all new?

22 A I -- yes, I did not mention in that statement mortuary.

23 Q So everything that you told the police about the bruising that you saw
24 was regarding the mortuary, it wasn't when you saw him alive?

25 MR. GIORDANI: I'm going to object to the form of that question. I don't know

1 what all the bruising and every bruise means.

2 THE COURT: Counsel, I think the question's unclear. Could you please
3 rephrase it?

4 BY MS. VON MAGDENKO:

5 Q The detectives asked you do you remember any bruising or injuries on
6 him when you had him that weekend. Do you --

7 A Yes.

8 Q You recall that question being asked?

9 A Yes.

10 Q The question was not asked to you do you recall what bruising Brodie
11 had when you saw him at the mortuary, right?

12 A Okay.

13 Q So when you gave your answers to the detective, it was about what
14 bruising Brodie had the last time you saw him that weekend, right?

15 A Okay, I believe there's -- in that statement it talks about the bruising on
16 his right cheek and the bruise in the middle forehead. Is that in there?

17 Q Yes, it is. But the -- is my statement correct that the detectives asked
18 you do you remember any bruising or injuries on him when you had him that
19 weekend; is that correct?

20 A Yes.

21 Q They didn't ask you about the mortuary bruising, did they?

22 A Probably -- no. I don't believe so.

23 Q So when they asked you about bruises and injuries, you told them he
24 had a bruise on his left ear, right? And actually you told them I noticed it when I
25 actually seen Brodie on that Sunday.

1 A Well --

2 Q Brodie was still alive that Sunday.

3 A No, Brodie did not have the mark on his ear that Sunday.

4 Q So do you lie to the police?

5 A No.

6 Q Why did you tell the police that?

7 A I didn't lie to the police, I was -- it depends on what Sunday we're talking
8 about, was it the Sunday -- because Brodie's body was not released for quite awhile
9 to us.

10 Q The detective asked you do you remember any bruising or injuries on
11 him when you had him that weekend.

12 A And I said yes.

13 Q Okay. And then you said: Ah, I actually noticed on Sunday the bruise
14 on his left ear.

15 A Can I --

16 Q Right?

17 A Can I see that statement? Do you mind?

18 MS. VON MAGDENKO: Your Honor, may I approach?

19 THE COURT: You may.

20 MS. VON MAGDENKO: Page 49.

21 BY MS. VON MAGDENKO:

22 Q Just read right there (indiscernible) --

23 A Well the statement also says I noticed when he -- when we actually
24 seen Brodie on Sunday, we got to visit with him and --

25 Q Did you tell them that he had a bruise on his left ear on Sunday? It's

1 yes or no.

2 A Not the Sunday that we had him at our house, but yes a Sunday. And I
3 believe it was a Sunday that we got to visit him at the mortuary.

4 Q You didn't say visit him on -- at the mortuary on Sunday, did you?

5 A Well, Brodie came to -- Brodie came to us. If we got to go visit Brodie,
6 my -- the way I was reading that and if you look above and below, it was meaning
7 that I went to visit Brodie at the --

8 Q Did you actually say that?

9 A Did I actually say I went to visit Brodie at the mortuary? No.

10 Q Okay.

11 A I said we went to visit Brodie.

12 Q After he had asked you about the weekend bruises.

13 MS. VON MAGDENKO: Your Honor, we can take a break. This is taking a
14 little longer.

15 MR. GIORDANI: Judge, I'll do a quick redirect. I think we can --

16 MR. ALTIG: I don't think she's --

17 THE COURT: I don't think she's finished.

18 MS. VON MAGDENKO: No, I'm not finished. A lunch break because it's
19 taking a little longer than I anticipated.

20 THE COURT: Well how much longer are you going to be, counsel?

21 MS. VON MAGDENKO: Fifteen minutes. Do you want to keep going?

22 THE COURT: Yeah, so we don't have to bring him back. Yeah, that's fine.

23 MS. VON MAGDENKO: Okay.

24 THE COURT: Oh no, no. I'm sorry, I thought you were going to finish --

25 MS. VON MAGDENKO: Oh, okay.

1 MR. GIORDANI: Thank you, Judge.

2 THE COURT: -- your cross if you were only going to be 15 minutes.

3 MS. VON MAGDENKO: Okay.

4 THE COURT: I'm sorry --

5 MS. VON MAGDENKO: Okay.

6 THE COURT: -- for the confusion.

7 MS. VON MAGDENKO: I apologize.

8 BY MS. VON MAGDENKO:

9 Q You would play a game called typewriter on Brodie?

10 A Yes.

11 Q And you weren't trying to hurt Brodie, were you?

12 A No.

13 Q And you would touch him pretty lightly?

14 A I -- I mean I was pressing on him. I don't know if it was -- it wasn't hard.

15 Q Would you describe it as light pressure, medium pressure --

16 A Medium.

17 Q So medium pressure? And Brodie would not cry, would he?

18 A No.

19 Q Brodie would not say oh you just hurt me?

20 A No.

21 Q So you could touch Brodie in a way that would bruise him but that he
22 would laugh?

23 A Well I didn't know I was bruising him.

24 Q No, no, no. No, I'm talking about what you knew. You would play
25 typewriter and sometimes you would leave bruising on Brodie, right?

1 A Yes.

2 Q During that process, the only physical signs you saw, the only external
3 signs you saw was Brodie laughing and giggling?

4 A Yes.

5 Q You could bruise him and he wouldn't even acknowledge any pain, he
6 bruised so easily, right?

7 A No, he didn't bruise easy.

8 Q So you're saying that you playing typewriter that was -- he should have
9 bruised?

10 A No.

11 Q So when you play typewriter, he should not have bruised, right? That's
12 not normal?

13 THE COURT: Hold on a second. I guess I'm confused about the context of
14 the question. Normal for when he played the game or normal for a child in general
15 to bruise --

16 MS. VON MAGDENKO: Normal -- I apologize. Normal for a child in general
17 to bruise.

18 THE COURT: I don't know that he's going to be qualified to answer --

19 MS. VON MAGDENKO: Okay.

20 THE COURT: -- that question.

21 BY MS. VON MAGDENKO:

22 Q Did you play typewriter on any other children before?

23 A I got -- yeah. I mean, we play tickle games with all the grandkids.

24 Q Did any of the other grandchildren get bruising when you played
25 typewriter and tickle games?

1 A Not that I can remember.

2 Q Okay. So was -- Brodie was different? Right?

3 A What do you -- what are you referring to Brodie was different?

4 Q That he would get bruises from the tickle and typewriter games.

5 A Not all the time, no.

6 Q I didn't ask all the time. Sometimes?

7 A Yes.

8 Q You testified before to the jury that he would sometimes bruise by
9 playing a game. Right?

10 MR. GIORDANI: And I'm going to object to that. I believe that misstates the
11 testimony. He said it was once or twice.

