

IN THE SUPREME COURT OF THE STATE OF NEVADA

Michael Alan Lee,)	Supreme Court Case No.: 76330
Petitioner/Appellant)	
)	Electronically Filed
vs.)	Nov 27 2018 09:36 a.m.
)	APPPELLANT'S APPENDIX INDEX
)	Vol. IV
Brian E. Williams, Sr., Warden High)	Pages 601-800
Desert State Prison,)	
Respondent,)	
)	
and)	
)	
The State of Nevada,)	
Real Party in Interest)	
)	
)	

Appendix Index (Alphabetical)

<u>Document Name</u>	<u>Date</u>	<u>Bates No.</u>
Appellant's Supreme Court Opening Brief (Docket No. 66963)	09/08/2015	914-935
Errata to Petition for Writ of Habeas Corpus (Post-Conviction)	09/16/2017	961-974
Information	11/18/2011	001-003
Judgment of Conviction	11/10/2014	912-913
Jury Instructions	08/15/2014	843-867
Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)	08/07/2017	1009-1021
Order Granting Second Petition for Writ of Habeas Corpus (Post-Conviction)	07/09/2018	1048-1054
Order of Affirmance	09/13/2016	936-949
Order of Dismissal	12/19/2017	1022-1026
Petition for Writ of Habeas Corpus (Post-Conviction)	05/12/2017	950-960
Second Petition for Writ of Habeas Corpus	02/06/2018	1027-1039

(Post-Conviction)		
State's Response to Petition for Writ of Habeas Corpus (Post-Conviction)	06/20/2017	975-990
State's Response to Second Petition for Writ of Habeas Corpus (Post-Conviction)	04/03/2018	1040-1047
Transcripts, Jury Trial Day 1	08/04/2014	004-182
Transcripts, Jury Trial Day 2	08/05/2014	183-285
Transcripts, Jury Trial Day 3	08/06/2014	286-442
Transcripts, Jury Trial Day 4	08/07/2014	443-628
Transcripts, Jury Trial Day 5	08/08/2014	629-728
Transcripts, Jury Trial Day 6	08/11/2014	729-772
Transcripts, Jury Trial Day 7	08/14/2014	773-842
Transcripts, Jury Trial Day 8	08/15/2014	868-905
Transcripts, Jury Trial Day 9	08/16/2014	906-911
Transcripts, Petition for Writ of Habeas Corpus (Post-Conviction)	07/12/2017	991-1008

Appendix Index (Chronological)

<u>Document Name</u>	<u>Date</u>	<u>Bates No.</u>
Information	11/18/2011	001-003
Transcripts, Jury Trial Day 1	08/04/2014	004-182
Transcripts, Jury Trial Day 2	08/05/2014	183-285
Transcripts, Jury Trial Day 3	08/06/2014	286-442
Transcripts, Jury Trial Day 4	08/07/2014	443-628
Transcripts, Jury Trial Day 5	08/08/2014	629-728
Transcripts, Jury Trial Day 6	08/11/2014	729-772
Transcripts, Jury Trial Day 7	08/14/2014	773-842
Jury Instructions	08/15/2014	843-867
Transcripts, Jury Trial Day 8	08/15/2014	868-905
Transcripts, Jury Trial Day 9	08/16/2014	906-911
Judgment of Conviction	11/10/2014	912-913
Appellant's Supreme Court Opening Brief (Docket No. 66963)	09/08/2015	914-935
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Petition for Writ of Habeas Corpus (Post- Conviction)	05/12/2017	950-960
Errata to Petition for Writ of Habeas Corpus (Post-Conviction)	09/16/2017	961-974
State's Response to Petition for Writ of Habeas Corpus (Post-Conviction)	06/20/2017	975-990
Transcripts, Petition for Writ of Habeas Corpus (Post-Conviction)	07/12/2017	991-1008
Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)	08/07/2017	1009-1021
Order of Dismissal	12/19/2017	1022-1026
Second Petition for Writ of Habeas Corpus (Post-Conviction)	02/06/2018	1027-1039
State's Response to Second Petition for Writ of Habeas Corpus (Post-Conviction)	04/03/2018	1040-1047
Order Granting Second Petition for Writ of Habeas Corpus (Post-Conviction)	07/09/2018	1048-1054

1 does that sound about right?

2 A Yes.

3 Q About two weeks after that 5/27 visit?

4 A Yes.

5 Q So you recall seeing him on that day?

6 A Yes.

7 Q What was his demeanor like that day? Was he normal playful Brodie?

8 A Yes.

9 Q Did you see him interact with mom on that day?

10 A Yes.

11 Q Did he ever indicate or show signs that he was injured severely in any
12 way?

13 A Not that I can remember.

14 Q Do you remember anyone mentioning to you anything about a red
15 Power Wheels or him falling off his bike?

16 A It sounds familiar, but I can't specify what day that was.

17 Q Okay. Do you recall a small bruise to Brodie's cheek on that visit you
18 saw him?

19 A Kind of I seen some redness, but I couldn't tell you if it was from the
20 pinkeye or from a bruise.

21 Q Okay. And on those two days, May 27th, 2011 and June 10th of 2011,
22 at any point did he do anything out of the ordinary or exhibit any signs that he was
23 injured severely?

24 A Not that I can remember.

25 MR. GIORDANI: Pass the witness.

1 THE COURT: Cross?

2 MS. VON MAGDENKO: Pass the witness. We don't have any questions.

3 THE COURT: All right. Is she free to go?

4 MS. VON MAGDENKO: Yes.

5 MR. GIORDANI: Yes, Judge.

6 THE COURT: All right. Thank you, ma'am.

7 MR. GIORDANI: State would call Sandra Pacheco at this time.

8 [Pause]

9 THE MARSHAL: Please remain standing. Raise your right hand, be sworn in
10 by our clerk.

11 SANDRA PACHECO

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

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

15 THE WITNESS: My name is Sandra Pacheco, S-a-n-d-r-a P-a-c-h-e-c-o.

16 THE COURT: Whenever you're ready.

17 MR. GIORDANI: Thanks, Judge.

18 DIRECT EXAMINATION OF SANDRA PACHECO

19 BY MR. GIORDANI:

20 Q Ma'am, what do you do for a living?

21 A I work at ABC Pediatrics as a medical assistant.

22 Q How long have you been working at ABC Pediatrics?

23 A About seven and a half years.

24 Q What are your responsibilities as a medical assistant?

25 A I call the patients from the waiting room to the back to get their weight,

1 a temperature, put them in a room and ask a chief complain (sic).

2 Q Do you recall a patient by the name of Brodie Aschenbrenner?

3 A Yes.

4 Q And is -- State's Exhibit 3. Is that Brodie?

5 A Yes.

6 Q On May 27th, towards the end of May of 2011, did you see Brodie and
7 his mom in your office?

8 A I -- I can't recall the date exactly, but I do remember seeing him coming
9 in.

10 Q And did you see him also again in June -- June 10th approximately of
11 2011?

12 A Yeah, he -- he would always come in with this mom so I -- whenever he
13 would go to the office, I see him with his mom.

14 Q Okay. Let me ask you this way. Did there come a time when you
15 became aware that Brodie had passed away?

16 A I don't know exactly the date, but it was on the morning when the
17 coroner's office had called to request the --

18 MR. ALTIG: Going to object; hearsay.

19 A -- the official medical records.

20 MR. GIORDANI: It's not for the truth, Judge.

21 THE COURT: I'll allow it for that purpose.

22 THE WITNESS: That was the -- whenever I became aware that he had
23 passed away whenever the coroner's office had called and requested for the -- the
24 official medical records. I -- that's how I found out about it.

25 BY MR. GIORDANI:

1 Q Okay. And is it fair to say that you had seen Brodie in a relatively short
2 time period before you found out that he had passed away?

3 A Yes, I -- I don't recall exactly the time, but I could tell you that it was
4 maybe within a couple days, a week.

5 Q I understand.

6 A It was a very short amount of time, yes.

7 Q I don't expect you to remember the exact date. On the last time you
8 saw Brodie, how did he appear to you?

9 A Like a normal kid. I mean he -- I do recall the last time that he came in
10 was for because he had an ear -- an eye infection.

11 Q Okay.

12 A I took him from the waiting room to the back office, took his weight, his
13 temperature, I -- it was obvious -- you know, his eyes were, you know, goopy stuff
14 coming out of it, nothing really different than normal and that's -- that's -- that was
15 pretty much all, you know, just that was the reason why he was in there and -- and
16 that -- that was actually like the only thing that I recall from the visit that he had the
17 pinkeye and then that's about it.

18 Q Okay. On that day, did you see any bruises to his face or head that
19 stand out to you in any way?

20 A Not at all.

21 Q Did you observe any other injuries to his body in any location that
22 caused you concern in any way?

23 MR. ALTIG: Going to object; lack of foundation.

24 MR. GIORDANI: She saw him in the exam room, she took his temperature --

25 THE COURT: Well, why don't you lay a little bit more foundation for what she

1 was able to observe?

2 BY MR. GIORDANI:

3 Q You're not a doctor, right?

4 A Yeah, no, I'm not, I'm only a medical assistant, yes.

5 Q So you're not doing a full examination of Brodie; is that fair?

6 A Yes. When I saw him, he clothe -- a shirt, maybe some shorts. I don't
7 recall exactly what he was wearing, but from what I could see of his face and arms, I
8 don't -- I don't recall anything unusual.

9 Q Okay. Thank you very much.

10 MR. GIORDANI: I'll pass the witness.

11 MS. VON MAGDENKO: We don't have any questions, Your Honor.

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

13 THE WITNESS: Thank you.

14 MR. GIORDANI: State will call Alayne Opie.

15 [Pause]

16 THE MARSHAL: If you can remain standing. Please raise your right hand
17 and be sworn in by our clerk.

18 ALAYNE OPIE

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

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

22 THE WITNESS: Alayne Opie, A-l-a-y-n-e, last is O-p-i-e.

23 THE COURT: Whenever you're ready.

24 MR. GIORDANI: Thank you, Judge.

25 DIRECT EXAMINATION OF ALAYNE OPIE

1 BY MR. GIORDANI:

2 Q Ma'am, what's your relationship to Brodie Aschenbrenner?

3 A Brodie was my nephew.

4 Q Who is Brodie's mom?

5 A Arica Foster, my sister.

6 Q That's your sister by blood?

7 A Yes.

8 Q What do you do for a living?

9 A An attorney.

10 Q Where at?

11 A Lewis Brisbois.

12 Q Here in Las Vegas?

13 A Yes, here in Las Vegas.

14 Q Okay. When did you go to law school?

15 A 2009 until 2011.

16 Q And during that time were you living out of state?

17 A Yes.

18 Q And was that in California?

19 A San Diego, California.

20 Q Were there times that you came back into town during time period of
21 law school?

22 A Often. At least twice a month.

23 Q And were you around Brodie during those times?

24 A Yes.

25 Q How frequently were you around Brodie while you were here in town?

1 A Every time I came back to town, I made a point to see him at least for a
2 few hours if not during an afternoon when I'd babysit him.

3 Q Can you describe kind or the type of child Brodie was for the ladies and
4 gentlemen?

5 A Brodie was full of energy, he was rambunctious, he loved to play like a
6 puppy and jump off the back of couches. He was just two-and-a-half-year-old boy.
7 He just liked to play. He was always laughing.

8 Q And when you saw Brodie on those occasions, did there come times
9 when you saw minor injuries to his body?

10 A Toward the later part of his life, yes.

11 Q And were you around Brodie enough to know when something was
12 concerning and not concerning?

13 A Yes.

14 Q Do you know a person by the name of Michael Lee?

15 A Yes, I do.

16 Q Do you see that person here in court today?

17 A Yes, I do.

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

20 A Gray suit on the left.

21 MR. GIORDANI: Record reflect identification, Judge.

22 THE COURT: It will.

23 MR. GIORDANI: Thank you.

24 BY MR. GIORDANI:

25 Q How do you know the defendant?

1 A Mike was dating my sister.

2 Q Which sister?

3 A Arica.

4 Q You have more than one sister, correct?

5 A I do have -- I have a ton of brothers and sisters.

6 Q When did you come to know the defendant?

7 A Me personally I knew him probably when my sister started dating him. I

8 can't remember exactly what month they started dating, but I would say Brodie

9 passed June, so I probably met Mike sometime October before he passed, October

10 2010.

11 Q October 2010?

12 A Yeah, sometime around that timeframe.

13 Q Okay. And was your interactions with the defendant kind of the same

14 as it was with Brodie where you would come into town and see them together?

15 A Maybe rephrase the question.

16 Q Did you see the defendant with Brodie during those times that you

17 would come into town and see Brodie?

18 A Yes. Briefly, but yes.

19 Q Okay. Can you estimate the number of times that you saw the

20 defendant with Brodie -- interact with Brodie whatsoever?

21 A Maybe four, five.

22 Q Okay.

23 A He wasn't -- Mike wasn't around the times that I had Brodie.

24 Q Was there --

25 A More often than not he was not around.

1 Q Okay. Now I want to move into June of 2011. Was there a particular
2 time that you saw the defendant with Brodie without Arica present?

3 A Yeah, the -- the first time that I can recall was a few weeks before
4 Brodie passed.

5 Q What was going on that day?

6 A I believe I -- I was watching Brodie because Arica was going to get her
7 hair done that day.

8 Q Okay.

9 A And I'd had him at Arica's and Mike's house all day long. It's just easier
10 when I watched him to have him in his own environment so that, you know, he had
11 his toys and things like that. Mike came home after work and he came through the
12 door. Brodie had I guess been eating cheese all day long and made a mess on the
13 counter which is unlike me to clean it up or it's not like me to not clean it up, but I left
14 a mess. And Mike wasn't happy about the mess and just got after Brodie a little bit.
15 Brodie kind of just shunned away and went into his room.

16 Q What do you mean by Mike getting after Brodie? Can you describe that
17 a little further?

18 A He didn't yell at him, but just kind of scolding him. You know, why is
19 there a mess? It just struck me as a little odd because it's two and a half year old, of
20 course there's going to be a mess with a two and a half year old.

21 Q And what was Brodie's reaction? You said he shied away?

22 A He -- he shied away. He -- he went into his room and played.

23 Q And that was when you, the defendant and Brodie were present
24 together alone, correct?

25 A Correct.

1 Q And Arica was not present?

2 A Arica was not there.

3 Q All right. I want to move forward a little bit to June 12th of 2011. That's
4 a Sunday.

5 A Okay.

6 Q Familiar with that date?

7 A Yes.

8 Q Why are you familiar with that date? Did you see Brodie then?

9 A That's the last day that -- that's the last day that I had Brodie. That I
10 ever saw Brodie.

11 Q Where did you see Brodie that day?

12 A I had been in town from San Diego and I went to pick Brodie up with my
13 other niece, Lilian, from my mom's house that Sunday morning at about 10:30.

14 Q What did you do with the kids that day?

15 A That morning I took them to Coco's to eat and just to get them out of the
16 house for a little bit. He had eaten almost a stack of pancakes and drank all of his
17 syrup and I remember that distinctly because I thought he was like Alf, that
18 character on TV because he drank --

19 Q The Will Ferrell movie?

20 A Oh no, not Elf. Alf it was back in the -- I think the early '90s.

21 Q So that was early morning or just before noon on Sunday, June 12th?

22 A Correct.

23 Q And I'm going to show you 77 if that helps, I'll put that up. We'll get into
24 that. So Brodie ate a whole stack of pancakes?

25 A Correct.

1 Q And then he also drank his syrup?

2 A Yeah, he drank the syrup.

3 Q Did he appear in any way out of shape or odd to you or was he reacting

4 to things differently than he normally would? What was his demeanor?

5 A He was typical Brodie. I mean I showed up to my mom's house to pick

6 him up and his reaction was the same to me. As soon as auntie came in town, he

7 knew it was time to get his shoes and we were going to go -- go the park or go

8 wherever. He was happy and healthy. He was eating, he was fine. I mean there

9 was nothing out of the ordinary, other than he had a bruise on his -- his right cheek.

10 Q I'm going to show you --

11 MR. GIORDANI: May I approach, Judge?

12 THE COURT: You may.

13 BY MR. GIORDANI:

14 Q -- State's 79 -- State's Proposed 79. Do you recognize that photo?

15 A Yes.

16 Q What is it?

17 A This is the photo that I took of Brodie and Lily when we were at Coco's

18 that morning.

19 Q And that's the morning of Sunday, June 12th?

20 A Yes.

21 Q Fair and accurate depiction?

22 A Yes.

23 MR. GIORDANI: Move for its admission, Judge.

24 THE COURT: Any objections?

25 MR. ALTIG: Your Honor, may I see the photograph, please?

1 No objection.

2 THE COURT: Okay.

3 MR. GIORDANI: May I publish it?

4 THE COURT: It's admitted and yes, you can publish it.

5 [State's Exhibit 79 admitted]

6 MR. GIORDANI: Thank you.

7 BY MR. GIORDANI:

8 Q Brodie on the right, Lily on the left?

9 A Correct.

10 Q And you said that's around 11 a.m. on Sunday, June 12th?

11 A Yes.

12 Q You mentioned a bruise to Brodie's face. Do you see it in that photo
13 there?

14 A Yes, I do.

15 Q And you have a screen up. You can actually touch that and I'd ask you
16 to circle that bruise for the ladies and gentlemen.

17 A (Witness complies.)

18 Q So it's on his right cheek area?

19 A Yes.

20 Q Did you see any other bruises to Brodie's face that you -- that stood out
21 to you at that time?

22 A Under his eyes were a little darker than normal.

23 Q Okay.

24 A But at that time, what I'm looking at is -- I mean I -- he has clothes on so
25 that's all I can see is -- so just the eyes and the -- the cheek.

1 Q What did you do after you left Coco's?

2 A After we left, we went back to Arica and Mike's place and just spent the

3 afternoon there and --

4 Q Who was present there at Arica and Mike's?

5 A Myself, Brodie and Lilian.

6 Q So Arica and the defendant were not present?

7 A Correct.

8 Q Okay. What did you do there?

9 A Just played. We had lunch there. We watched TV. His favorite thing

10 was SpongeBob so watched several episodes of SpongeBob and Scooby Doo.

11 Q You mentioned lunch. Did you eat again after Coco's?

12 A Yeah. He ate -- he just ate everything under the sun. He had cheese.

13 He loved cheese; kid always loved cheese. I remember him going to the refrigerator

14 several times. I thought maybe it was a new game that he was playing that he'd just

15 figured out how to open the fridge by himself but -- he was constantly in the fridge.

16 Cheese crackers, pickles, cheese.

17 Q Okay. And was that throughout the day on Sunday, June 12th, after the

18 Coco's thing after --

19 A Correct.

20 Q Was his demeanor any different than before as playful and

21 rambunctious as he had been previously?

22 A No difference. Same Brodie.

23 Q And some point did you go over to your mom, Merridee's house?

24 A I did.

25 Q Do you recall when that was?

1 A Right around dinnertime we went back to my mom's.

2 Q And would dinnertime be five, six?

3 A Yeah, about five or six. I don't recall exactly what time, but sometime
4 around then.

5 Q And who was there when you arrived?

6 A I remember my mom. My dad might have been, but my dad -- if I recall
7 right, he was studying at the time so he spent a lot of time in his computer room.