12 THE COURT: The State's correct. I believe he did state it was once or twice,
13 not every time.

14 BY MS. VON MAGDENKO:

15 Q So the detectives asked you what bruises and injuries Brodie had that
16 weekend. Do you recall that?

17 A Yes.

18 THE COURT: That weekend. Hold on, let's be clear as far as timeframe.
19 Which weekend are you specifying, counsel?

20 MS. VON MAGDENKO: All -- only the weekend before his death.

21 THE COURT: All right, thank you.

22 BY MS. VON MAGDENKO:

23 Q Whenever I say that weekend, I'm referring to the last weekend of his
24 life, if that's clear. And when they asked you those questions when they were
25 discussing what bruises he had, you had said that you had grabbed him by the

1 armpits and down in the groin area and that little round, small bruising could
2 probably come from that. Do you recall those questions being asked of you?

3 A Yes. I remember saying that.

4 Q Okay.

5 A I don't remember saying that I left bruises.

6 Q It was asked little, small, round bruising would most likely probably
7 come from that and your --

8 MR. GIORDANI: Judge, I'm going to object to this question. If she needs to
9 refresh his recollection, she can approach and show him a statement. He said he
10 doesn't recall saying that.

11 MS. VON MAGDENKO: I can approach, Your Honor. It's page 49.

12 BY MS. VON MAGDENKO:

13 Q (Indiscernible) area that question is directed to.

14 Have you had a chance to read this now?

15 A Yeah.

16 Q Does that help refresh your recollection?

17 A Yes.

18 Q And so isn't it true that when they asked you about bruising on his chest
19 that you had responded affirmatively that that could have come from you?

20 A The small bruising that's in that statement was on a chest. It didn't say
21 small bruising in the armpits or in the groin area. It said the chest and neck area.

22 Q Right, the chest and neck area. That's what I'm asking you right now --

23 A Right, that's where I would play typewriter with him.

24 Q And that you responded affirmly (sic) that those bruises could come
25 from that?

1 A If -- yes. But at the same time you asked me if I grabbed him in the
2 groin and armpits and that's not where I was saying the bruising was.

3 Q Okay, so you're saying the bruising was on the chest?

4 A Right.

5 Q And that's what the statement says, on the chest.

6 A Right, but you had --

7 Q Yeah.

8 A -- asked me a question about grabbing him in the groin and armpits.

9 Q Yeah, but you did grab him in the groin and armpits?

10 A Right.

11 Q Okay.

12 A But there was no bruising in groin and armpits.

13 Q No, I know. I'm just saying you grabbed him in the groin and armpits
14 and then the typewriter left bruising on his chest.

15 A It could have, yes.

16 Q Okay. Just so we're clear. But earlier you testified that that weekend
17 you did not leave any typewriter bruises, you just said it was once or twice. But to
18 the detective when he's asking you about these chest bruises, you said oh that
19 probably came from you?

20 A I think we're talk- -- okay.

21 Q Right? When he asked you little, small, round bruises -- like, you know,
22 like finger, that's little and small -- would most likely probably come from that and
23 you said yeah. Right?

24 A Okay.

25 Q So your testimony is refreshed you had actually forgotten that those

1 bruises -- those typewriter bruises were actually on Brodie that weekend, right?

2 MR. GIORDANI: I'm going to object, Judge. That's not what the transcript
3 says. We're talking about two different time periods here. He said there was a time
4 when or one or two times when there were chest bruises from the typewriter game
5 and now I think we're confusing that statement with the Sunday preceding Brodie's
6 death. Two separate things.

7 THE COURT: Can you clarify which you're talking about?
8 BY MS. VON MAGDENKO:

9 Q Brodie had just died, right? When the detectives interviewed you?

10 A Yes.

11 Q They wanted to know where all this bruising came from, right?

12 A Right.

13 Q They asked you that weekend what bruising was there, right?

14 A And I believe I said the center of his forehead --

15 Q No, no, no, just answer my questions. They --

16 MR. GIORDANI: Judge, I'd ask that the witness be able to respond to the
17 question that was asked.

18 MS. VON MAGDENKO: I did ask a question. The question was did they ask
19 you what bruises were there. It's a yes or a no if they asked the question. I hadn't
20 asked him tell me what you told the detectives.

21 THE COURT: Okay. Listen closely to what she's asking --

22 THE WITNESS: Yes, ma'am.

23 THE COURT: -- and answer exactly what she's asking.

24 Please ask the question again.

25 BY MS. VON MAGDENKO:

1 Q Did the detectives ask you what bruising Brodie had that weekend?

2 A Yes.

3 Q And during that conversation, they had asked you about chest bruising,

4 correct?

5 A Yes.

6 Q And you responded that -- affirmatively when they said the chest

7 bruising could have come from you, correct?

8 A Yes.

9 Q And then in addition to that you mentioned the forehead bruise, the

10 cheek bruise, the chin bruising, and that you actually told the detectives he had

11 blackish discoloration under both eyes, correct?

12 A Yes.

13 Q Is that correct?

14 A Yes.

15 Q So Brodie was rubbing his eyes so hard he caused them to become

16 blackish?

17 A They were -- yes, they were a little discolored.

18 Q Didn't you actually tell the detectives they were blackish? Not

19 discolored?

20 A Okay. Like I said earlier, they were like if somebody had not slept a

21 long time --

22 Q Did you tell the detectives that at that time?

23 A I believe so.

24 Q Didn't you actually say he had blackish discoloration under his eyes

25 from just rubbing?

1 A Yes.

2 Q You had testified earlier that Brodie had basically a voracious appetite,
3 he was always eating. Snacking, meals, he had a great appetite, right?

4 A Yes.

5 Q And would it be out of the ordinary if Arica testified to this court that on
6 Tuesday, the full day prior to his death, he didn't eat his McDonald's and wouldn't
7 eat his lasagna for dinner? Would that be out of the ordinary for Brodie?

8 A Yes.

9 Q And Brodie was a fearless child, correct?

10 A Yes.

11 Q And if you -- if Brodie did anything, you would just swat him on his
12 diaper, correct?

13 A If we really wanted to get his attention.

14 Q When you were holding Brodie down when you had to put these painful
15 eye drops in him, you had to -- you put your legs on him?

16 A I was sitting on the floor and my legs were outstretched and he was
17 between my legs so his arms and his legs were underneath mine.

18 Q And you were holding his arms down and his head together?

19 A Yes.

20 Q And were you exerting more force when you were holding Brodie down
21 as he's trying to fight you with the eye drops than you would if you were playing
22 typewriter on him?

23 A No, because I was just using the weight of my legs to hold him in
24 position.

25 Q So it would not be -- it would be the same force as playing typewriter?

1 A I -- I don't know how to answer that.

2 Q What has more force, the weight of your legs or your fingers?

3 MR. GIORDANI: Objection; asked and --

4 A Depends on the --

5 MR. GIORDANI: Objection; asked and answered.

6 THE COURT: I'll allow that one question.

7 MS. VON MAGDENKO: Did you -- I'm sorry, Your Honor?

8 THE COURT: Overruled. Ask the question, please.

9 BY MS. VON MAGDENKO:

10 Q Is there more force in playing a game of typewriter with your fingers or

11 with you putting your legs on a two year old?

12 A There's different types of pressure. So yes, there's different types of

13 pressure.

14 Q So was it greater pressure with your legs?

15 A I can't say it's a greater amount of pressure, it's different.

16 Q How much do you weigh? How much did you weigh at that time, I'm

17 sorry. Approximately.