8 Q Okay.

9 A But I remember my mom.

10 Q At some point did someone mention some tubby time?

11 A Yes.

12 Q And what is tubby time?

13 A I give the kids a bath.

14 Q And did you actually give Brodie a bath on that day?

15 A Yes, I did.

16 Q With who? Was someone else with you?

17 A With my mom, Merridee Moshier.

18 Q Did you also bathe Lily?

19 A Yeah. They -- they took a bath together. They played in the bath.

20 Q Did you see Brodie naked from head to toe?

21 A I did.

22 Q And did you see any injuries on Brodie that caused you any concern
23 whatsoever?

24 A None at all.

25 Q Who washed Brodie's hair?

1 A I did.

2 Q Did you rub his head, touch his head, palpate his head?

3 A I did.

4 Q Did he show any signs of pain at all?

5 A No pain.

6 Q Was he having a good time in tubby time?

7 A Yeah.

8 Q At some point did Arica come over to Merridee's house that night?

9 A Yes -- yeah, she did.

10 Q Did she take Brodie and go home?

11 A She did. She took Brodie after we sat in my mom's room for a little bit

12 and talked and Arica left with Brodie that night.

13 Q And did you talk with Arica yourself?

14 A I did.

15 Q And was Merridee also present?

16 A Yeah, she was.

17 Q What was the topic of discussion?

18 A How her and Mike's relationship wasn't going very well --

19 MR. ALTIG: And I'm going to object at this point, Your Honor, on hearsay --

20 MR. GIORDANI: And I'm not asking for the actual statement of Arica. All I'm

21 asking for is the topic of conversation.

22 THE COURT: That's fine.

23 BY MR. GIORDANI:

24 Q What was the --

25 THE COURT: Overruled.

1 MR. GIORDANI: Thank you, Judge.

2 BY MR. GIORDANI:

3 Q What was the topic of conversation?

4 A The status of Mike and Arica's relationship.

5 Q When was the last time you saw Brodie that evening, if you could
6 estimate?

7 A About eight -- I don't -- I don't recall exactly what time but --

8 Q When he left, did he have any injuries on his body that caused you
9 concern at all?

10 A None.

11 Q During the time you spent with him on that Sunday, did you ever see
12 any indication that he was vomitus?

13 A No.

14 Q Or have diarrhea?

15 A No.

16 Q Any signs of abdominal pain whatsoever?

17 A Not at all.

18 Q Want to move to June 15th, that Wednesday, 2011. Where were you at
19 the time on that day?

20 A When I got the call that Brodie had passed, I was at school in the
21 basement studying.

22 Q And is that at law school out of state?

23 A Correct.

24 Q Did you come back to Vegas immediately?

25 A I flew the next flight. I took the next flight to Vegas.

1 Q Okay. At some point did you arrive to Arica's home?

2 A I went to my mom's. Everyone was at my mom's.

3 Q And who's everyone? Who was present?

4 A My sister, Arica, my mom, Amanda, my other sister, my dad, and Mike.

5 Q And later on a couple days later, did you end up speaking with
6 detectives about the case?

7 A I did.

8 Q And did you give a written -- I'm sorry, voluntary recorded statement
9 with police?

10 A I did.

11 MR. GIORDANI: Pass the witness, Judge.

12 THE COURT: Cross?

13 MR. ALTIG: Thank you.

14 CROSS-EXAMINATION

15 BY MR. ALTIG:

16 Q Good afternoon.

17 A Good afternoon.

18 Q Is it Opie? Is that how you pronounce your name -- last name?

19 A Yes.

20 Q Okay. You talked about this incident with the cheese. When exactly --
21 what day was that?

22 A Are you referring to when the cheese was on the table?

23 Q The only time you talked about the cheese.

24 A I want to say two or three weeks before my nephew passed away.

25 Q Okay. And in that incident you said that Mike came home and there

1 was a mess with cheese that Brodie had left on the table or counter, right?

2 A Yes.

3 Q And then you said Mike became upset and he scolded Brodie?

4 A Correct.

5 Q And Brodie went and -- turned and went to his room, right?

6 A Correct.

7 Q Did Mike ever hit Brodie?

8 A No.

9 Q Okay. Did Mike --

10 A Not to my knowledge.

11 Q Did Mike punish Brodie in any way?

12 A I mean he scolded him. I would consider that --

13 Q Did he punish him?

14 A I would consider that punishment.

15 Q Okay. Did Brodie go to his room because Mike told him to go to his

16 room?

17 A I don't recall.

18 Q Did he go and sit Brodie in the corner of the house somewhere?

19 A I don't think so.

20 Q Did he yell at Brodie?

21 A No. As I testified, he did not yell at him.

22 Q Okay. Did he discipline Brodie in any way?

23 A If scolding is -- or if scolding is disciplining, then yes.

24 Q Okay. Do you recall talking to the police on June 23rd of 2011?

25 A Yes, I did.

1 Q Okay. And do you recall the officer speaking to you about whether or
2 not Mike ever disciplined Brodie?

3 A Yes, I do.

4 Q Okay, and do you recall telling the police officers at that time -- when
5 they asked you did Mike ever discipline Brodie at all for anything, you said no. Do
6 you recall that?

7 A Yes, I believe I did say -- say that.

8 Q Do you believe or do you recall as truth?

9 A If you can refresh my recollection, I --

10 Q Would you like to have your memory refreshed?

11 A Please.

12 [Colloquy between counsel]

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

14 THE COURT: You may.

15 MR. ALTIG: Thank you.

16 BY MR. ALTIG:

17 Q This is your statement. I'm showing your statement recorded by the
18 police. Here you go right here.

19 Okay.

20 A Correct

21 Q Does that refresh your recollection as to what you said to the police that
22 day on June 23rd, 2011?

23 A Yes.

24 Q What did you tell the police on June 23rd of 2011?

25 A When I was asked about disciplining Brodie, they wanted to know if I'd

1 ever seen Mike discipline him and I said Arica would be the one to discipline him by
2 way of putting him in the corner.

3 Q Hold on a second. I just showed you where they said -- let's try this
4 again.

5 MR. ALTIG: Judge, may I approach?

6 THE COURT: Yes.

7 MR. ALTIG: Thank you.

8 BY MR. ALTIG:

9 Q I'm showing you your recorded statement.

10 A Yes.

11 Q Showing you right here. Now the police say okay, as far as discipline,
12 did you ever see Michael discipline Brodie at all for anything, and your answer was
13 no. Do you see that?

14 A Yes.

15 Q Okay, so you -- on that day on June 23rd, 2011, when the police asked
16 you if you had disciplined Brodie -- if you ever saw Michael discipline Brodie for
17 anything at all, you said no, correct?

18 A At that time.

19 Q Okay.

20 A Yes, I had said that.

21 Q Thank you. Now, after the cheese incident when you said Michael
22 scolded Brodie, how long before you left the house? Or the apartment, I'm sorry.

23 A I left fairly quickly. I felt awkward hanging out with Mike.

24 Q Because you guys never talked, right?

25 A We just don't have anything in common and I just -- I don't know him.

1 Q Okay. You didn't feel awkward because you were afraid that Mike was
2 going to hurt Brodie, right?

3 A No. That is correct.

4 Q Okay. You didn't feel awkward because you thought Mike was going to
5 beat Brodie, right?

6 A That's correct

7 Q Okay, you felt awkward because you didn't really know Mike all that well
8 and you guys had nothing in common, right?

9 A Correct.

10 Q Okay. And then how was Mike and Brodie's relationship?

11 A When?

12 Q Whenever you witnessed it, how was it?

13 A I didn't -- like I said earlier, I didn't really see them together that often so
14 I couldn't -- I can't say --

15 Q When you did see them together, how was their relationship?

16 A I mean, Mike was fairly standoffish.

17 Q Did you ever notice and ever state that their relationship it was pretty
18 normal?

19 A Yes, I do recall saying that.

20 Q To the police?

21 A Yes.

22 Q On June 23rd?

23 A Yes.

24 Q That Mike and Brodie's relationship was normal?

25 A Correct.

1 Q Okay. And did you tell the police also that Brodie wasn't scared when
2 Michael came?

3 A I'm sure I did say that.

4 Q Okay. And did you also say that you would not have sent Brodie off
5 with Michael if you thought that Brodie was scared?

6 A I never personally witnessed Brodie scared --

7 Q I'm not asking you what you witnessed. I'm asking did you state that
8 you wouldn't personally send Brodie off with Michael if Brodie was scared?

9 A Yes.

10 Q Okay, that's what you told the police on June 23rd?

11 A Yes.

12 Q Did you -- were you asked by the police as to whether or not you found
13 anything alarming about Michael and Brodie's relationship or the way Michael
14 treated Brodie?

15 A I don't recall.

16 Q Okay. Do you recall telling the police you found nothing alarming about
17 their relationship?

18 A I don't recall.

19 Q Okay. Do you --

20 MR. ALTIG: Court's indulgence one moment, please.

21 BY MR. ALTIG:

22 Q Would it refresh your recollection if I showed you your statement?

23 A Sure.

24 THE COURT: And yes, you can approach?

25 MR. ALTIG: Excuse me? I'm sorry, Your Honor?

1 THE COURT: You can approach.

2 MR. ALTIG: Thank you.

3 BY MR. ALTIG:

4 Q Circled area there.

5 Do you recall on June 23rd, 2011 telling the police that there was
6 nothing alarming to us about that relationship?

7 A Correct.

8 Q And by us, who were you referring?

9 A I don't know. Your -- I mean I was in shock at that time. I don't know
10 who I was referring to.

11 Q Okay. You said there was nothing out of the ordinary? Right?

12 A Correct.

13 Q You never saw Michael hit Brodie?

14 A No.

15 Q Ever?

16 A Never.

17 Q Okay. And you never saw Michael discipline Brodie, ever?

18 A Ever.

19 Q Correct?

20 A Correct.

21 Q Okay. In fact, you would not have let Brodie go with Michael if you felt
22 he was going to hit him or do anything like that to him, right?

23 A Of course I never would have let my nephew go with someone who I
24 thought would hit him.

25 Q Okay. Or you had witnessed that done something like that, right?

1 A I never would have left my nephew with someone I thought was going
2 to hurt him --

3 Q Okay.

4 A -- ever.

5 Q Thank you.

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

7 THE COURT: Redirect?

8 MR. GIORDANI: No, Judge.

9 THE COURT: All right, ma'am, thank you for your time. You're free to go.

10 THE WITNESS: Thank you.

11 MR. GIORDANI: We have no further witnesses to call today, Judge.

12 THE COURT: Are we finished for the day?

13 MR. GIORDANI: Looks like it.

14 THE COURT: All right. Ladies and gentlemen, we'll see you back tomorrow
15 at 9:30 in the morning. You are admonished not to converse amongst yourselves or
16 with anyone on any subject connected with the trial, do not read, watch or listen any
17 report of or commentary on the trial, and do not form or express an opinion on this
18 trial. See you tomorrow.

19 [Jury out at 3:17 p.m.]

20 [Colloquy between the Court and the clerk]

21 THE COURT: All right. Okay, the jury's out of the room. Is there anything we
22 need to address --

23 MR. ALTIG: One.

24 THE COURT: -- before we go off the record?

25 MR. ALTIG: One thing, Your Honor. There was --

1 THE COURT: Yeah.

2 MR. ALTIG: -- brought to my attention that one of our witnesses will not be
3 here till I think Thursday afternoon?

4 MS. VON MAGDENKO: It's the pathologist.

5 MR. ALTIG: I do have a prearranged -- I'm supposed to be giving a talk to
6 250 children at the YMCA on Friday afternoon at 3 p.m. Not this Friday but the
7 following. I don't know if the trial will go into Friday, but if it does, I would appreciate
8 if we could leave at three. If we can't, I can try to find someone else --

9 THE COURT: Absolutely, I'll let you go to that and I --

10 MR. ALTIG: Okay.

11 THE COURT: -- can't imagine that we'd be still taking testimony on Friday.

12 MR. ALTIG: Okay.

13 MS. VON MAGDENKO: No --

14 MR. ALTIG: I just wanted to make sure.

15 THE COURT: Because the pathologist would probably be the only person
16 and what time do we start next Thursday?

17 THE CLERK: 9:30, Your Honor.

18 THE COURT: 9:30.

19 MS. VON MAGDENKO: He can only be here in the afternoon. He's flying in
20 Thursday morning.

21 THE COURT: Okay, then --

22 MR. STANTON: Your Honor, may I inquire about that?

23 THE COURT: Yeah.

24 MR. STANTON: Can we find out from defense counsel about what efforts we
25 can -- she can make to determine whether or not there's any ability to get him here

1 sooner?

2 MS. VON MAGDENKO: It's his trial calendar. He testifies a lot. He -- so --

3 THE COURT: Is he in trial till next Thursday?

4 MS. VON MAGDENKO: He has two different trial -- well, including this trial,
5 next week he'll have three different trials he's testifying in, in three different states.

6 THE COURT: Okay, well just will you touch base with him to see if something
7 changes?

8 MS. VON MAGDENKO: I will. I will. I --

9 THE COURT: Because -- okay, so if we call him Thursday afternoon --

10 MS. VON MAGDENKO: He'll be the --

11 THE COURT: -- we're probably going to be dark a few days and then we
12 won't be able to do closings until -- are we doing Friday morning? Yeah, because I
13 took that case off.

14 THE CLERK: Yes, Your Honor, we'll go Friday --

15 THE COURT: So we would do closings Friday morning I guess.

16 MS. VON MAGDENKO: Yeah.

17 THE COURT: I don't know how else we can calendar it. And then we'll send
18 it out to the jury hopefully by Friday midday.

19 Okay. So is there anything else we need to address?

20 MR. STANTON: The only thing I was going to suggest, Your Honor, is I'm
21 going to be prepared tomorrow to submit to you our proposed jury instructions both
22 clean and with cites to the Court. I'm hopeful that we can get defense counsel's at
23 that time as well. And then based upon what I just heard, we're certainly not in a
24 rush to settling, but I think it would probably be better to settle them sooner than
25 later.

1 THE COURT: I would agree. It sounds like next week we're going to have
2 plenty of time during the middle of the week.

3 MR. STANTON: Think so.

4 THE COURT: Okay, and you want to just go ahead and admonish the
5 defendant tomorrow on his right to testify or not to testify?

6 MR. ALTIG: We can, Your Honor.

7 THE COURT: You -- okay. So let's make a note we'll do it tomorrow after the
8 State finishes. Okay. Anything else?

9 MR. STANTON: And at that time, Your Honor, before we canvas him, I'd like
10 to, you know, talk to the Court before we -- I do it. Obviously it's going to be outside
11 the jury's presence, but there's be a matter I'd like to bring up to the Court.

12 THE COURT: Can we address it now?

13 MR. STANTON: Not right now, Your Honor. I'd prefer to address it tomorrow
14 if possible. Can we approach?

15 THE COURT: Well the only reason I ask is I don't want to keep the jury
16 waiting for a long time in the morning.

17 MR. STANTON: Oh no, this won't be any time while the jury's waiting. It's
18 only when the jury's done and -- do you anticipate canvassing the defendant after the
19 close of the evidence tomorrow?

20 THE COURT: Probably, because you have one witness left, but they'll go into
21 their case in chief Monday.

22 MR. STANTON: Correct.

23 [Colloquy between counsel]

24 MR. STANTON: Yeah, it could be done when we're finished with court
25 tomorrow.

1 THE COURT: The out of the presence?

2 MR. STANTON: Yes.

3 THE COURT: Okay, that's fine and then we'll admonish the defendant
4 somewhere tomorrow, probably around the same time.

5 MR. STANTON: Thank you, Your Honor.

6 MR. ALTIG: Thank you.

7 THE COURT: That's fine. Okay.

8 MR. GIORDANI: Thank you.

9 THE COURT: Then we'll see you tomorrow.

10 MR. GIORDANI: All right.

11 [Proceedings concluded at 3:21 p.m.]

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

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15 

16
17 Tracy A. Gegenheimer, CER-282, CET-282
18 Court Recorder/Transcriber

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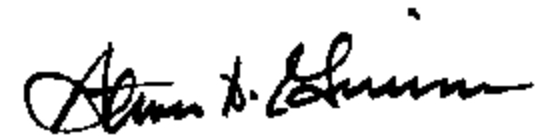
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CLERK OF THE COURT

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

FRIDAY, AUGUST 8, 2014

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 5

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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7
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10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF WITNESSES

PAGE

FOR THE STATE:

JENNIFER LEE

Direct Examination by Attorney Stanton	9
Cross-Examination by Attorney Von Magdenko	21
Redirect Examination by Attorney Stanton	24
Recross Examination by Attorney Von Magdenko	26

DANNY FICO

Direct Examination by Attorney Giordani	27
Cross-Examination by Attorney Altig	46
Redirect Examination by Attorney Giordani	53

GERALD COLLINS

Direct Examination by Attorney Stanton	57
Cross-Examination by Attorney Von Magdenko	73
Redirect Examination by Attorney Stanton	92

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

INDEX OF EXHIBITS

PAGE

FOR THE STATE:

(None)

FOR THE DEFENDANT:

(None)

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

2
3 [Outside the presence of the jury]

4 THE COURT: Hi.

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

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

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

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

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

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

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

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

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

1 THE COURT: You can look at my book soon as I look at it.
2 MR. ALTIG: Okay. Thank you.
3 THE COURT: That's fine. Okay. Yeah. Our statute doesn't seem to require
4 that a showing first be made.
5 MR. STANTON: And, Judge, I would add one other thing for the record. As
6 this Court has previously admonished these witnesses, there is subject matter that
7 is third rail type stuff and therefore the need beyond what the statute contemplates
8 in the natural course of an adverse witness, but the need to be direct in questions I
9 think is heightened in this case based upon the facts of their relationship with the
10 defendant and the subject matter that is not proper for this jury to hear.
11 THE COURT: Okay. Do you think we need with them again briefly or?
12 MR. ALTIG: I know that you did admonish them. I don't --
13 THE COURT: I did.
14 MR. ALTIG: I don't know if they need to be admonished again. If we -- if they
15 do, I'd ask they be admonished outside the presence of the jury first.
16 THE COURT: Absolutely. Absolutely.
17 MR. ALTIG: I don't think Mr. Stanton is suggesting that you admonish them in
18 front of the jury, but --
19 THE COURT: No, I don't think he is either. That's fine. Who -- do we have
20 them here?
21 MR. ALTIG: I'm not sure but I'll go out and see.
22 MR. STANTON: They should be here, Your Honor.
23 MS. VON MAGDENKO: They're here. I saw them.
24 THE MARSHAL: Who are we looking for?
25 THE COURT: Yeah. I'm just going to tell them briefly to make sure they --

1 MR. GIORDANI: Jennifer Lee --
2 THE COURT: -- listen to the questions asked --
3 MR. GIORDANI: -- and Danny Fico.
4 THE COURT: -- and only --
5 MR. ALTIG: Yes, Your Honor.
6 THE COURT: Mr. Altig?
7 MR. ALTIG: Yes.
8 THE COURT: You speak sometimes very fast --
9 MR. ALTIG: Okay.
10 THE COURT: -- and a couple of the jurors have asked if you could slow it
11 down a notch.
12 MR. ALTIG: Yes. Your bailiff talked to me -- or marshal talked to me about
13 that yesterday.
14 THE COURT: I did that too in court, so I understand.
15 MR. ALTIG: Yeah. That's how I am. I get excited and things start rolling out.
16 THE COURT: I know. I do that too. I fly sometimes. Okay. If that's it, then
17 can you see if those witnesses are here and --
18 THE MARSHAL: Yes, ma'am.
19 THE COURT: -- just bring them in very briefly?
20 THE MARSHAL: You said Jennifer Lee and?
21 MR. GIORDANI: Danny Fico or Fico?
22 MR. STANTON: And, Judge, one other thing besides what you previously
23 had done. Mr. Giordani brought it to my attention that they obviously know that the
24 defendant has been in custody since his arrest, so they shouldn't be -- comment
25 about his custody status.