18 A Two fifty.

19 Q And how much did Brodie weigh?

20 A I can't remember.

21 THE COURT: Counsel, maybe we should give the jury a break. I think

22 they're looking like they need to stand up and --

23 MS. VON MAGDENKO: Okay.

24 THE COURT: -- move around. Are you at a point where you can stop?

25 MS. VON MAGDENKO: Yes, Your Honor.

1 THE COURT: All right. So ladies and gentlemen of the jury -- Jason, how
2 long do you think they'll need?

3 THE MARSHAL: About six trials going, Judge, so hour and 15.

4 THE COURT: Hour and 15, so 1:45.

5 So ladies and gentlemen of the jury, please come back at 1:45. Again
6 you're admonished not to converse amongst yourselves or with anyone on any
7 subject connected with the trial, do not read, watch or listen any report of or
8 commentary the trial, and do not form or express an opinion on this trial. See you
9 soon.

10 [Jury out at 12:34 p.m.]

11 THE COURT: All right. Sir, we'll -- is there going to be anything that we need
12 to put on the record before we go off?

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

14 THE COURT: Okay.

15 MS. VON MAGDENKO: No, Your Honor.

16 THE COURT: All right. Then we'll see you after lunch.

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

18 [Off the record at 12:34 p.m.]

19 [Proceedings resumed at 2:01 p.m.]

20 [Outside the presence of the jury]

21 THE COURT: Okay. And I believe we have all the jury here. Is there
22 anything we need to address before the jury comes in?

23 MR. STANTON: Not from the State, Your Honor.

24 THE COURT: Okay.

25 MS. VON MAGDENKO: No, Your Honor.

1 THE COURT: All right.

2 MR. STANTON: Did you get the word?

3 THE COURT: That's not going?

4 MR. STANTON: Yeah --

5 THE COURT: It's not because of me though.

6 MR. STANTON: Oh, no, no.

7 THE COURT: You just have to pick a month.

8 MR. STANTON: Right. We'll get that --

9 THE COURT: And we're talking about another -- a trial.

10 THE MARSHAL: District Court XXIII jury is present.

11 [Jury in at 2:02 p.m.]

12 THE COURT: Okay, welcome back, ladies and gentlemen. Let's get the

13 witness back on the stand.

14 Mr. Moshier, sir, when you were in here last, you were placed under

15 oath. You are still under oath at this time, sir. Do you understand?

16 THE WITNESS: Yes.

17 THE COURT: All right. Thank you.

18 Whenever you're -- let's let him get seated and then you can begin.

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

20 BY MS. VON MAGDENKO:

21 Q Mr. Moshier, if your wife -- I'm going to call her grandma since you're

22 grandpa, if that's okay. If grandma would testify -- had testified that Brodie didn't eat

23 his dinner Sunday night, would you agree or disagree with her assessment of that?

24 A I don't know if I actually witnessed him eating or not eating.

25 Q Was that just Sunday night?

1 A Yeah.

2 Q Okay. We had talked about earlier when Friday before Brodie's death
3 how you -- the position you were in when you were administering the eye drops,
4 correct?

5 A Yes.

6 Q Where were your hands during that process?

7 A One was on the bottle and one was holding his eye open.

8 Q And how many times a day did you administer the drops to Brodie on
9 Friday prior this death?

10 A Twice.

11 Q Twice. And do you use the same procedure both times?

12 A Yes.

13 Q And you had Brodie Saturday and Sunday, correct?

14 A Yes.

15 Q And during that time period, did you administer the drops during that
16 following Saturday, Sunday?

17 A Yes.

18 Q And did your wife help you?

19 A Yes.

20 Q And did you change the process at all when you were administering
21 those drops?

22 A More than likely, yes.

23 Q You don't remember?

24 A I -- there was two of us so I'm sure we held him down differently.

25 Q Could you have held his face to hold him steady?

1 A I'm sure.

2 Q Okay. Could you have held his torso to make sure he wasn't
3 squirming?

4 A No. More than likely it was just his head.

5 Q Just his head? But you don't really remember?

6 A I can't be 100 percent positive.

7 Q Sometimes when Michael came to pick Brodie up, Brodie would throw a
8 fit?

9 A Yes.

10 Q And did Arica use to do the same thing when she was little?

11 A I -- well, she was 11, 12 when we started dating.

12 Q Did you tell the detectives that Arica did it with me when I first married
13 her mom?

14 MR. GIORDANI: I'm going to object to relevance, Judge. Brodie was two and
15 a half. He's talking about an 11 year old.

16 MS. VON MAGDENKO: As a --

17 THE COURT: Counsel --

18 MS. VON MAGDENKO: As a stepparent.

19 THE COURT: Objection sustained. I don't see the relevance in this
20 questioning.

21 MS. VON MAGDENKO: Okay.

22 BY MS. VON MAGDENKO:

23 Q So Brodie would throw a fit when Michael would pick him up
24 sometimes, right?

25 A Towards the end, yes.

1 Q Okay. And isn't it true that sometimes Brodie would throw the same fits
2 when Arica came to pick him up? Because he just didn't want to leave your house
3 because it was so much fun?

4 A Well it was -- I don't think it was the same type of fit. I wouldn't say it
5 was the same type of fit.

6 Q How was it a different fit?

7 A The look on his face. His actions. I mean, one was just leaving us, the
8 other one was leaving with somebody for some reason that he didn't want to go with.

9 Q Okay, but he'd throw a fit both times with Arica and with Brodie, right?

10 A Like I said, they weren't the same type of fit. They were -- one was
11 because he wanted to hang out with papa --

12 MS. VON MAGDENKO: Your Honor, I'm going to object to him speculating as
13 to why Brodie was throwing a fit, unless he was articulating something specific.

14 THE COURT: I think he's responding to your question, counsel.

15 BY MS. VON MAGDENKO:

16 Q Did Brodie tell you why he was throwing a fit when Michael came to
17 pick him up?

18 A Brodie couldn't put sentences together. He was two and a half.

19 Q Okay. So you don't know the reason behind Brodie's fit with Michael
20 versus Brodie's fit with Arica?

21 A No --

22 Q Is that fair?

23 A He had a different look on his face when he was throwing a fit with
24 Mike.

25 Q So when you told the detectives that Brodie said see you, papa, I'm

1 going with Mike, that was not true?

2 MR. GIORDANI: Objection. Your Honor --

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

4 MR. GIORDANI: If she wants to refresh the witness's recollection, she can
5 approach and do so. This is the same issue we had previously.

6 MS. VON MAGDENKO: Your Honor, I'm impeaching. He said Brodie could
7 not formulate sentences. This is different. I don't need to refresh his recollection if
8 I'm impeaching him.

9 MR. GIORDANI: She's asking about a specific time when the defendant
10 picked Brodie up.

11 THE COURT: Go ahead and ask the question.

12 BY MS. VON MAGDENKO:

13 Q Did -- was Brodie able to articulate the sentence see you, papa, I'm
14 going with Mike at a time when Mike picked Brodie up?

15 A No, he would say see you, papa.

16 Q So if the -- if your typed-written statement says, quote, see you,
17 comma, papa, comma, I'm going with Mike, period, end quotation, that would be an
18 incorrect typed-written assessment of what you said Brodie said? See you, papa,
19 I'm going with Mike.

20 A That's what Brodie would say. He would like (indicating) see you, papa.

21 Q I'm going with Mike?

22 A If -- no, he would just say see you, papa, like he was going with Mike. I
23 don't --

24 MS. VON MAGDENKO: Your Honor, can I approach the witness? It's page --

25 THE COURT: Sure.

1 MS. VON MAGDENKO: -- 51 of his -- there's only one transcript, there's no
2 summary.

3 THE COURT: Okay, and it's a statement they gave to the police?

4 MS. VON MAGDENKO: Yes.

5 THE COURT: Okay.

6 BY MS. VON MAGDENKO:

7 Q I'm just going to direct you to the quotation marks.

8 A Okay.

9 Q Did you tell that to the police?

10 A Yes.

11 Q It's your understanding that Michael was not present when Brodie was
12 found dead, right?

13 A Is my understanding he was at work.

14 MR. GIORDANI: Objection. He was not present. He's not a percipient
15 witness. It's outside the scope of his knowledge.

16 BY MS. VON MAGDENKO:

17 Q Michael called you after Brodie's death? Couple times you testified to?

18 A When I was -- when Arica and Merridee were in the back office with
19 Detective Collins.

20 Q And --

21 A That was Friday.

22 Q Friday. And based upon your conversation with Michael, Michael
23 wasn't present during the death and he wanted to know what happened to Brodie?

24 A I don't know.

25 Q Okay.

1 A He was just asking me what the detectives were telling us.

2 Q Is your experience that a child can take an attitude with a stepparent?

3 A In my -- yeah, in my history, yes.

4 Q So that's normal behavior?

5 A I guess --

6 Q And --

7 A -- in some families, yes; in other families, no.

8 Q Well in your family, in your experience.

9 A We had some difficulties with the kids, yeah.

10 Q And did you opine -- did you state to the detectives that Brodie didn't

11 want to share mommy?

12 A I said it may have been why -- I think -- I think -- I think I might have

13 said Brodie may have been acting like he didn't want to share his mommy with the

14 new live-in.

15 Q During the weekend prior to Brodie's death, did you ever watch any

16 wrestling on TV with the children?

17 A No.

18 Q Prior to that, did you ever?

19 A No.

20 Q But you would play wrestle at times?

21 A We'd be rolling around on the floor, but it's not wrestling.

22 Q Okay. It's not wrestling?

23 A Are you talking like WWE wrestling, are you talking --

24 Q Just wrestling in general. However you would define wrestling.

25 A I mean if you call my grandson climbing on top of me wrestling, then I

1 guess that would be wrestling.

2 Q Well did you tell the detectives we would always wrestle on our master
3 bed after the bath?

4 A Yes. I guess if it's in the statement.

5 Q Isn't it true you told the detectives that you thought Michael was eager
6 to come pick Brodie up; that Michael seemed to want to be a part of Brodie's life?

7 A At first, yes.

8 Q Did you tell the detectives that Michael had changed in his eagerness to
9 pick Brodie up?

10 A I -- I don't know, I'd have to review --

11 Q Well you talked about earlier you had a chance to review it already,
12 right?

13 A Well yes, there's quite a few pages.

14 Q But as you sit here today, you don't remember actually saying that?

15 A I know at one -- when he was -- when they first started the relationship,
16 Mike would come over, Mike was playing with him, and we even told Mike that if at
17 any time he didn't want to come pick up Brodie that he didn't need to. If he, you
18 know, had something doing, he could have left Brodie at our house.

19 Q What was Michael's response to that?

20 MR. GIORDANI: Objection. That's hearsay.

21 MS. VON MAGDENKO: It's from the defendant.

22 MR. GIORDANI: It's a party opponent and that's not their opponent.

23 THE COURT: Just ask the question. That's fine.

24 BY MS. VON MAGDENKO:

25 Q What was Michael's response?

1 A I don't remember if he had a response or if he just came and picked up
2 Brodie anyways.

3 Q Okay.

4 MS. VON MAGDENKO: No further questions.

5 REDIRECT EXAMINATION

6 BY MR. GIORDANI:

7 Q I'm going to hit a few specific areas with you and I'll try to be brief.

8 A Okay.

9 Q You talked about the see you, papa, I'm going with Mike statement. Do
10 you remember that line of questioning?

11 A Yes.

12 Q When was that in the relationship between Michael, the defendant, and
13 Brodie?

14 A That was in the first part of the relationship --

15 Q And at some point did you notice a change in Brodie when Michael, the
16 defendant, would come to pick him up?

17 A Yes.

18 Q And when was that?

19 A Towards the end.

20 Q Okay.

21 A Just before --

22 Q Toward the end --

23 A Just before his death.

24 Q Okay. Do you remember a series of questions about fits he would
25 throw?

1 A Yes.

2 Q And specifically with regard to the fits he would throw with the
3 defendant and the fits he would throw when Arica tried to come pick him up.

4 A Yes.

5 Q You described them as being different.

6 A Yes.

7 Q What did you mean by that?

8 A The look on his face. I mean, he knew he could try to -- with his mom,
9 he could try to weasel --

10 MS. VON MAGDENKO: Objection; calls for speculation about what Brodie
11 knew he could do.

12 MR. GIORDANI: And if --

13 THE COURT: That'd be sustained. Perhaps if you ask it a different way.

14 BY MR. GIORDANI:

15 Q If you could describe the types of behaviors you observed Brodie doing
16 when the defendant would come versus when Arica would come and he would
17 throw a fit.

18 A When -- when Brodie would throw a fit when his mommas come in, it
19 was he didn't have a look of fear on his face. It was more of like trying to get
20 something out of a parent where they're kind of smiling but kind of throwing a fit. So
21 you know they're --

22 MS. VON MAGDENKO: Objection, Your Honor --

23 A -- or you think --

24 MS. VON MAGDENKO: -- calls for speculation. He's saying again saying
25 fear on Brodie's face. He's not physically describing it. He's ascribing an emotion to

1 Brodie.

2 MR. GIORDANI: Judge, I've got enough. I can move on to a different
3 subject.

4 THE COURT: That's fine.

5 BY MR. GIORDANI:

6 Q Do you remember a series of questions about eye drops?

7 A Yes.

8 Q And how you put them in to Brodie's eyes?

9 A Yes.

10 Q You said that you gave him on two different occasions eye drops?

11 A On Friday, yes.

12 Q Okay. And throughout the weekend, Friday, June 10th, through the
13 Sunday, June 12th, did you give it to him more times?

14 A I think we just two or three times depends on what the prescription was
15 called for.

16 Q Okay. And there were other people around, Merridee and Lily?

17 A Yes.

18 Q And you had to hold Brodie down?

19 A Yes.

20 Q I assume you didn't hold him down the mechanical way the same time
21 -- same way every single time you put the drops in, right?