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

11 UNIDENTIFIED SPEAKER: Okay.

12 MR. FICO: Okay.

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

14 MR. FICO: Okay.

15 MS. LEE: Okay.

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

17 MR. ALTIG: May I review the statute?

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

19 MR. ALTIG: Thank you.

20 THE COURT: And I said you could.

21 MR. ALTIG: Thank you.

22 [Colloquy between the Court and the clerk]

23 MR. ALTIG: Thank you.

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

1 MR. ALTIG: No --

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

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

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

12 THE COURT: Oh, no, that --

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

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

15 MR. ALTIG: Right.

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

17 MR. STANTON: That's okay.

18 MR. ALTIG: Thank you.

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

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

21 THE MARSHAL: Absolutely.

22 [Pause]

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

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

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

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

3 Please call your next witness.

4 MR. STANTON: State would call Jennifer Lee.

5 [Pause]

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

8 JENNIFER LEE

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

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

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

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

14 MR. STANTON: Thank you.

15 DIRECT EXAMINATION OF JENNIFER LEE

16 BY MR. STANTON:

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

18 A Yes.

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

20 A He's my younger brother.

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

23 A He's got a red tie on.

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

25 THE COURT: It will.

1 BY MR. STANTON:

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

4 A Correct.

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

6 A Yes.

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

9 A Yes.

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

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

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

14 A Between December and May of 2011.

15 Q So would it be December of --

16 A Of 2011, sorry.

17 Q -- '10 and then into?

18 A Eleven.

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

20 A At my home.

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

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

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

25 A Four and seven.

1 Q So older than Brodie?

2 A Yes.

3 Q And were they boys or girls?

4 A Both boys.

5 Q During the time of -- and apologize. You said December is when you

6 began. What was the month in 2011 where you no longer babysat Brodie?

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

8 Q May. Thank you. During that approximate six-month period of time, do

9 you think you're familiar with the normal bumps and bruises that Brodie would get

10 during the day when you were watching him?

11 A Yes.

12 Q And obviously you'd see him the next day when he came in, so the

13 times that you didn't see him you might see bruises or injuries that occurred outside

14 your presence.

15 A Correct.

16 Q So for that six months you have a pretty good sense about what Brodie

17 looked like as far as his normal bumps and bruises.

18 A Yes.

19 Q Did you ever see Brodie in diapers?

20 A Yes.

21 Q With nothing else on?

22 A Yes.

23 Q Ever see him naked?

24 A I changed his diapers, so yes.

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

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

4 A Yes.

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

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

11 Q Not that severity?

12 A No.

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

17 A No.

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

20 A No.

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

25 A No.

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

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

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

6 A Thank you.

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

9 A Okay.

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

11 A Yes.

12 Q What was the location that you saw Brodie?

13 A We went to the Whitney Ranch Aquatic Center.

14 Q And did you have your children with you?

15 A Yes.

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

17 A Yes.

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

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

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

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

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

1 A I believe she put a shirt on him when he got out of the pool.

2 Q Okay. So would you not have ever seen him bare naked from the waist

3 up?

4 A I probably did when he was in the water.

5 Q Did you notice anything unusual about his condition of his body as far

6 as injuries go?

7 A Nothing stuck out.

8 Q Did you ever hear Brodie complain of head pain?

9 A He said he had a headache.

10 Q Okay. And how about abdominal pain?

11 A He wasn't normal. But he never complained about abdominal pain.

12 Q How about nausea?

13 A Not to me.

14 Q Vomiting?

15 A I didn't see that.

16 Q Now, same day, Monday, the 13th. Did you see Brodie again that day?

17 A Yes.

18 Q Where did you see him?

19 A At Danny's house.

20 Q Danny?

21 A Fico.

22 Q And how do you know Danny Fico?

23 A He lived next door to me when I was younger. We grew up together.

24 We're really close friends.

25 Q And is he also friends with your brother?

1 A Yes.

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

3 house?

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

5 to watch a baseball game.

6 Q And was your brother there?

7 A He showed up about 30 minutes later.

8 Q And so how long would you approximate that you saw Brodie from start

9 to finish Monday evening?

10 A A few hours.

11 Q Was he acting normally?

12 A He was playing with my kids.

13 Q Was that normal?

14 A Yes.

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

16 A No new injuries, no.

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

18 A No.

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

20 A No.

21 Q You never saw him slip and fall and some concern about an injury that

22 he obtained that night?

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

24 Q And you certainly didn't see --

25 A -- see anything --

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

3 A Correct.

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

6 A Yes.

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

8 A Danny, Michael and Brodie did.

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

10 A Yes.

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

12 A No.

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

14 A Yes.

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

16 A No.

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

19 A Yes.

20 Q Who is that?

21 A It's Brodie.

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

24 A Loved that little boy.

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

1 15th, correct?

2 A Correct.

3 Q Your brother called you, the defendant.

4 A He called me.

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

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

7 Q Sometime later?

8 A Yes.

9 Q You went to their home?

10 A Correct.

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

12 A Yes.

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

15 A Yes.

16 Q By Detective Collins of the Henderson Police Department?

17 A Correct.

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

20 A He was --

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

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

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

1 of mind?

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

3 MR. STANTON: Thank you, Your Honor.

4 BY MR. STANTON:

5 Q You can answer the question.

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

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

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

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

12 A A couple of days, probably.

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

15 A Two different days.

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

17 A No, it was just the two.

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

19 A That's what I'm figuring.

20 Q Okay.

21 A He never stated that.

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

23 A Yes.

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

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

1 she thought it meant. Her state of mind.

2 THE COURT: Sustained.

3 BY MR. STANTON:

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

6 A Correct.

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

8 A I did not.

9 Q You did not?

10 A No.

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

12 A Not off hand.

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

15 A Okay.

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

17 A Okay.

18 Q Do you remember that?

19 A Yes.

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

21 A Early afternoon-ish.

22 Q And --

23 A Not exact.

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

1 A No.

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

3 doorbell?

4 A Yes.

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

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

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

8 A I couldn't see out the peephole.

9 Q Pardon me?

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

11 you can't see.

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

13 A Yes.

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

15 A After a while, yes.

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

17 A They had left a business card.

18 Q And what did the business card say?

19 A It had his name on it.

20 Q Detective?

21 A Collins.

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

23 the Henderson Police Department?

24 A Correct.

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

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

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

3 Q And when did you call Detective Collins back?

4 A I did not.

5 Q You never did?

6 A No.

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

9 A No.

10 MR. STANTON: Nothing further.

11 THE COURT: Cross?

12 CROSS-EXAMINATION

13 BY MS. VON MAGDENKO:

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

16 A Correct.

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

18 A Yes.

19 Q Okay. When did you first meet Arica?

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

22 Q When was that?

23 A A few months before everything had happened.

24 Q So the fall of 2010?

25 A Yes.

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

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

4 BY MS. VON MAGDENKO:

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

6 A Correct.

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

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

11 Q Per day?

12 A Probably an hour each day.

13 Q And what would you talk about with Arica?

14 A Everything. We were friends.

15 Q Did you talk about her relationship with Michael?

16 A Of course.

17 Q Would you talk about Brodie?

18 A Yes.

19 Q And Arica was paying you for you babysitting?

20 A Yes.

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

22 A Six dollars.

23 Q Have you ever seen Arica hit Brodie?

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

25 Q And what does she say?

1 A That she got out of hand once --

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

3 THE COURT: Sustained unless you have a exception.

4 BY MS. VON MAGDENKO:

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

6 A Yes.

7 Q And can you describe what you saw?

8 A She gets frustrated. She doesn't have patience. She screams, she

9 yells. And she would put him in a room and lock the door.

10 Q She would lock Brodie in a room alone?

11 A That's how they did it.

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

13 A The grandparents and her.

14 Q Why would they do that? What would Brodie be doing to warrant being

15 locked in a room alone?

16 A Even if he was just sleeping, that's how they kept him there until he

17 woke up. It was for any reason they felt necessary. If he was throwing a tantrum,

18 that was their time out.

19 Q When you were at the pool on Monday and Brodie -- who did Brodie tell

20 that he had a headache to?

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

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

23 A No.

24 MS. VON MAGDENKO: Court's indulgence.

25 THE COURT: Yes.

1 [Colloquy between counsel]

2 BY MS. VON MAGDENKO:

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

4 A Yes.

5 Q And can you describe that interaction?

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

8 Q Was Brodie a happy kid?

9 A Usually, yes.

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

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

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

14 A Never.

15 Q All right.

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

17 THE COURT: All right. Thank you.

18 Any redirect?

19 MR. STANTON: Couple.

20 REDIRECT EXAMINATION

21 BY MR. STANTON:

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

24 A Yes.

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

1 2011 before the Clark County Grand Jury, correct?

2 A Correct.

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

5 A No.

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

8 A I was given a subpoena.

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

11 A Correct.

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

14 A The -- excuse me?

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

17 A Okay.

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

19 A Okay.

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

21 A The grandparents and Arica.

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

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

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

1 A No.

2 Q When did you see that?

3 A I never saw it.

4 MR. STANTON: Nothing further.

5 THE COURT: Anything else of this witness?

6 RECROSS EXAMINATION

7 BY MS. VON MAGDENKO:

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

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

10 Q Okay. I think that's --

11 MS. VON MAGDENKO: No further questions.

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

13 MR. STANTON: Yes, Your Honor.

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

15 Next witness, please.

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

18 THE COURT: All right. Thank you.

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

20 [Pause]

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

23 DANNY FICO

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

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

1 the record.

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

3 THE COURT: Whenever you're ready.

4 MR. GIORDANI: Thank you, Your Honor.

5 DIRECT EXAMINATION OF DANNY FICO

6 BY MR. GIORDANI:

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

8 A Yes.

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

11 A Blue suit.

12 MR. GIORDANI: Record reflect --

13 THE WITNESS: Navy blue suit.

14 MR. GIORDANI: -- identification, Judge?

15 THE COURT: It will.

16 BY MR. GIORDANI:

17 Q How do you know the defendant?

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

19 Q Since you were how old?

20 A Six.

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

22 A No.

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

25 A Yes.

1 Q Did you come down for the pretrial conference?

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

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

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

6 THE COURT: Uh-huh.

7 MR. ALTIG: Thank you.

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

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

12 MR. GIORDANI: I am --

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

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

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

17 MR. GIORDANI: Okay.

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

19 THE COURT: So the objection will be sustained.

20 BY MR. GIORDANI:

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

22 A Yes.

23 Q How do you know him?

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

25 Q And who is it?

1 A Brodie.

2 Q And when did Mike introduce you to Brodie?

3 A I'd say around Christmas -- that time.

4 Q Okay. Did you also meet the woman in that photo around that time?

5 A Yes.

6 Q And who is that?

7 A Arica.

8 Q And is that Brodie's mom?

9 A Yes.

10 Q Arica Foster?

11 A Yes.

12 Q What was your relationship with the defendant around late 2010, early
13 2011, mid-2011?

14 A With Michael? That was my best friend.

15 Q All right. And as you sit here today, is it true that you've been convicted
16 of four felonies here in the State of Nevada?

17 A That I have?

18 Q Yes.

19 A Yes.

20 Q And was that in 2002?

21 A Yes.

22 Q And is that one count of burglary while in possession of a firearm?

23 A Yes.

24 Q One count of robbery with use of a deadly weapon?

25 A Yes.

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

2 A Yes.

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

4 A Yes.

5 Q I want to draw your attention to two specific days in June of 2011, and

6 I'm going to show you a calendar if it helps you.

7 A Okay.

8 Q State's 77. First date I want to draw your attention to is Monday, June

9 13th. Can you see it, Mr. Fico --

10 A Yeah. Yes.

11 Q So Monday, June 13th. Did you come into contact with Arica and

12 Brodie on that day?

13 A Yes.

14 Q And what time was that, approximately?

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

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

17 A I believe so, yes, sir.

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

19 A I believe the pool.

20 Q When you saw Brodie that morning, do you recall as you sit here today

21 what he was wearing?

22 A No. No.

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

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

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

1 saw them the next morning, Tuesday --

2 A Yes.

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

4 A Yes.

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

6 A Sort of, yes.

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

9 A Yes.

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

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

13 Q And who came into the store?

14 A Arica, Michael and Brodie.

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

17 A No, I don't.

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

20 A Yes.

21 Q That Monday night.

22 A Yes.

23 Q And when did you see them and --

24 A We --

25 Q -- how did it come about?

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

1 Q Okay.

2 A -- Ash and Richie.

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

4 A He seemed normal, seemed fine.

5 Q Did you see Brodie eat?

6 A Yes.

7 Q And what did he eat?

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

9 Q Okay. Wasn't it chicken parmesan?

10 A Chicken parmesan cutlets, yes.

11 Q Same thing?

12 A Yeah.

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

14 A Yes.

15 Q Do you --

16 A Ate some of it, yes.

17 Q I'm sorry?

18 A Yes, he was eating it.

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

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

21 bruise.

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

23 County back in 2011?

24 A No.

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

1 A Yes, for a prelim I believe.

2 Q And that was actually in front of a judge, preliminary hearing?

3 A Yeah.

4 Q And you don't recall the injuries to Brodie's face that evening?

5 A I don't -- I know he had a bruise, I'm sure.

6 Q Okay.

7 MR. GIORDANI: May I approach the witness to refresh his recollection,

8 Judge?

9 THE COURT: Yes.

10 MR. GIORDANI: It's 27, counsel.

11 BY MR. GIORDANI:

12 Q I'm showing you a transcript from that prior testimony.

13 A Okay.

14 Q Page 27, just review that page and look up at me when you're done.

15 A (Witness complies.)

16 Q Okay. Does that refresh your recollection --

17 A Yes.

18 Q -- as to the injuries you saw on Brodie that evening?

19 A Yes.

20 Q Monday.

21 A Yes.

22 Q And what were those injuries?

23 A Remember seeing a bruise on his cheek.

24 Q Okay.

25 A Believe on his chin. And --

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

2 A Yes.

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

5 A Yes.

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

8 A No.

9 Q Were you concerned about those injuries?

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

12 Q Okay.

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

14 BY MR. GIORDANI:

15 Q You need to speak up a little bit.

16 A Oh, okay.

17 Q She's taking all this down.

18 A Okay.

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

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

21 BY MR. GIORDANI:

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

24 A No.

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

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

2 A Yes.

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

4 A Yes.

5 Q Okay.

6 A Yes.

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

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

10 Q Okay. Where did you meet him?

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

12 Q And why'd you meet him there?

13 A Just to hang out.

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

15 A Did I? Not that I recall.

16 Q Okay.

17 MR. GIORDANI: May I approach, Judge?

18 And counsel, page 33.

19 THE COURT: Yes.

20 BY MR. GIORDANI:

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

22 A Yes, absolutely.

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

24 A Okay.

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

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

1 game that evening?

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

5 Q Mike with who?

6 A With Brodie.

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

9 A Yes.

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

12 A The cheek, the --

13 Q Which cheek?

14 A Right here looks like.

15 Q And you're indicating --

16 A His --

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

18 A -- his left.

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

20 A Forehead, left forehead.

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

23 A Left forehead.

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

25 A Yes.

1 Q Would you circle the one that you're referring to?

2 A It's been so long. Just don't recall exactly where. I just remember

3 seeing a bruise.

4 Q Okay. Let me ask you this: Did you see all these bruises on his left

5 side?

6 A Not that many, no.

7 Q Did you see any bruises at this severity level on that side?

8 A Possibly, it's been -- been a very -- been a long time.

9 Q How did you leave your house for the baseball game? Did you walk out

10 with anyone?

11 A I don't recall.

12 Q Okay. Did you ever have an incident at any point where you were

13 informed or saw Brodie fall down and hurt himself or any incident where he hurt

14 himself at all?

15 A Me personally, no. No.

16 Q You never witnessed Brodie fall on any rocks --

17 A Fall, yeah. I mean I've seen him fall --

18 Q I'm talking about specifically Monday night --

19 A No.

20 Q -- right after the baseball game.

21 A No.

22 Q I want to now move to the next day, Tuesday, June 14th.

23 A Okay.

24 Q Were you working that day?

25 A Yes.

1 Q And is that at America's Mart?

2 A Yes.

3 Q And were you working inside or outside?

4 A Inside.

5 Q And when I say inside, I mean --

6 A Inside at the front counter.

7 Q Okay. Did you see Brodie that day as well?

8 A Yes.

9 Q And who was he with when you saw him?

10 A He walked by the counter with Arica.

11 Q Okay. When you saw him that day, did you recall that he was wearing

12 a baseball cap?

13 A I don't recall.

14 Q Okay. Do you recall seeing injuries to Brodie that caused you concern?

15 A I don't recall if it was Monday or Tuesday I saw those injuries.

16 Q Okay.

17 A I -- I know I made a statement.

18 Q Is it fair to say the baseball game was Monday night?

19 A Yes.

20 Q And you saw Brodie the next morning as well?

21 A Yes.

22 Q Were there bruises to Brodie the next day that you hadn't seen the night

23 before?

24 A Yes.

25 Q Did you have a conversation with Arica about those bruises?

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

1 A Yes.

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

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

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

6 A Yes.

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

8 MR. GIORDANI: Wednesday, June --

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

10 BY MR. GIORDANI:

11 Q Wednesday, June 15th?

12 A Yes.

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

14 A Yes.

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

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

18 Q At the gas station?

19 A Yeah. Yes.

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

21 A Yes.

22 Q And what was that?

23 A They were questioning me about the case.

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

1 A I don't believe I --

2 MR. ALTIG: At this point --

3 A -- talked to them.

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

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

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

7 THE COURT: Yeah.

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

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

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

15 MR. ALTIG: (Indiscernible) --

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

18 THE COURT: You can.

19 MR. GIORDANI: -- and probative.

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

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

25 MR. ALTIG: Thank you.

1 MR. GIORDANI: Thank you.

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

3 BY MR. GIORDANI:

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

6 A Can you repeat it, please?

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

9 A Yes, they came my gas station.

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

11 A Yes.

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

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

15 Q Do you recall telling them about the bruising?

16 A No.

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

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

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

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

21 BY MR. GIORDANI:

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

25 A I'm sorry?

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

4 A That sounds right.

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

8 A No.

9 Q Did you think that was relevant?

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

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

12 A Yes.

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

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

15 Q Did they come and contact you again?

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

17 Q Okay.

18 A I mean.

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

21 A Yes, please.

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

23 BY MR. GIORDANI:

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

25 A Okay.

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

2 A (Witness complies.)

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

4 MR. GIORDANI: Yes.

5 MR. ALTIG: Thank you.

6 [Pause]

7 BY MR. GIORDANI:

8 Q Does that refresh your recollection?

9 A Yeah.

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

12 A Yes.

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

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

15 Q You didn't have anything to say?

16 A Yeah.

17 MR. GIORDANI: Pass the witness.

18 THE COURT: Cross?

19 MR. ALTIG: Thank you.

20 CROSS-EXAMINATION

21 BY MR. ALTIG:

22 Q Good morning, Mr. Fico.

23 A Morning.

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

25 A Since I was six.

1 Q Since you were 6? And at this time we're talking about June of 2011.
2 Where did you live?

3 A Same apartments, Avalon.

4 Q Okay. Were you in fact in the same building?

5 A Yes.

6 Q Okay. So you lived in the same building as Michael?

7 A Yes.

8 Q How often would you see Brodie and Michael and Arica during a week?

9 A Almost every day.

10 Q And would you see them interact with one another?

11 A Yes.

12 Q And you got to see how Michael interacted with Brodie?

13 A Yes.

14 Q How would you characterize Michael's interactions with Brodie?

15 A Seemed like they always had lots of fun. Always calling him bum, come
16 in the gas station, lots of laughs.

17 Q How would you characterize Arica's interaction with Brodie?

18 A Same.

19 Q Same way?

20 A Yep.

21 Q And how would you characterize Michael's and Arica's interactions?

22 A Everything seemed normal, seemed good.

23 Q Okay. Now, drawing your attention to June 13th of 2011.

24 A Okay.

25 Q You said a few moments ago that you did see Arica and Brodie and

1 Michael come into the store?

2 A Yes, in the morning.

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

4 pool?