22 A No.

23 Q When you held him down on any occasion to put those drops in, did he
24 ever scream in pain?

25 A No, he was screaming about the eye drops, the actual eye drops.

1 Q Was it clear to you that he didn't like the eye drops being put in?

2 A Yes.

3 Q Did you use an amount of force that left injuries to his body that you
4 saw?

5 A No.

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

7 MR. GIORDANI: I just asked if there were injuries to the body that he --

8 THE COURT: Overruled.

9 MR. GIORDANI: Thank you.

10 THE COURT: He can testify what he saw.

11 BY MR. GIORDANI:

12 Q There was a line of questioning before the break today about ear
13 injuries to Brodie?

14 A Yes.

15 Q And it became very confusing about the date of the bruising.

16 A Yes.

17 Q Do you remember your statements to the detectives?

18 A Yes, they were -- they were kind of general because we were going
19 over bruises and it was, you know, confusing the days and -- but I --

20 Q Let me ask you this way. Did you stay in a chronological line
21 throughout your interview and answer session?

22 A No, we were bouncing all over the place.

23 Q Okay. And you explained an injury to Brodie that you saw to his ear
24 and it was on a Sunday?

25 A Yes.

1 Q And did you then clarify that that was at the viewing?

2 A Yes.

3 Q And what is the viewing?

4 A When we went up to the mortuary to see Brodie.

5 Q And that would be postmortem?

6 A Yes.

7 Q You described with defense counsel that injury being seen a month and

8 a half prior?

9 A Yeah, there was a injury very similar to the one that I seen on that

10 Sunday at the mortuary --

11 Q Okay.

12 A -- that had healed already.

13 Q Okay. So it had healed at the point of Brodie's death?

14 A Yes.

15 Q And it was a month and a half before you saw the injury at the viewing?

16 A Right. The first injury was a month and a half, that one healed, and

17 then we saw one that was almost identical at the mortuary.

18 Q Okay, so I want to be very clear about Sunday, June 12th, the last day

19 you and Merridee babysat --

20 A Yes.

21 Q -- is that fair?

22 A Yes.

23 Q On that day, did you see anything on his ear at all?

24 A No.

25 Q Okay. What did you see on Brodie's body that Sunday and the

1 preceding Friday and Saturday since you had him all weekend?

2 A The dot in the forehead, the bruise on the cheek, and some bruising on
3 his shins and knees areas.

4 Q Absolutely nothing else?

5 A Nothing else.

6 Q Did you ever during that weekend that operative -- the 10th to the 12th,
7 Friday to Sunday, ever see Brodie exhibit any signs of head pain?

8 A No.

9 Q Abdominal pain?

10 A No.

11 Q Vomiting?

12 A No.

13 Q Diarrhea?

14 A No.

15 Q Nausea?

16 A No.

17 Q And was his appetite normal from what you saw?

18 A Yes.

19 MR. GIORDANI: I'll pass the witness.

20 THE COURT: Anything else of this witness?

21 MS. VON MAGDENKO: Yeah, just one question, Your Honor.

22 RE CROSS EXAMINATION

23 BY MS. VON MAGDENKO:

24 Q If right before Brodie's death you felt that Brodie was exhibiting fear
25 towards the defendant, why would you let Brodie go with him?

1 A We didn't -- I said he was making a face. I took it as fear on his face,
2 but as you pointed out, we can't know what he was actually thinking.

3 Q Okay.

4 MS. VON MAGDENKO: No further questions.

5 THE COURT: All right. Anything else of Mr. Moshier?

6 MR. GIORDANI: No, Judge, not from the State.

7 THE COURT: Thank you, sir, for your time. You're free to go, sir.

8 THE WITNESS: Thank you.

9 THE COURT: Next witness please.

10 MR. GIORDANI: State would call Dr. Hesham Sirsy.

11 [Pause]

12 THE MARSHAL: Stand right here. Face the clerk. Raise your right hand,
13 please.

14 HESHAM SIRSY

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

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

18 THE WITNESS: Hesham Sirsy.

19 THE COURT: Can you spell --

20 MR. GIORDANI: Can you please spell it?

21 THE WITNESS: H-e-s-h-a-m S-i-r-s-y.

22 THE COURT: Whenever you're ready.

23 MR. GIORDANI: Thank you, Your Honor.

24 DIRECT EXAMINATION OF HESHAM SIRSY

25 BY MR. GIORDANI:

1 Q Doctor, what do you do for a living?

2 A I'm a pediatrician.

3 Q And as a pediatrician, what's your primary purpose on the job?

4 A To take care of children from birth to age 18.

5 Q Age of 15?

6 A Eighteen.

7 Q Eighteen, okay. And what type of education and experience did you

8 have to have to become a pediatrician?

9 A I have to have a medical diploma and do a residency program and do a

10 board certification.

11 Q And you are board certified?

12 A Yes.

13 Q Do you work at a particular practice or hospital or what?

14 A No, I work in my private office, my practice --

15 Q Is that ABC Pediatrics?

16 A ABC Pediatrics.

17 Q How many staff do you have there?

18 A I have four.

19 Q Is there other doctors there or is it just you?

20 A Just me.

21 Q And how many patients, if you could guess, do you see on a weekly

22 basis?

23 A On a weekly basis? Around 150.

24 Q Do you know how many patients you have in total?

25 A In one week?

1 Q No. In total. I'm guessing you probably don't know how many patients
2 you have.

3 A No.

4 Q Okay. How long have you been at ABC Pediatrics?

5 A Since '98, so it's about 16 years.

6 Q And that's 1998?

7 A Yeah.

8 Q And I assume you were the only doctor there?

9 A Yes.

10 Q For that period of time?

11 A I have couple of doctors join me, but I'm the only one.

12 Q Okay. And throughout that time period, can you approximate how
13 many two to three-year-old children you saw as a doctor? Is it in the thousands?

14 A Yeah, I mean this would been like 16 years so I -- thousands of visits,
15 yeah.

16 Q Fair to say you've been around a fair number of two to three-year-old
17 children?

18 A Yes.

19 Q And are you familiar then based on your experience with the typical
20 bumps and bruises that a two to three year old would have?

21 A Yes.

22 Q And do you keep a lookout during any office visit for bruises or injuries
23 that would stand out and cause you concern?

24 A Yeah, if something abnormally located, you know, I mean looks
25 suspicious, I have to really look at this and examine them very carefully.

1 Q And --

2 A But if it's a normal location, you know, I mean for bruises for this age

3 because they learn how to walk and they can have bruises in normal area but --

4 Q Sure. Now when you're looking at a child or examining a patient and

5 you see something that's out of the ordinary, do you have a duty to report that?

6 A Yes, of course.

7 Q And is that called a mandatory reporter?

8 A Yes.

9 Q And when I say report, who do you have to report suspicious injuries to

10 if you suspect abuse?

11 A Family service.

12 Q Okay. Can you generally describe kind of what goes on when a patient

13 comes in to see you? I assume they come in and speak to the front desk?

14 A They first sign in, then wait in the waiting room, and she calls them and

15 they go back because the medical assistant --

16 Q Okay.

17 A -- takes their vitals and puts them in the room waiting for me to see.

18 Q And when you go into the room, do you have information going in?

19 Have you spoken with your staff and do you know the reason for the visit?

20 A Yeah, it's -- she writes a history and I look at the history.

21 Q Okay, so you know why you're going in to treat this patient?

22 A Yeah, I got chartal (phonetic) system and laptop so I can look --

23 Q Okay.

24 A -- what's going on.

25 Q And from a general perspective, if someone say comes in for a runny

1 nose, are you just looking at the kid's nose when he's in the room or are you also
2 looking for apparent other injuries or other issues that could explain what's going
3 on? Are you simply limited to what they're coming for?