5 A Yes.

6 Q And you saw some injuries on Brodie at the time, however they

7 appeared to be normal injuries to you?

8 A Yes.

9 Q You said that he oftentimes had bruising?

10 A Yes.

11 Q What types of bruising would he have?

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

13 or something.

14 Q Okay. Did he fall a lot?

15 A When I was around him, yes.

16 Q How often were you around him?

17 A When Jen was babysitting, I was there quite often and I saw him fall

18 quite a bit over there and just his walking and his falling.

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

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

21 Q Okay. Now, there came a time Monday afternoon that you saw

22 everybody again; is that right? At least Michael and Brodie?

23 A Yeah. Back at Jen's house.

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

25 A To the -- to the baseball --

1 Q -- to the baseball game.

2 A -- to my house to watch baseball game.

3 Q Okay. And everything seemed to be okay at that particular time you

4 said?

5 A Yeah.

6 Q Brodie still have his -- those injuries?

7 A Yes.

8 Q Okay. Did you see Jen that -- or did you see Arica that night?

9 A I don't recall.

10 Q You don't --

11 A If it would have been, it would have been late, but I don't recall.

12 Q Okay. Now, that night after the baseball game you left?

13 A Yeah, went over --

14 Q Went to Jen's house?

15 A -- Jen's house.

16 Q You said everything seemed to be fine then?

17 A Yeah.

18 Q How was Michael interacting with Brodie Monday night?

19 A Same. He was -- fed him dinner and everything.

20 Q Michael fed him dinner?

21 A Yeah.

22 Q Okay. Was that common in your interactions to see Michael take care

23 of Brodie like that?

24 A All the time he was with him.

25 Q Okay. Michael --

1 A Yeah.

2 Q -- and he'd feed Brodie?

3 A Yeah. Whenever he -- yep.

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

5 A No.

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

7 A No.

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

9 and Brodie again, right?

10 A Yeah, they came through the gas station.

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

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

13 Q Okay.

14 A -- on a little bruise on him.

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

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

17 A No.

18 Q About the bruising?

19 A No.

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

21 concerned you said, right?

22 A No.

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

24 A Yes, at the gas station.

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

1 A Yes.

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

3 promotion?

4 A Yes.

5 Q To supervisor?

6 A Yes.

7 Q Supervisor of what?

8 A Of the car wash.

9 Q Of the car wash itself?

10 A Yes.

11 Q And what was your position with the mart?

12 A General manager of the store.

13 Q Of the store?

14 A Yes.

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

16 A To go to --

17 Q -- to supervisor of the car wash?

18 A -- supervise the car wash, yes.

19 Q Was Michael happy about that?

20 A Very.

21 Q Okay. Did he seem excited?

22 A Very excited.

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

24 aggravated?

25 A No, not at all.

1 Q Have you ever seen Michael hit Brodie?

2 A No.

3 Q You ever seen Michael yell at Brodie?

4 A No.

5 Q You ever seen Michael be aggressive with Brodie?

6 A No.

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

8 A Yes.

9 Q Or not speaking to the police?

10 A Yeah.

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

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

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

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

15 death?

16 A Yes.

17 Q So when the police are calling you, you don't know the exact reason --

18 what they're investigating or why they want to talk to you or anything like that, right?

19 A No. Correct.

20 Q Okay.

21 [Colloquy between counsel]

22 BY MR. ALTIG:

23 Q Do you know what time it was on Tuesday evening that Michael found

24 out he received a promotion to supervisor?

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

1 remember. It's been a while.

2 Q Okay.

3 A But it was in the evening though.

4 Q In the evening hours?

5 A Yeah.

6 Q On Tuesday?

7 A Yeah.

8 Q Thank you.

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

10 THE COURT: Redirect?

11 MR. GIORDANI: Just briefly.

12 REDIRECT EXAMINATION

13 BY MR. GIORDANI:

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

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

18 Q Was that --

19 A -- they interacted together with each other.

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

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

23 Q Bum?

24 A Yeah, bum.

25 Q B-u-m?

1 A Yeah.

2 Q Okay.

3 MR. GIORDANI: Nothing further.

4 THE COURT: Is free to go?

5 MR. ALTIG: Yes, Your Honor.

6 THE WITNESS: Thank you.

7 THE COURT: Thanks.

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

10 MR. STANTON: Yes, Your Honor.

11 THE COURT: All right.

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

16 THE MARSHAL: Thank you, jurors.

17 Please all rise for the exiting jurors.

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

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

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

24 THE COURT: Who and how many?

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

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

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

4 MR. ALTIG: You know --

5 THE COURT: -- with your witnesses?

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

9 MS. VON MAGDENKO: Until we --

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

13 MR. ALTIG: Right.

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

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

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

22 THE COURT: All right.

23 MS. VON MAGDENKO: -- including --

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

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

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

3 THE COURT: We do.

4 MR. GIORDANI: Okay.

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

6 MR. ALTIG: Thank you.

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

8 MS. VON MAGDENKO: Thank you.

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

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

11 [Colloquy between the Court and the clerk]

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

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

14 THE MARSHAL: Thank you. Please be seated.

15 THE COURT: Okay, the next witness please.

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

17 THE COURT: Okay.

18 THE MARSHAL: Detective?

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

21 MR. COLLINS: Morning, Judge.

22 THE COURT: Morning.

23 GERRY COLLINS

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

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

1 the record.

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

3 THE COURT: Whenever you're ready.

4 MR. STANTON: Thank you, Your Honor.

5 DIRECT EXAMINATION OF GERALD COLLINS

6 BY MR. STANTON:

7 Q Detective, are you currently employed?

8 A No, I'm not.

9 Q You're retired?

10 A Retired.

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

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

13 Q And how long were you a police officer?

14 A About 25 and a half years.

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

17 A Probably about 14 years. Right around 14.

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

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

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

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

25 Q Just give me an approximate figure.

1 A Five -- five to 600.

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

5 A Yes.

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

8 A Yes, I was.

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

11 A Yes.

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

14 A Yes, I was the primary detective.

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

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

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

25 A Yes.

1 Q And what was the location?

2 A It was Seven Hills apartment complex.

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

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

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

6 location?

7 A Yes.

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

9 A Yes.

10 Q Was there a -- was the scene preserved or at least cordoned off for

11 non-law enforcement personnel?

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

13 Q Did you go into the apartment?

14 A Yes.

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

16 Aschenbrenner?

17 A Yes.

18 Q I want to show you what has been admitted into evidence, a series of

19 photographs, beginning with the State's Exhibit 42. Do you recognize what's

20 depicted in that photograph?

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

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

23 A When I initially observed him, yes.

24 Q Now, the items that are attached to his lower right shin area, upper left

25 arm and to the underarm of his right, do you recognize those items?

1 A Yes. That's medical intervention.

2 Q What do you mean by medical intervention?

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

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

8 A Yes.

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

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

12 Q And that's a common practice?

13 A Yes. It's protocol.

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

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

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

18 A I'm sorry --

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

20 A Yes.

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

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

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

3 A There was some concern, sure.

4 Q What was that concern generated from?

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

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

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

14 Q And that would be Nancy Dahl?

15 A Nancy Dahl, yes.

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

17 A Yes.

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

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

1 little more concerned at that point.

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

4 A Yes.

5 Q Did that cause you concern as well?

6 A Yes.

7 Q Based upon your training and experience?

8 A Absolutely.

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

11 A Yes.

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

14 A Yeah, a lot of alarms went off.

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

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

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

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

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

23 A Eventually, yes.

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

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

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

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

7 A Yes.

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

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

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

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

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

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

20 Q But your --

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

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

24 A Right down here, yes.

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

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

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

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

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

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

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

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

17 A I believe so, yes.

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

20 A No.

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

23 A That would be a fair assessment.

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

1 A Yes.

2 Q And that was performed by who?

3 A That was performed by Dr. Gavin.

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

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

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

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

14 Q Now --

15 A -- and submit it to the doctor.

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

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

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

21 A About 11:45 in the morning.

22 Q And how long did that interview take place?

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

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

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

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

7 A Yes.

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

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

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

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

18 MR. ALTIG: Objection; hearsay.

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

20 THE COURT: Okay. Thanks.

21 MR. STANTON: I --

22 BY MR. STANTON:

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

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

25 Q And where was the location of that interview?

1 A It was at the north substation.

2 Q And how long did that interview take place?

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

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

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

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

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

14 Q And where physically was that interview?

15 A That was at the main station.

16 Q And how long did that interview take place?

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

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

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

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

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

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

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

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

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

8 A It is very important.

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

13 A No.

14 Q -- or suspect?

15 A No, I wouldn't do that.

16 Q Why not?

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

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

23 A Yes, I did.

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

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

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

3 MR. ALTIG: Objection; hearsay.

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

6 THE COURT: Overruled.

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

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

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

17 THE COURT: Overruled.

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

20 BY MR. STANTON:

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

22 A Yes.

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

24 A Sure. Absolutely.

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

1 sequence of events that Arica gave you?

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

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

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

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

7 A Yes.

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

10 A Yes.

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

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

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

16 BY MR. STANTON:

17 Q I don't want you --

18 A Okay.

19 Q -- to say --

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

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

22 A Yes, it would.

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

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

1 his report.

2 Am I correct, counsel?

3 MR. ALTIG: Yes.

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

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

8 THE COURT: All right.

9 MR. STANTON: Prior inconsistent statement.

10 MR. ALTIG: Understood.

11 THE COURT: All right.

12 MR. ALTIG: Not under oath.

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

14 BY MR. STANTON:

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

17 A Yes.

18 Q What did he tell you?

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

20 Q And doing that means talking to you?

21 A Talking to me, yeah.

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

25 A Yes.

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

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

4 Q Something that was important to you?

5 A Yes.

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

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

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

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

11 Q And --

12 A In the morning. In the morning.

13 Q -- did you ring the doorbell?

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

15 Q Did you ring it more than once?

16 A Eventually I did.

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

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

24 Q And --

25 A And I never got --

1 Q -- did anybody ever respond?
2 A No, nobody ever responded.
3 Q And did you leave something at the residence that day?
4 A Left a card.
5 Q Business card?
6 A Yeah. Usually when I visit some place, I always leave a business card.
7 Q And does it identify you by name?
8 A Yes.
9 Q And what agency you work for?
10 A Yes.
11 Q Did you ever hear back from Jennifer Lee?
12 A No.
13 Q As you testify here today had she ever contacted you as a result of
14 those contacts?
15 A No. I've never been contacted by her.
16 MR. STANTON: Nothing further, Your Honor.
17 THE COURT: Cross?
18 MS. VON MAGDENKO: Thank you, Your Honor.
19 CROSS-EXAMINATION
20 BY MS. VON MAGDENKO:
21 Q Detective, you -- the first full interview you had with Arica Foster was on
22 June 17th, 2011; is that correct? From your testimony?
23 A When you say first full interview, what do you mean?
24 Q I just want to make --
25 A You mean like a formal --

1 Q Yes.

2 A -- sit-down interview?

3 Q Yes.

4 A Yeah. The first one that I had was on June 17th.

5 Q And that was just two days after Brodie's death?

6 A Yes.

7 Q And that lasted approximately two to two and a half hours?

8 A Yes, right around there.

9 Q So it was pretty thorough?

10 A As much as it could be in her -- because of her state of mind.

11 Q And is there police -- that was at the police station, correct?

12 A The north substation.

13 Q So is there police protocol what happens when a witness is

14 interviewed?

15 A You're going to have to be specific about protocol. What do you mean?

16 Q Whether or not it's taped or videoed or --

17 A Oh, yes.

18 Q -- if other people are present, that sort of thing.

19 A Yeah. We tape them.

20 Q Okay. And is it audio and video?

21 A At that place it was audio and video.

22 Q Okay. And was her statement in fact audio and video recorded?

23 A Yes, it was.

24 Q And is there a chain of custody that happens with that audio and video?

25 A Normally there is, but this was a new system and so the chain of

1 custody really wasn't established at that time.

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

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

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

16 A Who lost it?

17 Q The substation system?

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

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

20 A I --

21 Q -- of that interview?

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

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

25 A As far as I could see, yes.

1 Q Okay. And she -- did she type those notes up or did you?
2 A I put them in the report.
3 Q Okay. So you put her notes in the report and you entered them on
4 June 30th, 2011?
5 A I would have to look back. I'm not sure what date it was entered on.
6 Q Does that sound fair?
7 A If it's at the top of the report, then --
8 Q Yeah.
9 A -- probably that's the date, yeah.
10 Q Okay. And is it fair to say that during that time period Arica told you --
11 and you can look at your report if you don't remember, on page 63.
12 A Okay.
13 Q That Brodie had actually fallen forward in an ATV accident?
14 A What paragraph are you on?
15 Q One, two, three, four -- fifth. Where it says Arica said that on Monday,
16 June 13th, and then it goes on.
17 A Arica said on Monday, June 13th?
18 MS. VON MAGDENKO: Your Honor, can I approach the witness?
19 THE COURT: Yes.
20 THE WITNESS: Yeah. Can you -- I --
21 MS. VON MAGDENKO: You know, it's funny, the pagination that I have and
22 the prosecution had is different. So here (indiscernible) and I don't know why it is --
23 THE WITNESS: Okay. Where are we at then? Right here?
24 MS. VON MAGDENKO: Yeah.
25 THE WITNESS: Let me see if I can --

1 MS. VON MAGDENKO: It might be the next page.

2 THE WITNESS: Yeah. Right here?

3 MS. VON MAGDENKO: Yeah.

4 THE WITNESS: When they were going to the pool?

5 MS. VON MAGDENKO: Yeah. That's --

6 THE WITNESS: Okay. All right.

7 MS. VON MAGDENKO: So it's the last sentence.

8 THE WITNESS: Last sentence: She said that when he struck the curb it sent
9 him forward and struck his face on the car.

10 BY MS. VON MAGDENKO:

11 Q And that's -- to your understanding, that's an accurate statement of
12 what she said during the interview two days after?

13 A Well, which car are we talking about?

14 Q This four-wheeler.

15 A Oh, the toy electric car?

16 Q Yeah.

17 A Yes.

18 Q Not a motor vehicle?

19 A Right. Okay.

20 Q No.

21 A Yeah. The toy electric car, yes.

22 Q Okay. And in addition to this, you also did another interview with Arica
23 that was formal, but there was actually a transcript made of that?

24 A Yes. That was on the 21st.

25 Q Okay. So that was just a few days later?

1 A Yes.

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

4 A Did we have a discussion about what?

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

6 A She quoted him several times.

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

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

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

13 A I might have to look at yours again.

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

16 A I don't know.

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

19 A You're at 105?

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

21 A (Indiscernible) --

22 See here. Hmm.

23 Q There it is, yeah.

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

1 Q He says -- hang on --

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

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

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

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

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

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

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

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

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

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

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

23 BY MS. VON MAGDENKO:

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

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

1 beginning that you want?

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

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

4 Q Okay.

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

6 Q Okay, so --

7 A Mom --

8 Q Right here.

9 A Okay, Mom --

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

11 A He put the money?

12 Q Yeah.

13 A You want me to read that?

14 Q Yeah.

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

18 BY MS. VON MAGDENKO:

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

21 As to her words. Would the transcriptionist --

22 A I think --

23 Q -- change her words?

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

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

1 A Yes.

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

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

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

7 A Not --

8 Q -- being on Brodie's back?

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

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

13 A Yes.

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

16 A Yes.

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

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

20 Q Oh, when did she tell you that?

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

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

1 A Yeah.

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

6 BY MS. VON MAGDENKO:

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

8 THE COURT: Hold on a second.

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

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

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

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

15 MS. VON MAGDENKO: Yes.

16 THE COURT: Okay.

17 BY MS. VON MAGDENKO:

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

20 A Yes.

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

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

24 Q Okay. And just --

25 A The medical examiner, I should say.

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

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

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

7 A Yes.

8 Q And she said that was from grandpa?

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

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

13 A You're talking about Arica, correct?

14 Q Correct.

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

16 Q The June 21st one.

17 A June 21st?

18 Q And I can go through it.

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

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

1 A I don't recall that. I don't recall her saying anything about that.

2 Q It's my page 73.

3 A Okay.

4 Q And there's been some confusion about the timing of when that -- when
5 they're referring to that.

6 A What does the -- what does it start with?

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

8 THE COURT: You may.

9 MS. VON MAGDENKO: Thank you.

10 BY MS. VON MAGDENKO:

11 Q Yeah, this (indiscernible) weird.

12 A He knows --

13 Q (Indiscernible) --

14 A Get to that. Okay (indiscernible) the bruising. Okay, did the bruising
15 getting worse. Okay, right here. So it was a bump on his head?

16 Q No --

17 A Yeah. So which one (indiscernible) --

18 Q This one, yeah.

19 A His ear? I just had it (indiscernible) -- oh his ear had this weird --

20 Q Yeah.

21 A Okay.

22 Q When she's talking about this ear bruise, is she -- when is she referring
23 to it?

24 A I can't remember.

25 Q Does the transcript tell us at all if she's referring to --

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

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

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

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

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

9 Q Please do. I just --

10 A Okay.

11 Q I just want to be sure.

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

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

15 A Yes.

16 Q Okay.

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

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

20 A Right.

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

23 A Yes.

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

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

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

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

6 THE COURT: That's fine.

7 THE WITNESS: Is this it right here?

8 MS. VON MAGDENKO: Right here and --

9 THE WITNESS: Yeah, bruises --

10 MS. VON MAGDENKO: Okay.

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

12 MS. VON MAGDENKO: Yeah.

13 THE WITNESS: That's it.

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

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

16 MS. VON MAGDENKO: Yeah.

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

20 BY MS. VON MAGDENKO:

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

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

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

1 on his forehead?

2 A Where we at?

3 Q The incident summary. The 20th --

4 A Said that Brodie --

5 Q She said -- starts with said.

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

7 Q There, said.

8 A Said Brodie always --

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

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

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

14 A No.

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

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

17 Q You didn't actually review that?

18 A No, I did not.

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

21 A Yes.

22 Q Okay.

23 A When -- for the curtain incident?

24 Q For the curtain incident.

25 A Yeah. She told me about that.

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

3 A Additional mark at the pool.

4 Q Yeah. Do you --

5 A She said --

6 Q -- do you --

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

9 Q Okay. Did --

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

11 Q Okay.

12 A That was present.

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

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

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

18 A The fremulin?

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

20 A Well, under --

21 Q Yeah.

22 A -- underneath the lip?

23 Q Yeah. Yeah.

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

25 Q Oh.

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

2 Q Okay. Okay. So, so far when you're interviewing her, she's explained

3 away a lot of the bruising; the forehead, the lower lip, the frenulum cut, one on the

4 back, the ear. These have all been explained away by Arica.