4 A Sick visits usually different than well and -- or physical exam --

5 Q Okay, so --

6 A -- and so sick visits usually focusing on the local -- but sometimes I
7 have to look in the ear. If runny nose, could have ear infection so I have to look.

8 Q Okay, and you mentioned three different types of visits; a sick visit, well
9 visit, and a full physical exam.

10 A Well and physical are the same.

11 Q What is a well or physical?

12 A Well is -- it's comprehensive visit. We have to really examine all the
13 systems and all parts of the body.

14 Q Okay. When you do that, physically how do you examine all the
15 systems? Do you do it visually?

16 A History, visually and all the -- all the organs. Undress the patient and
17 look everywhere.

18 Q And you undress the patient --

19 A Yes.

20 Q -- head to toe and look in all areas of the body?

21 A Yes.

22 Q And that's during a well or a physical?

23 A Yes.

24 Q And for a sick visit --

25 A It depends on what is it. You know, I mean --

1 Q But it's limited to whatever complaint --
2 A Yeah.
3 Q -- the patient has? Do you remember a patient by the name of Brodie
4 Aschenbrenner?
5 A Yes.
6 Q And do you remember Brodie's mom? Or do you remember him
7 coming in with a female?
8 A Yes.
9 Q On a number of different occasions?
10 A Yes.
11 Q Do you remember him coming in with anyone else?
12 A I remember was grandma.
13 Q Okay. Do you recall as you sit here today how many times you saw
14 Brodie Aschenbrenner as a patient?
15 A By looking at the charts, you know, I look -- I seen him 11 times.
16 Q And you mentioned the charts. Are those your medical records that you
17 keep?
18 A Yes.
19 Q Do you keep those in every single case and patient in the ordinary
20 course of your business?
21 A Yes.
22 Q And you reviewed those records before you came in today?
23 A Yes.
24 Q In preparation for your testimony?
25 A Yes.

1 Q And you said 11 different times?

2 A Yes.

3 Q And that was over the course of how long? Approximately.

4 A About seven months.

5 Q Okay. Each of the 11 times, did Brodie come back to the exam room

6 and see you in your office -- or in the exam room?

7 A Yes.

8 Q Did the mom or grandma come back into the room with you?

9 A Yes.

10 Q So you don't just see Brodie alone, it's the parent present?

11 A Yes.

12 Q What type of child was Brodie if you can describe him?

13 A He was well nourished, well developed, White American child, normal.

14 Q Normal?

15 A Yeah.

16 Q And you spent time obviously around the mother when she's with

17 Brodie?

18 A Yes.

19 Q And what was the relationship that you observed between them?

20 A Normal relationship was between doctor and mother.

21 Q Okay. I'm talking about the relationship between mother and son.

22 A And son.

23 Q Did it appear appropriate to you?

24 A Yes.

25 Q The interactions that you observed?

1 A Yes.

2 Q And you've observed hundreds of other interactions between parents
3 and children?

4 A Yes, if something abnormal, I notice right away.

5 Q Okay. I'm going to briefly go over the details of some specific visits.
6 You mentioned 11 of them and I'm going to breeze through a number of them and
7 get to two specifically in depth. Let me start with the first time you saw him back in
8 November 10th of 2010. Do you recall what that was for?

9 A I -- I'm not sure but --

10 Q And would it help you to look at the records?

11 A Yes, please.

12 MR. GIORDANI: May I approach, Judge?

13 THE WITNESS: I think it was for ear infection --

14 THE COURT: Yes, you may.

15 THE WITNESS: I'm sorry.

16 THE COURT: No, I was talking to the attorney, sir.

17 BY MR. GIORDANI:

18 Q Would it assist you in testifying if you held these records up and
19 refreshed your recollection and flipped them over every time?

20 A Okay.

21 Q So I can leave them up with you?

22 A Uh-huh.

23 Yeah, it was November 10, 2010.

24 Q What type of visit was that?

25 A Was a sick visit and he had some kind of cold -- diagnosis cold,

1 Eustachian tube dysfunction.

2 Q What is that for the ladies and gentlemen real briefly?

3 A It's pressure on the eardrum.

4 Q So he had ear problems?

5 A He had ear problem, yeah.

6 Q And did those problems kind of persist throughout you seeing him as a
7 patient?

8 A Yes.

9 Q At some point did you become aware that he got tubes in his ears?

10 A Yes.

11 Q And did those problems with his ears generally subside at that point?

12 A Yeah, after a few visits it's went away --

13 Q Okay.

14 A -- by himself.

15 Q You saw him again on December 9th of 2010?

16 A Yes.

17 Q Do you remember what the purpose of that visit was?

18 A Yes, he had like a sutured wound in his left eyelid.

19 Q And suture, is that another word for stitches?

20 A Yes.

21 Q And do you recall who brought him in to the office to see you that day?

22 A It was mom.

23 Q And what was the purpose of bringing him into you if he already had the
24 stitches?

25 A Usually is the check and is there infection or he need -- is the sutured

1 helping the healing.

2 Q So it's a follow-up visit?

3 A Follow up.

4 Q To make sure everything's healing?

5 A Yeah.

6 Q Okay. I'm going to skip over a few visits, but would you agree with me
7 that you saw him on December 13th of 2010, December 30th of 2010, January 13th
8 of 2011?

9 A Yes.

10 Q All those days?

11 A Yes.

12 Q You saw him again on January 20th of 2011?

13 A Yes.

14 Q February 1st of 2011?

15 A Yes.

16 Q February 9th of 2011?

17 A Yes.

18 Q February 22nd, 2011?

19 A Yes.

20 Q And the following two visits I want to get in a little more detail. You can
21 set that down for now. Do you remember the May 27th of 2011 visit?

22 A Yes.

23 Q And do you recall what the purpose for that visit was?

24 A Well, if I recall it was follow up on motor vehicle accident.

25 Q Follow up on motor vehicle accident?

1 A Yeah.

2 Q Did you know when the motor vehicle accident occurred?

3 A The day before.

4 Q Okay. Who brought Brodie in to see you that day?

5 A Mom.

6 Q What types of things did you look at on Brodie that day?

7 A In motor vehicle accident, I have to look in everything is like complete

8 physical.

9 Q Okay. From head to toe?

10 A Head to toe.

11 Q And what are you looking for -- what signs are you looking for, what

12 abnormalities?

13 A I look for any bruises, I look for any fractures, I look of any internal

14 bleeding or -- or any fracture ribs or problem breathing, air entry, any guarding in his

15 -- abdominal bleeding, any hip fracture --

16 Q How do you look for abdominal bleeding?

17 A Mainly you know if there is any guarding or very tenderness or signs of

18 rigidity of the abdomen.

19 Q So you actually physically touch --

20 A Yeah --

21 Q -- the child's abdomen?

22 A Yeah.

23 Q And you also visually look at the child's --

24 A Yes.

25 Q And did you do that to Brodie on May 27th?

1 A Yes.

2 Q And did he have any issues whatsoever with his abdomen?

3 A No.

4 Q Did he have any swelling?

5 A No.

6 Q Any rigidity in the abdomen?

7 A No.

8 Q And did he indicate any signs of pain whatsoever?

9 A No.

10 Q Did you also examine his head that day?

11 A Yes.

12 Q And what were you looking for there?

13 A I look first for his pupils and reaction to light. I look for any bruises, any

14 fractures and --

15 Q Do you physically palpate his skull --

16 A Palpate.

17 Q -- or touch his skull? And did you have any indication whatsoever that

18 Brodie had injuries to his head?

19 A No indication.

20 Q Okay. Now, with regard to Brodie specifically, did he come in at times

21 and you see bumps and bruises on him that you necessarily wouldn't put down in

22 your records?