5 A Yeah --

6 MR. STANTON: Objection --

7 THE WITNESS: Well --

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

9 THE WITNESS: -- she's not basically taking all the bruises all over the face

10 and explaining each one.

11 MS. VON MAGDENKO: Right.

12 THE WITNESS: She's basically saying that he runs into a lot of things and

13 that's why he has some bruising, you know? So I mean, she's -- specifically the

14 frenulin (phonetic) under the lip, the marks under the -- on the bottom lip, you know,

15 where kids kind of lick or rub their lip, they get some type of an irritation there. And

16 she was applying some topical things to that. And then she mentioned the two

17 linear lines or what she said were two linear lines on the back.

18 BY MS. VON MAGDENKO:

19 Q And she mentioned the ear --

20 A And she obviously mentioned the ear, yes.

21 Q And she mentioned the knot on the head.

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

23 Q And she mentioned the forehead bruising.

24 A From --

25 Q It was -- she said --

1 A -- the car -- well, go ahead.

2 Q No, no, you go ahead. I don't want to interrupt you.

3 A I know she said something about the cheek.

4 Q Oh, the cheek.

5 A The front cheek when she --

6 Q Yeah.

7 A -- when --

8 Q Her -- the cheek.

9 A -- when he was driving his little car. And he hit the curb.

10 Q Okay. And she also said he always had forehead bruising and always

11 had a bump on his forehead?

12 A Well, those are her words, yeah. He always had --

13 Q Yeah, no, these are just her words.

14 A Yeah.

15 Q Right? So she's probably explained about five or six injuries at that

16 point. One, two, three, four, five.

17 MR. STANTON: You know, Your Honor, I'm going to object. Counsel can't

18 testify. She can ask questions.

19 THE COURT: Watch the form of the question, please.

20 MS. VON MAGDENKO: Okay.

21 BY MS. VON MAGDENKO:

22 Q And Brodie had a -- black eyes, correct? And she said that was from

23 his pinkeye?

24 A Yeah. There was some mention about darkness under his eyes. And

25 that he did -- he had pinkeye.

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

4 A Yes.

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

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

11 Q Okay.

12 A Yeah.

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

15 Court's indulgence.

16 BY MS. VON MAGDENKO:

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

18 A Yes.

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

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

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

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

24 Q Yes.

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

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

2 THE COURT: Any redirect?

3 MR. STANTON: Yes.

4 REDIRECT EXAMINATION

5 BY MR. STANTON:

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

9 A I'm at 76, yeah.

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

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

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

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

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

17 A Yes.

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

23 A Yes.

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

1 A Yes.

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

4 A Yes.

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

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

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

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

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

15 A Right.

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

18 A Yes.

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

21 A It could. It could.

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

24 A Yes.

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

1 caused Brodie's death, correct?

2 A Yes.

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

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

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

8 A Yes.

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

10 A Yes.

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

13 A Yes.

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

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

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

20 A Possibly.

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

23 A Oh --

24 Q In this courtroom and in this trial.

25 A Absolutely, yes.

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

2 A Right.

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

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

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

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

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

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

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

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

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

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

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

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

25 BY MR. STANTON:

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

2 MS. VON MAGDENKO: No.

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

5 A Yes.

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

8 A Oh, yes.

9 MR. STANTON: Nothing further.

10 THE COURT: Anything else of the detective?

11 MS. VON MAGDENKO: No, Your Honor.

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

14 Counsel?

15 MR. STANTON: Your Honor --

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

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

20 THE COURT: It is.

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

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

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

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

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

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

15 THE COURT: Wednesday for sure. Maybe Tuesday.

16 UNIDENTIFIED SPEAKER: Maybe Tuesday too?

17 THE COURT: Yeah.

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

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

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

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

23 Are you ready, Maria?

24 THE COURT RECORDER: Yes, ma'am.

25 THE COURT: All right.

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

5 THE DEFENDANT: Yes, ma'am.

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

11 THE DEFENDANT: Yes, ma'am.

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

15 THE DEFENDANT: Yes, ma'am.

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

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

22 THE DEFENDANT: No, ma'am.

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

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

5 THE DEFENDANT: No, ma'am.

6 THE COURT: All right.

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

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

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

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

16 THE COURT: I did not.

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

19 THE COURT: Yeah.

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

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

23 THE DEFENDANT: Thank you very much.

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

25 MS. VON MAGDENKO: Thank you.

1 MR. STANTON: Thank you.

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

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

5 

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

9 

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

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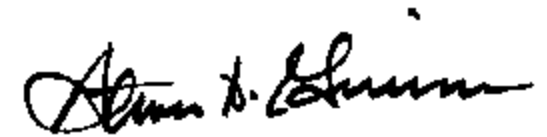
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CLERK OF THE COURT

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

MONDAY, AUGUST 11, 2014

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 6

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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INDEX OF WITNESSES

PAGE

FOR THE STATE:

LISA GAVIN

Cross-Examination by Attorney Altig	5
Redirect Examination by Attorney Stanton	20
Recross Examination by Attorney Altig	28

GERARD COLLINS

Direct Examination by Attorney Stanton	31
Cross-Examination by Attorney Von Magdenko	36
Redirect Examination by Attorney Stanton	39
Recross Examination by Attorney Von Magdenko	40

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

INDEX OF EXHIBITS

PAGE

FOR THE STATE:

(None)

FOR THE DEFENDANT:

(None)

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

2
3 [Outside the presence of the jury]

4 THE COURT: All of our jurors are here.

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

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

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

10 MR. STANTON: Correct.

11 MR. ALTIG: Yes, Your Honor.

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

13 THE MARSHAL: Yes, ma'am.

14 [Pause]

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

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

17 THE MARSHAL: Thank you. Please be seated.

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

20 If you could please bring her in, Randy?

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

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

24 THE WITNESS: Correct.

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

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

2 THE WITNESS: May I sit down?

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

4 LISA GAVIN

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

6 CROSS-EXAMINATION

7 BY MR. ALTIG:

8 Q Good afternoon.

9 A Good afternoon.

10 Q How are you?

11 A Good. How are you today?

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

14 A Okay.

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

16 A In 2009.

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

18 A Correct.

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

20 A No.

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

23 A Correct.

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

25 A Correct.

1 Q What does it mean to be board certified?

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

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

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

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

8 A No.

9 Q Are you currently board certified?

10 A No.

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

14 A Correct.

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

18 A The galeal hemorrhage, yes.

19 Q Galeal hemorrhage that you dated, right?

20 A Correct.

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

23 A About 24 hours.

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

1 A Correct.

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

4 A Correct.

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

6 A Correct.

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

9 A The most accurate we can.

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

13 A Correct.

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

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

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

21 A Yes.

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

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

1 broken up are getting absorbed into the macrophages.

2 Q Leaving more iron?

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

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

6 A That's correct

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

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

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

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

15 Q None of the contusions on the body?

16 A Correct.

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

20 A It's approximate.

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

23 A From the time of the injury.

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

25 A Correct.

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

3 A Correct.

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

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

7 Q Okay.

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

11 Q And what time of death was that?

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

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

14 A I don't recall what they --

15 Q You don't recall?

16 A -- wrote in their report.

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

18 A Yes, please.

19 Q Thanks.

20 [Colloquy between counsel]

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

22 THE COURT: You may.

23 MR. ALTIG: Thank you.

24 BY MR. ALTIG:

25 Q (Indiscernible) --

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

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

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

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

10 A I didn't base it off either of those times.

11 Q What time did you base it off of?

12 A I look at the composition of the body and talk about the time of death.

13 Q Okay. And did you -- are there certain ways to establish a time of death
14 as a forensic pathologist?

15 A Yes.

16 Q Can you take liver temperatures and things like that to determine a time
17 of death?

18 A Sometimes people take liver temperatures. It's a lot of stuff that you
19 can see on TV, but it's not always that accurate because it depends on the
20 environmental changes and those don't always give you a accurate representation
21 of the time of death.

22 Q And what did you do to determine the actual time of death?

23 A You can look at changes in the body in terms of whether or not it's in
24 rigor mortis which is the stiffening of the muscles or whether you're looking at the
25 livor mortis which is the settling of the blood in the body.

1 Q And that's what you looked at to determine what you believed to be
2 your time of death?

3 A And that's one of the things that I can look at and taking that information
4 in conjunction with the information that we have from investigations and try to put
5 those together to get an approximation. It's not like, you know, Quincy on TV where
6 you get the exact time. It's like a range of time.

7 Q And what was your range of time in this particular case?

8 A I have to look back at my report to refresh my memory.

9 MR. ALTIG: May I show -- may I approach, Your Honor?

10 THE COURT: Yes.

11 THE WITNESS: Thank you.

12 It's at least 12 hours prior to my exam.

13 BY MR. ALTIG:

14 Q Okay, and your exam was the following day, correct?

15 A Correct.

16 Q But we know that -- we know that as of 11 a.m. the day before your
17 exam he was passed, right? That's when your investigator --

18 A Correct.

19 Q -- arrived. So in your report did you establish a time of death as to what
20 you believe the time of death was?

21 A No, I don't write down what I believe the time of death was. I have
22 information in there about the rigor mortis receding --

23 Q Okay.

24 A -- and then the livor mortis --

25 Q Okay. Now, I'm just trying to get a good idea as to when you say this

1 injury occurs 24 hours ago or 24 hours from before the time of death, I mean I'm
2 trying to get an estimate as to what you -- what you're talking about, what timeframe
3 we're talking about here. Can you give me an estimate?

4 A It's approximately 24 hours prior to the time of his death, at least for
5 some of the head injury.

6 Q Okay. Some of the head injury and you said as to the duodenal injury
7 as well, right?

8 A Yes.

9 Q Okay. And so when we know from the investigator's report that their
10 time of death was 11, right?

11 A Correct, from the investigator's report.

12 Q And you knew that he was deceased before the investigator showed
13 up, correct?

14 A Correct.

15 Q Okay. You don't know for how long he was deceased before the
16 investigator showed up?

17 A No, I don't.

18 Q Okay. If there was a call to 911 saying that the child was dead at 8:30,
19 we would assume the child was dead by 8:30, correct?

20 A Yes, we can assume that.

21 Q Okay. And so when we're making those assumptions, we can safely
22 assume that your estimation of the time of the injury was 24 hours before 11 a.m.,
23 24 hours before 8:30 a.m. --

24 A Sure.

25 Q -- correct? Okay.

1 A We can make that assumption.

2 Q And so when we're looking at that and we're looking at that assumption
3 and we're saying that injury occurred let's say -- we were talking he died Wednesday
4 at 11 a.m., the call was made Wednesday, 8:30 a.m., right?

5 A That's what we said.

6 Q Okay. And so we then would estimate backwards in time saying that
7 his -- that the injuries that caused his death, the duodenal tear injury and then you
8 said the -- I think you said the cranial injury was not the cause of death but it was a
9 contributing factor you said, correct?

10 A Contributing, correct.

11 Q Okay. So those would have occurred, according to your estimation,
12 sometime Tuesday between 11 a.m. and 8:30 a.m., right? Or sometime --

13 A It's -- it's an approximation.

14 Q Okay. That's your approximation would be about that, right?

15 A It's an approximation.

16 Q And that's what your approximation is, correct?

17 A It's at least about 24 hours. It's around 24 hours.

18 Q At least?

19 A It's at least 24 hours. It's around 24 hours.

20 Q Okay, so it could be more 24 hour -- more than 24 hours?

21 A It's around 24 hours.

22 Q Okay. And that would tell you when you're doing the examination then
23 if you said it's approximately 24 hours being Tuesday sometime about 11 a.m., 8
24 a.m., that things that potentially happened let's say Tuesday evening weren't in your
25 estimation a part of the cause of death, correct?

1 A Again it's an approximation.

2 Q How much are we approximating by?

3 A We don't know how his body responds.

4 Q Okay. Could the approximation be 12 hours?

5 A I don't know how --

6 Q As opposed to 24?

7 A -- his body responds.

8 Q Okay. But we are looking at those -- the iron staining and stuff like that

9 and that's how you determine that approximation, right?

10 A We do look at the iron stains to assist with that.

11 Q And that those iron -- those -- the responders and things like that that

12 come out -- that you check for the iron, they respond in certain pretty consistent time

13 intervals?

14 A Yeah, it can be consistent in terms of the pattern in which we see them

15 and we talked about that last week, which cells come out and the timing that they

16 come out is very similar. How long someone takes to heal we've already talked

17 about and how long they -- that response is for them can vary.

18 Q Now would you agree with me that when someone is injured, they don't

19 necessarily get a bruise right away? Is that correct?

20 A That's correct.

21 Q Okay. Bruising's something that happens over time?

22 A Yes.

23 Q Right? And a bruise can actually get worse over time, correct?

24 A I don't know if it's worse. It's the way in which it heals so the quality of it

25 can change and we talked about those changes last week as well.

1 Q Well and as a -- it doesn't just all of a sudden pop in and be dark purple,
2 it kind of fades in and it fades back out, right?

3 A It can fade in and fade out as many of you have seen on yourselves, I'm
4 sure.

5 Q Okay. So when someone gets a bruise at a particular point, it doesn't
6 necessary mean that when they received that bruise, that was the time that the
7 injury occurred, correct?

8 A It can vary based on the individual.

9 Q Right. And -- so an individual can receive a bruise and potentially a day
10 later -- or receive an injury and potentially a day later start showing a bruise,
11 correct?

12 A It's possible.

13 Q Okay. Can even start showing a bruise two days later, correct?

14 A It depends on the individual.

15 Q It depends on the individual, it depends on the type of injury, right?

16 A It could depend on the type of injury as well.

17 Q Now would you also agree with me that bruising on a person's body
18 after they pass away becomes more intense? Postmortem.

19 A As the blood settles -- we talked about the livor mortis and the blood
20 settling in the body. If it's been injured in that area, it's already spread out in that
21 area, so it becomes more evident as the blood settles in the body. The bruise itself,
22 if you will, becomes more evident. So it's not that it gets bigger, it just becomes
23 more apparent because the rest of the blood has settled in the body.

24 Q Okay. So it becomes more evident? That's right -- that's what you
25 said --

1 A More apparent, yeah.

2 Q Right? Okay. And it becomes more apparent within just several hours

3 after death, right, as the blood starts to settle?

4 A As the blood starts to settle, you can see it more apparently in -- in -- on

5 the body.

6 Q Would you agree that occurs within first two hours after death?

7 A Yes, livor starts to drop down very quickly once someone has passed

8 and that's why the shades of their skin changes when you look at someone who's

9 passed.

10 Q Okay. And you said that's within the first two hours?

11 A It can occur in that period of time.

12 Q And so you saw these pictures -- and I'm not going to show them to you

13 again. I don't want to display them to the jury again, but you saw these pictures of

14 Brodie after he passed, correct?

15 A Correct.

16 Q Okay. And you saw the bruises on Brodie after he passed, correct?

17 A Correct.

18 Q Okay. And those pictures were taken some of them at your -- at the

19 coroner's office, correct?

20 A That's correct.

21 Q Okay. And some of them at the scene of the crime, correct? Or the

22 scene of the incident.

23 A The ones that we look at were predominantly the ones from our office.

24 Q And those were taken how long after his passing?

25 A The following day from his passing, so --

1 Q So when these pictures are shown to you, that's not the way Brodie
2 appeared -- the bruises appeared when he was alive, correct?

3 A Correct.

4 Q Okay. And when they show -- if these pictures were shown to other
5 witnesses and asked if this is the way they saw Brodie the last time they saw Brodie
6 alive, the witness is going to say no, correct?

7 MR. STANTON: Objection; calls for speculation.

8 THE COURT: Sustained.

9 BY MR. ALTIG:

10 Q In your opinion, the pictures do not reflect accurately the way Brodie
11 looked when he was alive, correct? The bruising?

12 A The bruising would look different because he would have more of his
13 flesh color, if you will, more of the blood would be present flowing. He'd have a --
14 he'd have a pulse.

15 Q And you can also get postmortem bruising, correct?

16 A It's not bruising that occurs postmortem. If there is a -- if you're in the
17 process of the livor settling and you still have some blood that's present in that
18 tissue, if that tissue is injured in some way, if you will, you can have that blood
19 spread out in that area and appear to be an injury.

20 Q Would you agree with me that it's important as a coroner or as a
21 forensic pathologist to be cognizant of things like if whether or not the individual
22 you're looking at was given CPR?

23 A Yes.

24 Q Okay. Because CPR can cause injuries to the individual's body,
25 correct?

1 A That's correct.

2 Q Such as putting a mask on the individual's face, they can cause scratch
3 marks on their face and things like that, correct?

4 A I haven't seen scratch marks on the face, but I imagine it could.

5 Q So those are things that you pay attention to when you're doing an
6 examination, right?

7 A Yes.

8 Q Okay. Now, did you have any involvement with the collection of the
9 DNA in this particular matter?

10 A I'm always present during that portion of the sampling.

11 Q Okay. Do you review the results of the DNA when they come back?

12 A I do not.

13 Q Okay. Do you know much about the DNA process, why it's collected --
14 are you trained in that regard?

15 A Yeah, we understand that process.

16 Q Okay, and you're trained in that regard?

17 A Yes.

18 Q Okay. And why is it that they collect DNA samples from injuries?

19 A We don't collect it from injuries.

20 Q Okay.

21 A We collect DNA from the body.

22 Q Were you -- from the body of the decedent?

23 A Of the decedent.

24 Q And in this particular matter, was DNA collected from what you -- I think
25 you testified to there were several semicircular marks that resembled nail marks.

1 Did you know if DNA was collected from those?

2 A I don't know if they scraped for that and -- and/or they swabbed for that
3 at all. I don't know.

4 Q You don't know?

5 A No, I do not.

6 Q Okay. Do you know if -- what they're looking for specifically when
7 they're swabbing for DNA?

8 A They're looking for DNA that might be other than the decedent.

9 Q By DNA, we're talking about human cells, correct?

10 A Correct.

11 Q Okay, so they're looking for other human cells that would leave traces
12 of human DNA, whoever they're looking for it at, right?

13 A Correct.

14 Q And if -- in your opinion since you're experienced with DNA, if an injury
15 occurred by way of let's say something that was made out of metal, that wouldn't
16 necessarily leave DNA on the person's body, correct?

17 A It may or may not depending on what's on the metal and whether it
18 transfers on to the body.

19 Q Could say the same thing about wood, correct?

20 A Correct.

21 Q Okay. Could say the same thing about stone, correct?

22 A Correct.

23 Q And we could say the same thing about acrylic, correct?

24 A It's possible.

25 Q Okay. Like acrylic nails, right?

1 A It's possible they can have different DNA under them as well.

2 Q Okay.

3 MR. ALTIG: Court's indulgence one moment, please.

4 THE COURT: Uh-huh.

5 [Colloquy between counsel]

6 BY MR. ALTIG:

7 Q I want to go back just one second and ask you a couple follow-up
8 questions. We're dealing with the time of death. You never actually approximated
9 the time of death in Brodie's case, did you?

10 A No, we didn't.

11 Q You didn't?

12 A No, I didn't.

13 Q Okay.

14 MR. ALTIG: No further questions, Your Honor. Thank you.

15 THE COURT: Redirect.

16 REDIRECT EXAMINATION

17 BY MR. STANTON:

18 Q Dr. Gavin, the information that you gather through the autopsy -- I think
19 your testimony several days ago on direct examination I was asking you about the
20 process of the autopsy to determine cause and manner and you indicated that
21 there's several aspects of your ultimate report to determine cause and manner. Is
22 part of that the investigative report by Nancy Dahl?