23 A If it's like I -- I say, you know, if it's in -- in normal places for a kid of this

24 age, I don't really --

25 Q Okay. Is the reason for that that you know kids have bumps and

1 bruises so you don't need to write down every single time they have a paper cut?

2 A Yes.

3 Q Okay. Moving on to -- actually, on that day -- May 27th is after the
4 motor vehicle accident. Do you recall being informed by Arica that there were
5 potential issues with Brodie bruising too easily?

6 A Yes.

7 Q And based upon that, did you do something?

8 A Yes, I -- I order some bloodwork to rule out any bleeding tendencies
9 and --

10 Q What does that bloodwork tell you?

11 A It tell me if has low platelet counts which can cause bleeding tendency
12 or --

13 Q Low platelets?

14 A Yeah.

15 Q And did you send those out to another lab?

16 A Yeah, they send the blood to -- to Quest lab.

17 Q So you actually drew Brodie's blood and sent that blood out to another
18 lab?

19 A No, I didn't draw the blood. I sent him to the lab to draw the blood.

20 Q Okay. And were you informed of the results of that test?

21 A Yes.

22 Q For you to be able to tell Arica, the mother --

23 A Yes.

24 Q -- that everything was okay or something was up?

25 A Yes.

1 Q And you received those results?

2 A Yes, I received it and I called the mom. And they are here, yeah.

3 Q And did you have any concerns whatsoever with Brodie having platelet
4 issues that would cause him to bruise too easily?

5 A No.

6 Q Moving on to the June 10th visit, June 10th of 2011, and I'm going to
7 show you State's Exhibit 77 if that helps you. Do you recall a visit with Brodie on
8 that day, June 10th of 2011?

9 A Can you repeat the question again? I'm sorry.

10 Q Do you recall Brodie coming in with his mom to see you on June 10th of
11 2011?

12 A Yes.

13 Q And do you recall the purpose of that visit?

14 A Yeah, pinkeye.

15 Q Pinkeye?

16 A Yeah.

17 Q And could you tell from just looking at Brodie that he had the pinkeye or
18 an issue --

19 A Yes.

20 Q -- with his eye? Did you do a full examination that day or a sick visit
21 examination?

22 A Sick visit exam.

23 Q Okay. During the course of that examination, did you look at Brodie's
24 body?

25 A I mainly focus on the eye and the ear because sometimes eye infection

1 goes with ear infection, and also I look in the nose and throat.

2 Q Okay. So you're examining his head generally?

3 A Yeah.

4 Q Do you recall seeing any bruises to his arms or legs that were
5 exposed?

6 A I -- I don't recall.

7 Q Okay. And if you would have seen bruises to his arms and legs, would
8 you have documented them if they caused you concern?

9 A Yes.

10 Q Okay. Do you remember seeing any bruises to Brodie's face that
11 caused you concern?

12 A No, I don't remember.

13 Q Do you recall a bruise to his cheek, either side?

14 A No, I don't recall.

15 Q Did you -- do you remember looking at his bare torso on that day, June
16 10th?

17 A No, I didn't.

18 Q Okay. I'm going to show you a series of photos, Doctor, and I apologize
19 for the nature of them.

20 MR. GIORDANI: May I publish, Your Honor?

21 THE COURT: They've been previously admitted?

22 MR. GIORDANI: Yes, they're State's 48 through -- oh geez, they're out of
23 order. State's 3, 60, 53, 52, 50 and 48.

24 THE COURT: All right.

25 MR. ALTIG: May we approach briefly, Your Honor.

1 THE COURT: Yes.

2 MR. ALTIG: Thank you.

3 [Bench conference begins at 2:36 p.m.]

4 MR. ALTIG: I believe the witness testified that he did not look at Brodie's bare
5 body that day. He said he does not recall having done that. So now they're going to
6 go ahead and publish the autopsy photos again --

7 MR. GIORDANI: Oh no. I'm sorry. I'm only publishing the face and the lower
8 arms.

9 MR. ALTIG: Okay, because you have --

10 MR. GIORDANI: That's it.

11 MR. ALTIG: -- the whole photo --

12 MR. GIORDANI: I know. I had the whole stack out.

13 MR. ALTIG: Okay.

14 MR. GIORDANI: I'm not publishing --

15 THE COURT: Okay.

16 MR. GIORDANI: -- all the body photos.

17 MR. ALTIG: Okay.

18 MS. VON MAGDENKO: Wait, wait, wait, wait. He testified he doesn't recall if
19 there was bruising on his face.

20 THE COURT: He --

21 MR. STANTON: Yeah, I don't think that's going to be the subject of his
22 questions.

23 MR. ALTIG: Thank you.

24 [Bench conference ends at 2:37 p.m.]

25 BY MR. GIORDANI:

1 Q Just so the record is clear, I'm going to show you only one or two
2 photos.

3 THE COURT: Please let defense counsel know which ones before you
4 publish.

5 MR. GIORDANI: I will, Judge.

6 [Colloquy between counsel]

7 BY MR. GIORDANI:

8 Q Showing you State's 53. When you saw Brodie on June 10th of 2011,
9 do you recall seeing any of these bruises on his face?

10 A Not at all.

11 Q If you would have seen any of these bruises, would you have reported
12 to DPS (sic) or family services regarding --

13 A Right away, yeah.

14 MR. GIORDANI: Pass the witness, Judge.

15 CROSS-EXAMINATION

16 BY MS. VON MAGDENKO:

17 Q After the May 27th motor vehicle accident, and that was approximately
18 three weeks prior to Brodie's death, you did a full abdomen exam, correct?

19 A Yes.

20 Q And during the June 10th exam, you did not examine his abdomen,
21 correct?

22 A No.

23 Q All right. Even though the platelet count came back normal, did you
24 have an explanation for why Brodie was bruising so easily?

25 MR. GIORDANI: Well objection. That's outside the scope of his knowledge.

1 I don't think he was present when the bruises were inflicted and he just said that he
2 had no concerns from the --

3 THE COURT: I think the question probably is what were the results of the
4 blood test. Is that what you're going at?

5 MS. VON MAGDENKO: A medical cause. So the platelets came back
6 normal --

7 THE COURT: Ask the doctor.

8 MS. VON MAGDENKO: Okay.

9 BY MS. VON MAGDENKO:

10 Q The platelets came back normal, correct?

11 A Yes.

12 Q Did you have a medical explanation, aside from the platelets, of why
13 Brodie was bruising so easily according to the mother?

14 A Well, I didn't see any bruising so I -- is very hard for me to tell if there
15 was bruising or not, or maybe the location was normal for two years old. So I just --
16 if it -- if it -- if it look abnormal size or bleeding from orifices like nose or any -- was
17 any urine or anything like that, I would be really concern, but when I did this
18 bloodwork I felt comfortable that there was no problem.