23 A Yes.

24 Q And Ms. Dahl gives you information that is critical from the scene from
25 witnesses that she talks to -- she interviews?

1 A That's correct.

2 Q Now, related to what counsel ask you about the time of death and for
3 purposes of my questions to you on redirect examination, I want you to use the term
4 time of death to mean what it literally means and that is when Brodie's life actually
5 ended, when his heart stopped beating. Okay?

6 A Okay.

7 Q So you mentioned this 11:10 a.m. time of death that Investigator Dahl
8 pronounces sounds like more of as an administrative function to just insert a time
9 when she's confident of that, correct?

10 A That's correct.

11 Q Now I'd like you to go to your memory and if you need to refresh your
12 memory, I'm going to ask you about information contained Investigator Dahl's report
13 to you and to the coroner's office. Do you recall as you sit there today, without
14 referring to her report, what Investigator Dahl indicated in her investigation about the
15 discovery of Brodie by the mother, Arica Foster? Not the timing of things. Do you
16 recall that independently?

17 A I don't recall that independently.

18 Q Okay. Would be looking at Investigator's Dahl's refresh your
19 recollection when I ask you questions about the timing of things?

20 A I think so.

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

22 THE COURT: You may.

23 MR. STANTON: Page 1, counsel.

24 MR. ALTIG: Yes, sir.

25 BY MR. STANTON:

1 Q Do you see the highlighted section there? Let me just go through a
2 couple things. Ms. Dahl indicates that based upon the history of her investigation
3 provided by the mother of Brodie, Arica Foster, she approximates the time of the
4 discovery of Brodie at about 8:45 a.m. and she describes touching Brodie and that
5 there were two things that were observed by the mom; one, Brodie was cold and
6 two, Brodie is stiff. Do you see that?

7 A Yes, cool to the touch and stiff.

8 Q Okay. Let me address each one individually. What does cool to touch
9 mean to you as a forensic pathologist determining what is going on with a body
10 when someone experiences that sensation?

11 A It depends if there's --

12 MR. ALTIG: I'm going to object at this point, Your Honor, as to the
13 speculative nature of the questioning. It's asking what she would determine
14 someone else felt when they touched it -- when they touched something cold.

15 MR. STANTON: Well, that's not my question at all.

16 BY MR. STANTON:

17 Q Doctor, did you -- I'm not asking you about what someone felt. I'm
18 asking you what it meant to you as a forensic pathologist.

19 MR. STANTON: So if counsel --

20 THE COURT: Are you still objecting?

21 MR. ALTIG: Yeah. Yes, ma'am.

22 MR. STANTON: Well it's not speculative, Judge, because I'm not asking her
23 to step into Ms. Foster's --

24 THE COURT: She's asking what it means in a medical context. Is that what
25 you're getting at?

1 MR. STANTON: Exactly.

2 THE COURT: Then I'll allow it for that purpose.

3 THE WITNESS: When we're talking about cool, we're trying to do the best we
4 can to infer a temperature of the body. Again I mentioned that we don't do the -- like
5 on TV sticking the thermometer in the liver. Some offices do do that. That's not a
6 common practice here in our office because of the variation that you can have.
7 When you talk about cool, a lot of things you have to wonder is whether or not the
8 environment is refrigerated for example, whether or not the body's been exposed to
9 environmental temperatures that are elevated. So if you're saying cool and you're
10 assuming a normal environment, then it's suggesting that the temperature of the
11 body is decreased and suggesting that the body is deceased.

12 BY MR. STANTON:

13 Q And what is -- is there a recognized -- once again, in an average
14 contents absent some -- excluding extremes of temperature and outdoor exposure,
15 but is there recognized within the medical community an average rate of loss of
16 body heat once someone dies?

17 A Yes, there is.

18 Q And what is that?

19 A It's about a degree or to a degree and a half an hour. So as the person
20 is -- once they die, they start to lose that over each hour.

21 Q And I would assume that the core of the body stays warmer longer?

22 A That's correct.

23 Q Now, Doctor, you mentioned two terms and I'd like to go back to them
24 as it relates to the second phenomenon that's listed in Investigator Dahl's report and
25 that is an expression that Brodie was stiff. You previously mentioned something

1 called rigor mortis. Could you explain what rigor mortis is?

2 A Normally your muscles will move as you indicate them to do so and
3 there are chemicals that are present in your muscles that allow that muscle to
4 function and it requires energy to be able to do that. If someone has died, there's no
5 longer that energy going into that muscle to allow it to move and because there's no
6 energy to allow it to move, it's going to stay in that position that it was last in. And
7 that's fixed in that position and stiff in that position and we call that rigor mortis.

8 Q And how long -- and there's a recognized time where rygor mortis or
9 rigor mortis enters the body and different parts of the body, appendages to the core
10 of the body, and then when rigor mortis leaves the body. Is it a recognized rate of
11 onset of rigor and then the elapse or the extinguishment of rigor?

12 A Yes, there is and it can also be dependent upon environmental
13 temperatures as well, the rate at which that occurs. Assuming that everything is in a
14 normal state, not -- not Vegas normal but normal in terms of the environment of
15 being say refrigerated air for example, it may take up to 12 hours for you to even
16 start to see that rigor subside and if it's cooler in that environment, it may take even
17 longer.

18 Q And how much would you begin to see the onset of rigor; that is, when
19 someone from the cessation of the last heartbeat of Brodie to the onset of rigor
20 when rigor would be noticeable to the touch; that is, the stiffness, when would you
21 potentially see the earliest onset of rigor?

22 A You could see that within a couple hours of death.

23 Q Now, you talked about -- or counsel asked you a question about
24 bruising and bruising being more pronounced at autopsy versus in life. And you
25 mentioned something called livor mortis; is that correct?

1 A Correct.

2 Q Now livor mortis is the settling of blood and it's settling of blood
3 pursuant to gravity, correct?

4 A That's correct.

5 Q And so is that indicative or at least something that explains to you the
6 position of the body around and after the time of death?

7 A Yes, it can.

8 Q And so if I'm lying on my back and I pass away, the blood in my body is
9 going to pull, pursuant to the laws of gravity, towards the back of my body?

10 A That's correct.

11 Q Now if I'm lying on the ground and my back has pressure against the
12 floor, there's something called blanching, correct?

13 A It can happen either direction. It doesn't have to be towards the front or
14 the back. If there's an area where the body has settled that is applied some
15 pressure to that area, there'll be an area of what they call blanching. You won't see
16 the livor pooled in that area. You won't see the -- the blood pooled in that area
17 because it's been pressed against something. So an area of pressure has called
18 the -- caused that area to blanch is the word they like to use.

19 Q So the bruising to Brodie's face, assuming that he's lying on his back
20 after death, the blood would be flowing away from his face and towards the back of
21 his body if he's positioned face up?

22 A That's correct.

23 Q Now, counsel asked you questions about CPR and let's say for the
24 purpose of my question that Brodie is as described in Investigator Dahl's report to be
25 cold to the touch and stiff at 8:50 a.m. approximately when 911 is called. Do you

1 see that as far as the timing in the highlighted section on page 1 about the timing of
2 the 911 call?

3 A Yes, I do.

4 Q Now, is it accurate, Doctor, that dead people don't bleed?

5 A That's correct.

6 Q So if I were to cut a body that was deceased, it wouldn't bleed?

7 A Well --

8 Q Absent there's no blood underneath the skin and there's not a wound
9 beneath it, but as a general principle, what we would normally see as bleeding
10 wouldn't occur?

11 A What most people think in the living as bleeding, if you were to cut
12 yourself and then you have a blood pressure, that allows some of that blood to come
13 out. Of course if you cut an artery, it's more significant than if you cut a vein where
14 when we cut into the body, there is some blood because there's blood present in the
15 tissues, but it's not the same as if we were doing a surgical procedure on a live
16 person in terms of the amount of blood that would be present. So they're not
17 bleeding in the way that you would think of if you cut yourself, but there's blood
18 present in the tissue.

19 Q And based upon the observations of the mother that Brodie was both
20 stiff and cold to the touch, if CPR had been performed after sensing that and Brodie
21 was in fact medically deceased, no additional bruising would occur --

22 MR. ALTIG: I'm going to object at this point. I believe he's leading the
23 witness, Your Honor.

24 MR. STANTON: Well, I am but I'll rephrase, Your Honor.

25 BY MR. STANTON:

1 Q Assume that if Brodie's mom applied CPR after discovering his body
2 being cold and stiff, would you imagine or could you envision that that activity would
3 cause bruising?

4 A No.

5 Q For the same reasons you just described?

6 A Yes.

7 Q The heart's not beating?

8 A Correct.

9 Q Now, counsel asked you --

10 MR. STANTON: May I approach again, Your Honor?

11 THE COURT: You may.

12 BY MR. STANTON:

13 Q Counsel asked you a question about postmortem lividity or the
14 phenomena of blood pooling in the back and bruises getting more pronounced. We
15 saw photographs of the autopsy of Brodie's back being scalpeled (sic), cut, and then
16 removed for further examination from the dura or the outer skin to his ribs. Do you
17 recall that portion of the autopsy?

18 A Yes, I do.

19 Q Is that in part, Doctor, to determine the bruising on his back as to
20 whether or not it's an artifact of lividity or livor mortis -- blood pooling down below to
21 determine it or distinguish it from actual bruising injuries?

22 A Yes.

23 MR. STANTON: Nothing further.

24 THE COURT: Anything else?

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

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Q Now, Doctor, you talked about the cool to the touch the State's asking you about, this cool to the touch.

Q Remember him asking you about that?

A Correct. Yes, I do.

Q Okay. And you said it has a specific medical term -- terminology when you guys are talking about something being cool to the touch, correct?

A Correct.

Q Okay. You don't know what cool to the touch is to me, do you?

A No, I do not.

Q You don't know what cool to the touch is to Arica, do you?

A No, I do not.

Q You don't know if she feels something that's 95 degrees that's cooler than her skin, that might be cool to the touch to her, correct?

A It may be.

Q Okay. Now you also talked about there being a loss of body heat after death of 1.5 degrees per hour.

A It starts out about 1.5 and then go about to 1.

Q Okay. It really depends on certain environmental conditions, correct?

A Yes, I said that.

Q Okay. So if it's hot outside, the heat's going to be lost at a slower rate?

A That's correct

Q Okay. And if it's cool outside, the heat's going to be lost at a quicker

1 rate?

2 A That's correct

3 Q And do you know what the temperature was in the apartment Brodie

4 was found in?

5 A I do not.

6 Q Okay. Do you know what if air conditioning -- the air was even on?

7 A I do not.

8 Q Do you know what the temperature was outside that day?

9 A I do not.

10 Q Do you know what the month was?

11 A We did it I believe in May if that's correct, yeah.

12 Q Now you also talked about some comments regarding the stiff portion of

13 a body and you went and explained what all that stuff meant?

14 A Yes, correct.

15 Q Now the report that you refreshed your recollection with, your

16 investigator's report, it's relaying information to you that was relayed by Arica,

17 correct?

18 A That's correct.

19 Q That she found Brodie's body to be stiff, correct?

20 A That's correct.

21 Q And you don't know what Arica believes to be stiff, do you?

22 A No, I do not.

23 Q Okay. You wouldn't know what I believe to be stiff, right?

24 A That's correct

25 Q Okay. Now you talked about bleeding and there being no bleeding after

1 death. And the State asked you some questions about CPR. Remember those?

2 A Yes.

3 Q Okay. And you said that CPR wouldn't leave bruises because I believe
4 the State said the heart is not beating, correct?

5 A He was saying that I believe.

6 Q Okay. And you agreed with him, correct?

7 A Correct.

8 Q Okay. Now, what's the purpose of CPR?

9 A The purpose of CPR would be to try to revive someone who's dead.

10 Q Okay. And how do they do that?

11 A Compressions on the chest.

12 Q So they start beating the heart for the person, correct?

13 A Right.

14 Q And beating the heart moves blood around the body, correct?

15 A That's correct.

16 Q Okay. So if a person's beating the heart for somebody else and they
17 get cut, they can bleed?

18 A It's possible you could see somebody at the same time they're cut
19 there's going to be blood.

20 Q Right. Even though their heart's not beating on their -- on its own,
21 correct?

22 A That's correct.

23 Q Okay. Now, one last little bit of questioning. Bruises that are on a
24 person's body prior to death sometimes may not be visible to anybody looking at
25 them, correct?

1 A We mentioned that before.

2 Q And after death, they can then become visible, correct?

3 A That's correct.

4 Q Thank you.

5 MR. ALTIG: No further questions.

6 THE COURT: All right. Any other questions?

7 MR. STANTON: No, Your Honor.

8 THE COURT: All right, ma'am, thank you for your time. You're free to go.

9 THE WITNESS: Thank you.

10 THE COURT: Next witness please.

11 MR. STANTON: Your Honor, the State would recall Detective Gerry Collins.

12 THE COURT: Did we release him previously?

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

14 THE COURT: Yeah. So we need to re-swear him.

15 Go ahead and swear him in.

16 THE CLERK: Yes, Your Honor.

17 GERARD COLLINS

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

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

20 the record.

21 THE WITNESS: Gerard Collins, G-e-r-a-r-d C-o-l-l-i-n-s.

22 MR. STANTON: May I begin, Your Honor?

23 THE COURT: You may.

24 DIRECT EXAMINATION OF GERARD COLLINS

25 BY MR. STANTON:

1 Q Detective, after you left court last week, I asked you to look at three
2 different items in your investigative file; is that correct?

3 A Yes.

4 Q The first one I asked you to do is relative to defense counsel's question
5 regarding the injury related to you about a sippy cup in Brodie's mouth.

6 A The fremulin (sic).

7 Q Do you recall that --

8 A About the frenulum?

9 Q Yes.

10 A Yes.

11 Q And I asked you to go back to your report and to look at the statements
12 of Ms. Foster and the grandmother, Merridee, and I want to ask you a series of
13 questions about that. Have you had opportunity since you last testified to go over
14 that portions of your report?

15 A Yes, I did.

16 Q And specifically, I want to ask you about the source of that information
17 about that injury. At the time that you got that information, who were you talking to?

18 A I was talking to Arica and her mother, Merridee Moshier.

19 Q They were both present at the same time?

20 A Yes.

21 Q And do you remember what day that would have been?

22 A That was the 17th of June.

23 Q And on June 17th, you -- they told you about this incident because you
24 asked them specifically about injuries around the lips and frenulum area, correct?

25 A Yes, I did.

1 Q And they told you about this sippy cup?

2 A Yes.

3 Q Did there come a time where they explained to you both the timing of
4 when that injury occurred and how they knew about the injury?

5 A Yes.

6 Q What did they say was the timing -- when was that injury that they
7 observed?

8 MS. VON MAGDENKO: Your Honor, objection; hearsay.

9 MR. STANTON: Your Honor, counsel asked this witness about the questions
10 of Merridee and this particular injury. I would assume that it was relevant to them
11 when they asked the question and therefore I don't think they can object that it's
12 hearsay now.

13 MS. VON MAGDENKO: Your Honor, I'm making the objection now. So it's
14 not -- I don't (indiscernible) defense is related to what happened days ago.

15 THE COURT: Go ahead and ask the question.

16 BY MR. STANTON:

17 Q Who -- what was the timing of the injury?

18 A Merridee, the mother of Arica, told me that the injury occurred probably
19 about May 3rd.

20 Q Of 2011?

21 A Of 2011.

22 Q And where did both Merridee and Arica get the source of the
23 information?

24 A Merridee said that Michael had told them about the incident.

25 Q The next thing I wanted to ask you about was Brad Moshier and your

1 interview with Brad Moshier. There was -- I asked you to look about the incident of
2 when Brad saw an injury on the ear. Do you recall that?

3 A Just to clarify, I didn't have an interview with Brad Moshier. That was
4 Detective Mitchell.

5 Q That transcript is part of your investigative file, correct?

6 A Yes.

7 Q And in review of Brad Moshier's transcript, there's question ask about
8 when was the last time he saw a bruise on Brodie's ear and he mentioned Sunday.
9 Do you recall that in his transcript?

10 A Yes.

11 Q Now, in that transcript, he also says that Sunday was when he viewed
12 the body or was at the viewing, correct?

13 A Yes.

14 Q Now, during the course of that interview, does he relate when he saw a
15 bruise on Brodie's ear before the Sunday viewing?

16 A Yeah, he said that he had member -- he remembered a bruise like that
17 consistent with what he saw --

18 MR. ALTIG: I'm going to object again hearsay, Your Honor.

19 MR. STANTON: Once again, Your Honor, this was inquired on cross-
20 examination of Mr. Moshier. They sought to impeach him with his statement. I'm
21 now doing it by a prior or recorded statement of that particular witness. Therefore
22 by definition is not hearsay.

23 MR. ALTIG: I don't think they can do it through this particular witness. If they
24 want to call Mr. Moshier back and put Mr. Moshier back up to explain his
25 statements, they can. If counsel's saying he made an error and didn't object to a

1 hearsay objection, we're objecting to hearsay now and his error doesn't really matter
2 to that objection.

3 MR. STANTON: And Judge, it's not hearsay, it's about what his statement
4 says. Counsel -- I'm not asking him about his testimony in this trial of Mr. Moshier's.
5 That -- he's already done that. I'm asking what the transcript says.

6 THE COURT: Mr. Moshier's transcript?

7 MR. STANTON: Yes, Your Honor.

8 THE COURT: I'll allow it.

9 BY MR. STANTON:

10 Q In the transcript, what does he say about when he last observed a
11 bruise on Brodie's ear while Brodie was alive?

12 A He said he remembered seeing a bruise like that probably about a
13 month or a month and a half prior to his death on the ear.

14 Q And I ask you to review Arica Foster's -- those transcripts of her
15 interview as well as your notes of the interview of June 17th. In particular, a
16 statement by Ms. Foster about a bruise on Brodie's ear that she observed. Do you
17 recall looking back at her both transcripts and your notes of the June 17th interview?

18 A Yes. I was asked that question about when she said it occurred or she
19 saw it and I had said the weekend prior to -- to death or something along that line --

20 Q And that was questions by counsel on cross-examination last week?

21 A Yes. And I remember sitting here and I said well let me go back a little
22 bit and read a little bit, but I didn't go back far enough. And after court when I went
23 back far enough, I realized that Arica was talking about the -- the weekend prior to
24 May 14th.

25 Q And May 14th had some impact or some importance about something

1 occurring regarding Arica and Brodie. What was that?

2 A As near as I can remember, Arica was seeing a lot more bruising and
3 that she was becoming upset and she -- she told me, she says, I told my sister that I
4 can't do this and -- and at that point in time she had her sister, Amanda, watching --
5 watching Brodie from that point on.

6 Q So after your review of the entirety of the transcript of Arica in this
7 subject matter, your testimony now would be that the ear bruise she observed was
8 one week prior to the May 14th, 2011 time period?

9 A Yes.

10 MR. STANTON: Nothing further.

11 THE COURT: Any other questions?

12 MS. VON MAGDENKO: Yes, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. VON MAGDENKO:

15 Q So when Arica's explaining away the frenulum bruising, her and her
16 mother say oh well, Michael told us that's how it got cut?

17 A Merridee basically said that she had talked to Michael about it and that
18 Michael was apparently there and said that Brodie was running with the cup in his
19 mouth and that the dog hit Brodie and knocked him down.

20 Q Okay, and Merridee didn't seem concerned about a torn frenulum?

21 A She said she was. That's why she took a picture of it.

22 Q She took a picture of it?

23 A Yeah.

24 Q Okay. Did she say she thought Michael hurt Brodie?

25 A There wasn't any -- there -- there wasn't any -- she didn't answer

1 anything like that. She didn't -- there wasn't any accusation. There wasn't anything
2 like that, no.

3 Q So right -- and this is two days after Brodie died, right?

4 A What was -- the --

5 Q You're having this conversation --

6 A -- the interview?

7 Q Yeah.

8 A Yeah, on the 17th.

9 Q Okay, so two days after Brodie died, neither Arica nor Merridee think
10 that Michael did anything, right?

11 A They didn't indicate to me that he -- that he was beating the child or
12 anything like that.

13 Q But a little boy had just died. Would you think it would be relevant for
14 someone to bring up if they thought someone had -- was beating a kid?

15 A Well unless you wanted me to plant that in their head, I don't -- I didn't
16 think it was my place to plant that in their head. I was just on a fact finding. I
17 wanted to know what happen. I wanted to get background information. That's why I
18 was doing the interviews.

19 Q Do you do fact finding to see if someone had beaten the kid?

20 A Well that's what ultimately the investigation is all about, yes.

21 Q Okay, so during that interview, did you ask if anyone had beaten Mike --
22 Brodie?

23 A Not specifically, no. Nothing -- nothing direct like that.

24 Q Okay. And they didn't volunteer anything against Michael?

25 A No. Although now that I remember, when I showed Arica the photo of

1 the entire back of Brodie, when she fell on the floor she says -- something along a
2 quote of about why did he do that to him or something along that. I can look back
3 and -- and give you the word for word on it.

4 Q Did she say she witnessed anything?

5 A No.

6 Q Arica testified before to the jury that she made statements on the record
7 and off the record. Do you have an understanding of any interview you did with her
8 off the record?

9 A No.

10 Q No. So when she said that, she's just making things up?

11 MR. STANTON: Objection. That's argumentative, Your Honor.

12 THE COURT: Sustained.

13 BY MS. VON MAGDENKO:

14 Q You can answer.

15 MR. STANTON: I believe the objection was sustained --

16 THE COURT: Sustained.

17 MR. STANTON: -- Your Honor.

18 MS. VON MAGDENKO: I'm sorry.

19 BY MS. VON MAGDENKO:

20 Q Do you normally take statements of witnesses off the record?

21 A No, everything they say to me is on the record.

22 Q Okay. We talked before about DNA. When you're looking at DNA, are
23 you only looking at human cells? Or what is DNA?

24 A I don't think I'm qualified to answer that question.

25 Q Okay. So you don't know what leaves DNA and what doesn't?

1 A Not in -- not in depth or anything like that.

2 Q Okay. Did Arica tell you that she ever saw Michael hit Brodie?

3 A I don't believe she did say that, no.

4 Q And did grandma say that she ever saw Michael hit Brodie?

5 A Again I don't -- I don't think Merridee ever said that. Not to me anyway.

6 Q And did you interview anyone else in connection with the death of

7 Brodie?

8 A Just the ones that are documented that I interviewed.

9 Q And did any of those witnesses say that they had ever seen Michael hit

10 Brodie?

11 MR. STANTON: Objection; calls for speculation. Or hearsay, Your Honor.

12 I'm sorry.

13 THE COURT: Overruled.

14 BY MS. VON MAGDENKO:

15 Q You can answer.

16 A As far as I know, I don't think anybody said they actually saw him hit

17 anybody.

18 Q Okay.

19 A Or hit Brodie, I should say.

20 MS. VON MAGDENKO: Court's indulgence.

21 No further questions.

22 THE COURT: Anything else?

23 MR. STANTON: Briefly, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. STANTON:

1 Q Detective Collins, there's questions about the nature of this injury of the
2 frenulum. In fact, Merridee and Arica never told you that they witnessed an injury
3 where the frenulum was actually disrupted or torn, but they gave it to you in the
4 context of injuries they've ever observed to his mouth; is that accurate?

5 A Yes.

6 Q Now, when they said that they took a picture, they provided you,
7 Merridee and Arica, with a number of pictures of Brodie in the days and months
8 leading up to his death, correct?

9 A Yes.

10 Q And did you ever see the picture that they were describing about Brodie
11 and that injury?

12 A I can't recall if I saw that one or not.

13 Q But no pictures ever shown to you were of the lip of Brodie pulled up
14 looking at the actual frenulum; is that accurate?

15 A Not from Merridee or Arica.

16 Q Or anybody else until the autopsy?

17 A There might have been one taken at the scene when he was -- when
18 Coroner Dahl --

19 Q I apologize. For the -- I'm talking about in Brodie's life when he was
20 alive --

21 A Prior to -- prior to his death?

22 Q Correct.

23 A I don't recall any picture like that.

24 MR. STANTON: Nothing further.

25 RECROSS EXAMINATION

1 BY MS. VON MAGDENKO:

2 Q So just some I'm clear, when you're talking about the torn frenulum,
3 Merridee and Arica say we took a photo of that injury?

4 A Merridee said she took a photo of it with her cell phone.

5 Q And yet she never provided it to you; is that correct?

6 A I can't remember if it's in what -- what she gave -- what Arica gave me
7 or not. I don't believe that I saw one of that.

8 Q Okay.

9 MS. VON MAGDENKO: Court's indulgence.

10 [Colloquy between counsel]

11 MS. VON MAGDENKO: No further questions. Thank you.

12 THE COURT: Is he free to go?

13 MR. STANTON: Yes, Your Honor.

14 THE COURT: Thank you. You're free to go, sir.

15 Do we have one more witness?

16 MR. STANTON: No, Your Honor.

17 THE COURT: That's it for the day?

18 MR. STANTON: The State rest, Your Honor.

19 THE COURT: All right. And have you checked to make sure everything is
20 moved into evidence?

21 MR. STANTON: We have, Your Honor.

22 THE COURT: Okay. And are you -- do you have any witnesses here today?

23 MR. ALTIG: Not today, Your Honor. I don't believe.

24 THE COURT: All right. So I think we talked about before the jury came in the
25 next witness the defense has is Thursday afternoon?

1 MR. ALTIG: Thursday, Your Honor, yes.

2 THE COURT: Okay.

3 So ladies and gentlemen of the jury, we are finished for the day. We're
4 going to actually be dark tomorrow and dark on Wednesday. The next time I will
5 see you in court is Thursday at 1:00. And again, we're sorry for the inconvenience,
6 but a doctor for the defense was unavailable and out of town so this is the first time
7 we could get the doctor to testify which is Thursday afternoon.

8 Again, this case should be sent to you probably Friday for your
9 deliberations, so until I see you Thursday at one, you're admonished not to converse
10 amongst yourselves or with anyone any subjected connected with the trial, do not
11 read, watch or listen any report of or commentary on the trial, and do not form or
12 express an opinion on this case. See you on Thursday at one.

13 THE MARSHAL: All rise for the exiting jury.

14 Jurors, please leave your notebooks on the chairs.

15 [Jury out at 2:30 p.m.]

16 THE COURT: Is there anything we need to address before we go off the
17 record?

18 MR. STANTON: No, Your Honor. When would you like to have the jury
19 instructions?

20 THE COURT: Well, when will you all be able to go over them? You want to
21 go over them -- when would you like to go over them?

22 MR. STANTON: Soon.

23 THE COURT: We have Thursday morning. Do -- am I free Thursday
24 morning?

25 THE CLERK: Yes, Your Honor.

1 THE COURT: You want go over them Thursday morning?
2 MR. ALTIG: Can I check my calendar real --
3 THE COURT: Sure. I mean most of them should be standard.
4 MR. ALTIG: Right. I would imagine.
5 MR. GIORDANI: Judge, would it be possible to do it late Thursday morning
6 like 10:30?
7 MR. ALTIG: I am open all Thursday.
8 THE COURT: Why don't we do it Thursday morning at 10:30. That way you
9 guys can have a chance to look at each other's proposed jury instructions.
10 MR. ALTIG: Thank you.
11 MR. GIORDANI: Thank you.
12 MS. VON MAGDENKO: Thank you, Your Honor.
13 THE COURT: So 10:30.
14 MR. ALTIG: I had the whole day off -- blocked for the trial, you know, and you
15 told the jury come back at 1:00 on Thursday. Is that what we did?
16 MS. VON MAGDENKO: Yeah.
17 THE COURT: I did because that's when you said --
18 MR. ALTIG: Okay.
19 THE COURT: -- your expert would be here.
20 MR. ALTIG: Okay.
21 THE COURT: And then --
22 MR. ALTIG: All right. Thank you.
23 THE COURT: -- you have a 3:00 on -- no, Friday you have --
24 MS. VON MAGDENKO: Friday.
25 MR. ALTIG: Friday I have to be across town at three.

1 THE COURT: You should be fine because I imagine we'll do the jury
2 instructions in the morning and then --

3 MR. ALTIG: And close?

4 THE COURT: -- the closings.

5 MR. ALTIG: If it's not, I can try to get someone to go in my place, but I'm --

6 THE COURT: No --

7 MR. ALTIG: -- want to specifically speak to them about some stuff so --

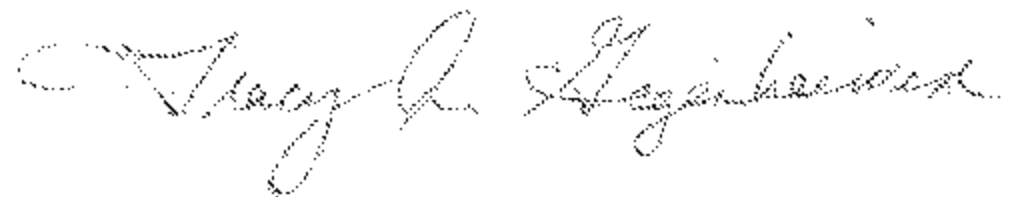
8 THE COURT: No, no, no, I understand. I know that you do those programs
9 in the community. No, that's fine. It'll work.

10 MR. ALTIG: Okay.

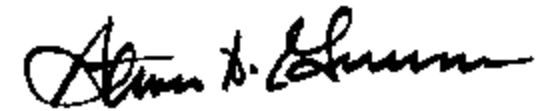
11 THE COURT: Yeah. I can't imagine it won't be to the jury by three.

12 [Proceedings concluded at 2:31 p.m.]

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

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18 Tracy A. Gegenheimer, CER-282, CET-282
19 Court Recorder/Transcriber
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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 14, 2014

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 7

APPEARANCES:

For the State:

DAVID STANTON, ESQ.

Chief District Attorney

JOHN L. GIORDANI, III, ESQ.

District Attorney

For the Defendant:

NADIA VON MAGDENKO, ESQ.

STEVEN M. ALTIG, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

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INDEX OF WITNESSES

PAGE

FOR THE DEFENDANT:

JENNIFER LEE

Direct Examination by Attorney Von Magdenko

19

JONATHAN ARDEN

Direct Examination by Attorney Von Magdenko

27

Cross-Examination by Attorney Stanton

55

INDEX OF EXHIBITS

PAGE

FOR THE COURT:

1 Proposed Jury Instruction

6

FOR THE DEFENDANT:

G Photograph

25

1 Thursday, August 14, 2014 at 10:53 a.m.

2
3 [Outside the presence of the jury]

4 THE COURT: Okay. I -- are we on, Maria?

5 THE COURT RECORDER: Yes.

6 THE COURT: Okay, so everyone's here, the defendant's here, all the
7 counsel are here, and I understand that there's only a few that are not agreed to; is
8 that right?

9 MR. ALTIG: That is correct, Your Honor.

10 THE COURT: Okay, so why don't we go with the ones that are not agreed
11 to. And two -- and I have two copies. One with citations, one without. Okay, so tell
12 me which ones are in dispute.

13 MR. ALTIG: I'm getting there, Your Honor. Hold on one second.

14 THE CLERK: Can we call the case, Judge?

15 THE COURT: Oh we didn't call it? I'm sorry.

16 So it's -- we're doing jury instructions on C277650. The defendant is
17 present. All counsel are present. Counsel's indicated a large portion of the jury
18 instructions are stipulated; however, we're going to go through the ones that are not
19 agreed upon.

20 MR. ALTIG: It's about 17 pages back, Your Honor. The State refers to it as
21 the *Tavares* instruction. It begins with you have heard evidence. You have heard
22 evidence that the defendant may have committed other crimes.

23 THE COURT: Okay.

24 MR. ALTIG: For tactical reasons, we are asking that that instruction be
25 removed and not presented to the jury.

1 MR. STANTON: And we have no objection to that, Your Honor.

2 THE COURT: I don't think there was any evidence of other crimes.

3 MR. ALTIG: No, the State though in abundance of caution believes under
4 *Tavares* that it can -- other bad conduct can be referred to and I think that they
5 believe that that limits that issue. However, given our defense, we are asking it be
6 removed.

7 THE COURT: Okay, it -- the State has no opposition so by defense request,
8 it'll be removed.

9 MR. ALTIG: Thank you. About three instructions behind that. It's the State's
10 expert witness instruction.

11 THE COURT: Yes.

12 MR. ALTIG: We're asking that that instruction be replaced with our proposed
13 instruction -- if I may approach?

14 THE COURT: You may.

15 MR. ALTIG: Sorry, I didn't forward it to Your Honor --

16 THE COURT: This looks like the standard one we see all the time.

17 MR. ALTIG: Right. There is one that's given by the Ninth Circuit and we
18 believe the wording of that is a little bit stronger and we would rather that instruction
19 be given to the jury than the instruction submitted.

20 THE COURT: But I think the one the State proposed is one that's been
21 utilized here in Nevada.

22 MR. ALTIG: Okay.

23 MR. STANTON: And Judge, I believe -- just for the record, I believe the
24 State's proposed that begins a witness who has is a more complete articulation of
25 the law for jurors not only to understand what an expert is but also how to consider

1 and weigh their testimony.

2 THE COURT: Doesn't this one come out of the Nevada books for jury
3 instructions?

4 MR. STANTON: Is it a pattern instruction in the Nevada, yes.

5 THE COURT: It's one of the ones that's been approved.

6 MR. ALTIG: Right, and the instruction I submitted, Your Honor, is a pattern
7 instruction for the Ninth Circuit Federal Courts and so that's why we were asking for
8 that one. There's some wording in there that we think is a little bit more significant
9 regarding experts' experience and education and things like that.

10 THE COURT: You know, I'm going to go ahead and use the one that's been
11 approved here in Nevada which is the State's proposed. We'll make this a court's
12 exhibit.

13 Okay, Mr. Altig, what else do you have?

14 [Court's Exhibit 1 admitted]

15 MR. ALTIG: That was the only other instruction I believe that we had issues
16 with.

17 THE COURT: Okay.

18 [Colloquy between counsel]

19 THE COURT: That's it?

20 MR. STANTON: Judge, there is one other matter on instructions. On the
21 one just prior to the one that the expert witness at least in the order --

22 THE COURT: Oh, hold on. Now I have to count back, but yeah, which --
23 what's wrong with it?

24 MR. STANTON: There's nothing wrong with it, but just while we're settling it,
25 this is an instruction that has to be affirmatively asked for or declined by the

1 defense --

2 THE COURT: About testifying?

3 MR. ALTIG: Oh, I'm sorry.

4 MR. STANTON: Correct.

5 MR. ALTIG: We were affirmatively asking for that one at this particular point.

6 THE COURT: About the defendant's right not --

7 MR. ALTIG: Yes, Your Honor.

8 THE COURT: -- to testify?

9 MR. ALTIG: I'm sorry, yes.

10 THE COURT: Okay.

11 MR. ALTIG: And there was one other issue that Ms. Von Magdenko brought
12 to my attention. It's with regard to the State's requested felony murder rule
13 instruction.

14 THE COURT: Which one is that?

15 MR. ALTIG: It's one, two, three, four, five, six, seven pages back from the
16 beginning.

17 MR. STANTON: How does it begin?

18 MR. ALTIG: There are certain kinds of murder.

19 THE COURT: Doesn't that come with a statute? Okay, what's the --

20 MR. ALTIG: I think the --

21 THE COURT: -- dispute?

22 MR. ALTIG: -- the issue is, Your Honor, that the State is alleging not only
23 that there was an act of child abuse, but that there was a failure to receive -- failure
24 to obtain medical treatment allegation in the information and that that felony murder
25 rule may cause some -- or cause some issues with regard to the jury's deliberation

1 when deliberating whether or not he received medical treatment or was a person
2 obligated to seek out medical treatment. The child died from that medical treatment
3 or from the lack of medical treatment and therefore it's murder and without there
4 being any kind of overt act.

5 THE COURT: I don't really -- I'm sorry, I don't really understand your
6 objection. I'm sorry, please --

7 MR. ALTIG: It's just that there could be --

8 THE COURT: -- help me understand.

9 MR. ALTIG: -- some potential confusion with regard to the way that the
10 information is pled. The information's pled that not only that there was an overt act
11 on the part of the defendant causing bodily harm but also that there was a lack of
12 medical treatment -- it says and/or a lack of medical treatment and I believe that the
13 issue being raised would be that there's some potential confusion that the jury
14 could take the fact that the defendant may have been a person obligated to seek
15 out medical treatment didn't and then through that particular statute say that is
16 murder in and of itself without there being any overt act on his part to do anything.
17 That's the objection.

18 THE COURT: Okay. By the State?

19 MR. STANTON: Well, Judge, I got to join the Court at least to the extent that
20 I'm a little confused about the objection to the instruction. It is an accurate
21 statement of the law in Nevada, and the law in Nevada is and was expressly
22 passed by the legislature that child abuse is first degree murder. That is statutorily
23 defined. That's why under the theory -- the sole theory in this case of child abuse
24 murder that the malice involved need not be express; that it is implied by the
25 conduct and that conduct has been legislatively codified.

1 And when counsel says an overt act, I'm not sure if he's attempting to
2 draw a distinction between a physical act of abuse versus some failure or omission
3 to act. But I -- I don't want to speculate, but --

4 THE COURT: Is there -- I'm sorry. In instructions, is there a -- is there the
5 definition of child abuse in the statute?

6 MR. ALTIG: The instructions do instruct on child abuse. They do not instruct
7 on the -- that particular element on the failure to receive medical care.

8 THE COURT: Well the jury's going to first have to determine whether or not
9 there's child abuse -- those injuries are child abuse or not.

10 MR. ALTIG: Right.

11 THE COURT: I don't see where you're talking about in the -- I'm looking at
12 the instruction with the information. Where is the receive care --

13 MR. ALTIG: The information -- Your Honor, the instruction with the
14 information reads --

15 THE COURT: Oh, defendant did fail to seek medical care for the said Brodie
16 Aschenbrenner. Are you --

17 MR. ALTIG: Right.

18 THE COURT: -- disputing the fact that he would have had an obligation to
19 provide care?

20 MR. ALTIG: Yes. That's one of our disputes --

21 THE COURT: But isn't there an obligation to provide assistance if you create
22 the injury?

23 MR. ALTIG: That would assume that he created the injury.

24 MR. STANTON: Well, in addition -- but that's a question of fact. In addition,
25 he is the sole caretaker at operative time periods of this minor child and I think that

1 testimony currently stands uncontroverted to this jury. But I still don't understand
2 the argument of why this is going to lead confusion to the jury of consideration of
3 the felony murder rule.