19 Q So you didn't follow up with the mother's concern of the easy bruising?

20 A Like I said, you know, I -- I -- I felt, you know, this is normal bruising for
21 two years old child.

22 Q Okay. As you sit here today, do you have an independent recollection
23 of Brodie on June 10th, 2011?

24 A Well I mean, of course been a long time, but from looking at the
25 records, he had the pinkeye.

1 Q That wasn't my question. Do you -- aside -- if you take the records
2 away, do you have an independent recollection -- can you see Brodie in your mind
3 on June 10th, 2011 when you did that examination?

4 A It would be very hard, yeah.

5 Q So --

6 A I have to look at the record.

7 Q So the answer is no --

8 A Yeah.

9 Q -- you don't have an independent recollection?

10 A Yeah.

11 Q Is that correct just for the record? Is my question correct?

12 A Yes.

13 Q Okay.

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

15 MR. GIORDANI: Just one --

16 THE COURT: Redirect?

17 MR. GIORDANI: Just one, Judge.

18 REDIRECT EXAMINATION

19 BY MR. GIORDANI:

20 Q To be clear, I'm not asking you if you had seen or if you have an
21 independent recollection of seeing him that day, but if I -- if you saw any of the
22 injuries that were in that photo I just showed you, would you have reported and done
23 something about it?

24 A Of course, yeah.

25 MR. GIORDANI: Nothing further.

1 MS. VON MAGDENKO: Nothing --

2 THE COURT: Is the doctor free to go?

3 MS. VON MAGDENKO: Yes, Your Honor.

4 THE COURT: Thank you, Doctor.

5 THE WITNESS: Thank you.

6 THE COURT: Next witness?

7 MR. GIORDANI: Court's indulgence.

8 [Colloquy between counsel]

9 MR. GIORDANI: Thank you, sir.

10 The State's going to call Alayne Opie to the stand.

11 MR. STANTON: And, Your Honor, while that witness is coming in, can we
12 approach on a schedule matter?

13 THE COURT: Yes.

14 [Bench conference begins at 2:41 p.m.]

15 MR. STANTON: We have one more witness for this afternoon and there's a
16 series of three final witnesses that have to be kind of taken in order to make sense.
17 They're the defendant's sister and then a case detective and the defendant's best
18 friend. So I just want to let you -- the Court know -- I told your staff earlier that I don't
19 think we're going to be -- you know, take all the way up to 5:00 today. And then if
20 we start at 9:30 tomorrow --

21 [Colloquy between counsel]

22 MR. STANTON: But -- won't be the whole day tomorrow, just so you can
23 advise the jury because we'll be done after those three witnesses if we start at 9:30
24 tomorrow. So we're going to be done before the end of the day. I don't know how
25 long they expect to cross on those witnesses, but I don't think it's going to take the

1 whole day.

2 THE COURT: Do you have any witnesses scheduled for tomorrow?

3 MS. VON MAGDENKO: No.

4 MR. ALTIG: No.

5 THE COURT: You're going to start on Monday?

6 MR. ALTIG: (Indiscernible) --

7 MS. VON MAGDENKO: Actually, one of our witnesses is flying back from
8 back east. He's not available till next Thursday afternoon. He's the pathologist. I'm
9 trying to get him in earlier, but that was the soonest he could come in due to his
10 other trial testimony. He's stuck in a trial (indiscernible) court. So --

11 THE COURT: Okay. That means we're going to have a gap in days probably
12 on the trial.

13 MS. VON MAGDENKO: Yeah. Definitely Wednesday --

14 THE COURT: Okay.

15 MS. VON MAGDENKO: -- for sure.

16 THE COURT: Well we'll figure this out when the jury's not waiting.

17 [Bench conference ends at 2:42 p.m.]

18 MR. GIORDANI: Judge, just so the record is clear, I was informed by your
19 marshal that Alayne Opie's not yet outside so I'm calling a Joanna Zavala instead.

20 THE COURT: That's fine.

21 [Pause]

22 THE MARSHAL: Please remain standing. Raise your right hand, be sworn in
23 by our clerk.

24 JOANNA ZAVALA

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

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

3 THE WITNESS: Joanna Zavala, and last name is Z, as in zebra, a-v, as in
4 Victor, a-l-a.

5 THE COURT: Whenever you're ready.

6 MR. GIORDANI: Thank you, Judge.

7 DIRECT EXAMINATION OF JOANNA ZAVALA

8 BY MR. GIORDANI:

9 Q Ma'am, you're wearing scrubs here in court today; is that fair?

10 A Yes.

11 Q What do you do for a living?

12 A I'm a medical assistant.

13 Q And where at?

14 A Bright Futures Pediatrics.

15 Q Did you previously work at an ABC Pediatrics in Henderson, Nevada?

16 A I did.

17 Q And were you familiar with a patient there by the name of Brodie
18 Aschenbrenner?

19 A I am.

20 Q And I'm showing you State's 3. Is that Brodie?

21 A Yes.

22 Q Were you present on a number of occasions when Brodie came in to
23 see the doctor?

24 A I was.

25 Q And who did Brodie come in with?

1 A Mom.

2 Q Mom. Is that Arica Foster?

3 A Yes.

4 Q And did you observe Arica and Brodie interact?

5 A I did.

6 Q What's your position there at ABC?

7 A I was a medical assistant. I roomed the patients.

8 Q What does that mean?

9 A I would take their vitals, find out their chief complaints to find out why

10 they're being seen by the physician.

11 Q Okay, so you actually have them back in the exam room?

12 A Yes.

13 Q And you do the preliminary stuff before the doctor comes in?

14 A Correct.

15 Q Okay. If you could estimate, how many times did you see Brodie there

16 with Arica? And if you can't, that's okay.

17 A I can't say for sure how many times --

18 Q A number of times?

19 A -- I've seen him, but it's -- it was quite a few times.

20 Q Okay. I want to draw your specific attention to May 27th of 2011. Do

21 you recall that visit?

22 A Sort of.

23 Q Okay. What do you mean by that?

24 A I remember seeing him. I remember because our interaction with the

25 kids we play with them to make them feel a little bit more comfortable, so being

1 friendly. And I kind of remember that mom came in concerned I think about bruising
2 easily.

3 Q Okay. So I'll represent to you that we're talking about the same visit,
4 May 27th of 2011.

5 A Correct.

6 Q And you remember mom being concerned about bruising?

7 A Yes.

8 Q Before we get into the details of that, was the interaction between mom
9 and Brodie appropriate that day?

10 A As far as I can remember, yes.

11 Q And was it generally appropriate any time you saw them together?

12 A Yes.

13 Q What type of kid was Brodie?

14 A He was a fun loving little boy. He would always play either with -- they
15 had playhouses in the front in the waiting rooms and mom always would tell him that
16 we had to go and he didn't want to go. He was -- just wanted to stay and play.

17 Q Okay. And on that May 27th date, was Brodie acting like his normal
18 playful self?

19 A As far as I can remember, yes.

20 Q Do you think it would stand out in your mind if he was acting odd or
21 different than his normal playful self?

22 A Possibly.

23 Q Okay. Do you recall whether he had also had issues with pinkeye?

24 A Yes, but I can't tell you what date.

25 Q Okay. If I were to represent to you that he came in on June 10th, 2011,