4 THE COURT: Because I think that if they believe the mom did it but the
5 boyfriend should have taken him to the doctor, that they'll tag him with the murder --

6 MR. ALTIG: Yes, Your Honor.

7 THE COURT: -- even though they don't think he committed the murder.

8 MR. ALTIG: Yes, Your Honor. That's the confusion.

9 MR. STANTON: Okay, but yeah --

10 THE COURT: I can see that --

11 MR. STANTON: It's not pled that way and nor do I think the instructions of
12 law speak to that.

13 MR. ALTIG: Well it is -- it is pled and/or suffered head injuries and the
14 defendant failed to seek medical care for said Brodie Aschenbrenner. The issue is
15 then does the jury take that part of it, the State's proved that element, and then say
16 well because he failed to seek medical care --

17 THE COURT: Frankly I agree with you.

18 MR. ALTIG: -- that's felony child abuse, felony child abuse means first
19 degree murder, he's convicted of first degree murder when he hadn't done it, mom
20 did it. Or somebody else did it.

21 THE COURT: Actually I agree with the defendant. I mean the -- it's -- based
22 on the evidence presented, it's going to come down there's two people near that
23 child within that window. It was either the mother or the defendant. So I do think
24 that and but you're claiming that he actually did the act versus the mother actually
25 doing the act and I guess there's always the possibility that the jury, like the Court

1 did, could consider that the mother did the act but he should have and failed to take
2 the child for medical assistance. So I do think it's confusing.

3 MR. ALTIG: Right.

4 THE COURT: And I think it would be confusing given the fact that there's
5 really been no testimony and I don't anticipate there will be testimony about the
6 obligation of an individual to seek out medical care.

7 MR. STANTON: That's correct, Your Honor.

8 MR. ALTIG: That is correct.

9 THE COURT: So I think that it should come out.

10 MR. STANTON: Okay. What should come out, the instruction as a whole or
11 to clarify the --

12 THE COURT: No, I think the only -- and I'm sorry, I didn't mean to cut you off
13 if I did. I think if I'm understanding Mr. Altig, on the jury instruction that has the
14 section from the information, it's on line 24, defendant did fail to seek medical care
15 for the said Brodie Aschenbrenner. There's no evidence on that at all during the
16 case.

17 MR. STANTON: Okay.

18 THE COURT: I don't see any other language regarding the failure to seek
19 medical care. Do you, Mr. Altig? Or am I --

20 MR. ALTIG: No, Your Honor.

21 THE COURT: What?

22 MR. ALTIG: No, Your Honor.

23 THE COURT: Okay. So then that should be removed as it doesn't conform
24 with the evidence.

25 MR. ALTIG: That would correct the -- and then the instruction would be fine

1 then.

2 THE COURT: Okay. So with that being removed, is there -- are there any
3 other issue with respect to the jury instructions?

4 MR. STANTON: Judge, there's only one additional one. I provided your
5 court this morning the statutory definition of substantial bodily harm. I don't know --

6 THE COURT: Okay.

7 MR. STANTON: -- if the Court got that. I have a clean copy here.

8 THE COURT: I would like the copy.

9 Is there any objection to this one?

10 MR. ALTIG: Your Honor, no, that's the -- what I believe to be the --

11 THE COURT: It's usually statutory.

12 MR. ALTIG: -- statutory definition of that. The only issue -- the only question
13 I have just for clarification is what actual lines are we striking on the information
14 page?

15 THE COURT: It would be line 24, the end of line 24 going 25, defendant did
16 fail to seek medical care for the said Brodie Aschenbrenner.

17 MR. ALTIG: Okay. Thank you.

18 MR. GIORDANI: It's going to have to start --

19 MR. STANTON: Start a little bit before that, Judge.

20 THE COURT: Let's see.

21 MR. ALTIG: At the and/or?

22 MR. STANTON: Where it says -- yeah, right above it, and/or after
23 determining because that kind of sets up that --

24 THE COURT: Oh, yeah, you're right. I'm sorry, I didn't read that --

25 MR. ALTIG: So line 23 --

1 THE COURT: -- all that together.

2 MR. ALTIG: -- starting at the and/or. Okay.

3 THE COURT: Uh-huh. Yes. Okay, so that's it --

4 MR. STANTON: Now, Judge, would you like me to do that and provide it to
5 the Court or I provided the WordPerfect to the Court. How would you like me to do
6 that?

7 THE COURT: I would like for you guys to do the corrections.

8 MR. STANTON: Okay.

9 THE COURT: And I'll tell you why I have you guys do it. I know other
10 departments do it, but you know, if something were to be done in error in the jury
11 instructions, I don't want it on us.

12 MR. STANTON: Yeah. Fair enough.

13 THE COURT: You guys can do it. So what I do is go through -- now that we
14 have jury instructions that are stipulated upon or settled by the Court, once you get
15 the final packet, please go through together and number them and the reason I do
16 that is so that you guys can make sure that everything is in fact in the packet of jury
17 instructions which will ultimately be marked as the originals.

18 MR. ALTIG: Thank you.

19 THE COURT: And then once that's done, we'll just see you guys at one.

20 MR. ALTIG: Yes, Your Honor.

21 MR. STANTON: And as far as the timing goes, there's one additional issue --
22 may I approach?

23 THE COURT: Yeah.

24 MR. STANTON: This is the report prepared by the defense expert that I
25 believe is going to testify this afternoon. His last name is Arden. I've had

1 somewhat of a detailed discussion with counsel before you Court -- the Court came
2 into session and they've assured me that there is going to be no elicited testimony
3 through this witness that goes outside the four corners of his report. And so
4 obviously I take them at their word. That is a significant concern of the State's.
5 The State would object to any testimony in the form of it being done out loud in front
6 of this jury and if the State believes it, obviously we're going to object, ask the jury
7 be excused and to explore the area.

8 But we went over with it so that there's I don't believe a
9 misunderstanding between the State and the defense that he rendered this opinion
10 over a year ago in writing that has been provided timely to the State. I've reviewed
11 it in detail a number of times. It's been discussed with Dr. Gavin prior to her
12 testimony and thus, I believe, pursuant to the rules of evidence and to the notice of
13 expert witnesses, this witness is confined to the subject matter as expressed in his
14 report. And once again, defense counsel have assured me that that's going to be
15 the case.

16 With that, Your Honor, I don't imagine that the length of the testimony
17 -- I believe they're going to recall Jennifer Lee, the defendant's sister, and then
18 they're going to call Mr. Arden, and then that may be their last witness. Obviously
19 we have the issue of the defendant which I think we should take up now and then it
20 would be my recommendation for timing that we then charge the jury this afternoon
21 so that when we come in on Monday at 9:30 I would presume or something close --

22 THE COURT: Tomorrow's Friday.

23 MR. ALTIG: Friday.

24 MR. STANTON: Or Friday. I'm sorry. We come in on Friday at 9:30 that we
25 could go directly into closing arguments.

1 THE COURT: I'm fine with that. If the time -- the time allows, I'm fine with
2 that.

3 Counsel on the report?

4 MS. VON MAGDENKO: I'm not planning on asking him anything outside of
5 his report, Your Honor.

6 THE COURT: Okay. And that rule's consistent in civil and criminal cases.

7 MR. ALTIG: There --

8 MS. VON MAGDENKO: Yes.

9 THE COURT: Here let me give the State --

10 MR. ALTIG: One --

11 THE COURT: -- back your copy of the report.

12 MR. ALTIG: One other issue with regard to Dr. Arden. He does have -- and I
13 spoke to the State about this. They have received a copy of it sometime ago and I
14 showed them a hard copy of it today. He does have a PowerPoint presentation he
15 needs to use for purposes of explaining his testimony. It's more demonstrative in
16 nature. I don't believe the --

17 THE COURT: And the State seen it?

18 MR. ALTIG: The State has.

19 THE COURT: Okay.

20 MR. ALTIG: I don't think they have any objection to him using it for
21 demonstrative purposes.

22 MR. STANTON: Yes, that it's not going to be an admitted exhibit, but that it
23 can be used to assist in his testimony before the jury.

24 THE COURT: That's fine. Anything else we need to address?

25 MR. ALTIG: One other issue, Your Honor, and I don't mean to belabor an

1 issue and beat a dead horse, but I would -- just so the record's clear, I need to
2 renew the motion for mistrial. I understand Your Honor's --

3 THE COURT: On what grounds?

4 MR. ALTIG: After the testimony of Gavin, State's expert, that expert testified
5 very clearly that the injuries that were photographed on that child were -- the child
6 was not in the same condition when the child was alive as the injuries documented
7 on that child in the photographs that were displayed over and over and over again.
8 Those photographs were used by the State to show witness after witness after
9 witness and basically asking them is this the way Brodie looked the last time you
10 saw him alive and they said no. Their expert came and took the stand and straight
11 up said he wouldn't have looked that way because the images don't depict him the
12 way he would have looked when he was alive, the injuries are more significant,
13 they're more pronounced, things like that.

14 THE COURT: But what she did not say is that all those additional injuries
15 other than the ones that were previously identified by the witnesses and their
16 testimony, she did not say those suddenly would have occurred at the time of death
17 versus being before.

18 MR. ALTIG: Right, no, and I --

19 THE COURT: She just didn't know --

20 MR. ALTIG: Right.

21 THE COURT: -- really.

22 MR. ALTIG: And I understand that your ruling was that there was some
23 defense put forward in the opening statement that these things may have been
24 accidental and you were allowing the -- that for that purpose and I understand Your
25 Honor's ruling. I just wanted to make sure I made a record regarding that and --

1 THE COURT: Okay, and I -- again, I think that it goes to the weight versus
2 the admissibility and I -- certainly I think it's fair game at the time of closing --

3 MR. ALTIG: Okay.

4 THE COURT: -- to focus in on those aspects of the testimony.

5 MR. ALTIG: Thank you very much.

6 THE COURT: Anything else?

7 MR. STANTON: No, Your Honor.

8 THE COURT: All right. Thank you.

9 MR. ALTIG: Thank you.

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

11 [Off the record at 11:10 a.m.]

12 [Proceedings resumed at 1:19 p.m.]

13 [Outside the presence of the jury]

14 THE COURT RECORDER: Okay, on the record.

15 THE COURT: Okay.

16 MS. VON MAGDENKO: I guess we won't need a break because I'm going to
17 turn it on right now so --

18 THE COURT: Is everyone ready? We have the jury here.

19 MR. STANTON: State's ready.

20 THE COURT: By the defense?

21 MS. VON MAGDENKO: Your Honor, we're ready.

22 THE COURT: Okay.

23 MS. VON MAGDENKO: Maria, I can plug this in even though I'm going to
24 use this -- the Elmo first?

25 THE COURT: Would you yell at Jason to please -- can you tell Jason it's

1 time to bring the jury in, please? Thank you.

2 THE MARSHAL: Ready?

3 THE COURT: And you rested last time, right?

4 MR. STANTON: We did.

5 THE COURT: Okay. So this will begin their case in chief.

6 MR. STANTON: Yes.

7 THE MARSHAL: District Court XXIII jury is present.

8 [Jury in at 1:20 p.m.]

9 THE COURT: Welcome back, ladies and gentlemen. When we were in here
10 last, the State rested its case in chief and now what's going to happen is the
11 defense is going to present their case.

12 Your first witness, please.

13 MS. VON MAGDENKO: Your Honor, we would call Jennifer Lee, please.

14 THE COURT: Okay.

15 [Pause]

16 THE COURT: She'll need to be re-sworn.

17 THE CLERK: Yes, Your Honor.

18 THE COURT: Good afternoon, Ms. Lee. Please raise your right hand.

19 THE MARSHAL: Please raise your right hand and be sworn in by our clerk.

20 JENNIFER LEE

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

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

24 THE WITNESS: J-e-n-n-i-f-e-r L-e-e.

25 THE COURT: Whenever you're ready, counsel

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

2 DIRECT EXAMINATION OF JENNIFER LEE

3 BY MS. VON MAGDENKO:

4 Q Ms. Lee, you had testified previously in this case. Do you recall that?

5 A Yes.

6 Q Okay. And some questions were asked of you about the Monday
7 before Brodie's death?

8 A Yes.

9 Q And you testified that you were at the pool and Brodie was there
10 Monday?

11 A Correct.

12 Q What time was that?

13 A Between 11 and 2:30.

14 Q What time did you arrive at the pool?

15 A About -- about 10:30.

16 Q And who were you with?

17 A My two sons.

18 Q And when did Brodie arrive?

19 A Right about opening, right before 11.

20 Q And was Brodie with anyone?

21 A With Michael and Arica.

22 Q And did you bring any food with you to this pool?

23 A Michael and Arica brought Little Caesars pizza.

24 Q How many pizzas was it?

25 A I believe one.

1 Q And at some point did Michael and Arica sit down for that pizza?
2 A Yes, as soon as we walked in, we all sat down to eat.
3 Q And was Brodie with Arica at that time?
4 A Yes.
5 Q And did Brodie eat his Little Caesars?
6 A No.
7 Q And you had testified previously generally about Brodie's physical state
8 that day that -- while at the pool. Can you be more specific?
9 A He had a big lump on his head.
10 Q Where was that?
11 A The corner. This is the side facing him, I believe.
12 Q So the left side of his head?
13 A Correct. And he had a cut under his lip a little bit and a little bruise on
14 his cheek.
15 Q And did Brodie indicate to you anything about his physical condition?
16 A He said he had a headache, but that was really all he had said.
17 Q Was Arica present when he said that?
18 A Yes.
19 Q And were there anything going on with Brodie's eyes?
20 A They were kind of droopy at the end when we were getting ready to
21 leave about 2:30.
22 Q And what do you mean by droopy?
23 A The corners were kind of sagging down.
24 Q And how old were your children at this time?
25 A Four and seven.

1 Q And did you have any discussions with Arica about Brodie's physical
2 health at that time?

3 A I told her maybe talk -- take her -- take him to the doctor.

4 Q Okay. And what was her response?

5 A She wasn't sure that it was that bad. So I asked her to maybe call the
6 pharmacist just to see if maybe it was the pinkeye medication with the chlorine, just
7 to get some kind of explanation.

8 Q What was her response?

9 A She said okay.

10 Q And you had occasion to see Brodie a second time that Monday,
11 correct?

12 A Correct.

13 Q What time was that?

14 A I believe it was 5:00. It was Monday Night Baseball, I believe. Or it
15 was a baseball game. Yeah, Monday Night Baseball.

16 Q Five p.m.?

17 A Yes.

18 Q And where was that?

19 A At Danny's house.

20 Q What time did you arrive?

21 A The game had already started, so 5, 5:15.

22 Q And when did Brodie arrive?

23 A About half an hour later-ish.

24 Q And did his physical condition change that you saw?

25 A Not really.

1 Q And who did Brodie arrive with?

2 A With Michael.

3 Q And was any food provided to Brodie at that baseball game Monday

4 night?

5 A Yes.

6 Q What was it?

7 A Chicken parmesan.

8 Q And did Brodie actually in fact eat the chicken parmesan?

9 A No.

10 Q Did Brodie say anything regarding his not eating?

11 A No.

12 Q And after -- when did you find out Brodie died?

13 A Wednesday morning.

14 Q At approximately what time?

15 A A little after nine.

16 Q And what did you do when you found out?

17 A We were kind of just standing around trying to find out what was going

18 on and what was happening.

19 Q How did you find out?

20 A Michael.

21 Q Okay. Actually going back to the pool Monday morning, did -- was

22 Brodie acting like his normal self?

23 A He wasn't as rambunctious. He was just sitting with Arica in the water.

24 Q And did he want to be around you at all?

25 A Not really.

1 Q Did he say anything to you?

2 A Not really. He was really quiet.

3 Q And was that normal for Brodie?

4 A No.

5 Q Back -- what time -- Michael told you that Brodie had died?

6 A Correct.

7 Q And what did you do after you found out?

8 A We cried a little bit, we hugged each other, and we stood around and

9 waited for Arica.

10 Q Where were you when this was happening?

11 A Right out front of the apartment.

12 Q Where was Arica?

13 A She was being questioned in the police car.

14 Q Did -- what happened after Arica was in the police car?

15 A When she came out, she was extremely upset.

16 Q Did she say anything while she was upset?

17 A She said oh my god, they're going to blame me for this.

18 Q Did you say anything in response?

19 A No.

20 Q Did she say anything else at that time?

21 A No.

22 MS. VON MAGDENKO: I'm going to -- Your Honor, if the Court will allow, I'm

23 going to approach the witness with a photograph for --

24 THE COURT: Have you shown it to the State?

25 MS. VON MAGDENKO: Yes, I have. It's Defendant's Proposed Exhibit G.

1 THE COURT: That's fine.

2 BY MS. VON MAGDENKO:

3 Q Ma'am, have you seen this photo before?

4 A Yes.

5 Q And do you know who took the photograph?

6 A I believe it was my fiancé.

7 Q Okay. And did you -- were you present when the photograph was
8 taken?

9 A Yes, I'm -- I'm in it.

10 Q You're in it. Okay. And is this a fair and accurate representation of the
11 photograph as it was taken since you were in it?

12 A Yes.

13 Q Okay. And do you know when it was taken?

14 A It was April, right before all this happened. It was my son's birthday
15 party.

16 Q Oh this is your son's birthday party?

17 A Correct.

18 Q And that be 2011?

19 A Yes.

20 Q Can you just write that on there?

21 A Uh-huh.

22 MS. VON MAGDENKO: Your Honor, I would seek to move Defendant's
23 Proposed Exhibit into evidence.

24 MR. STANTON: State's -- Defense G. The State has no objection.

25 THE COURT: That's fine. Would you like to publish?

1 MS. VON MAGDENKO: Yes, Your Honor.

2 THE COURT: Permission granted.

3 [Defendant's Exhibit G admitted]

4 BY MS. VON MAGDENKO:

5 Q So this photograph was taken two months before Brodie's death?

6 A Correct.

7 Q And I don't -- is that out of focus?

8 A It's a little blurry.

9 Q Oh. Auto focus. And can you say who is this in the photo?

10 A It's Michael.

11 Q And who is this?

12 A It's Brodie.

13 Q And Brodie's sitting on Michael lap?

14 A Correct.

15 Q Was that common?

16 A Yes.

17 Q Did -- what were the nature of the interactions between Brodie and
18 Michael --

19 A They were always playful. Michael wanted to have fun with him. He
20 would tickle him, he would, you know, shoot squirt guns with him, anything to have
21 fun.

22 MR. STANTON: And, Your Honor, could we have some foundation as to the
23 time period counsel's question?

24 THE COURT: Please.

25 BY MS. VON MAGDENKO:

1 Q When was the first time you saw Brodie and Michael interact with each
2 other?

3 A As soon as Arica and Michael started dating.

4 Q And when was that?

5 A I wouldn't have a -- October I believe, but I'm not a hundred percent
6 sure.

7 Q So approximately October 2010?

8 A Correct.

9 Q And this photo -- and then you -- and when did that interaction end?

10 A With -- between Michael and Brodie?

11 Q Yes.

12 A It -- it didn't.

13 Q And during that time period from the time that -- of October 2010 until
14 Brodie's death, did the nature of Michael's interaction with Brodie change at all?

15 A No.

16 MS. VON MAGDENKO: Court's indulgence?

17 THE COURT: Sure.

18 [Colloquy between counsel]

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

20 THE COURT: Cross.

21 MR. STANTON: No questions.

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

23 The next witness, please?

24 MS. VON MAGDENKO: Your Honor, we would like to call Dr. Arden.

25 THE COURT: Okay.

1 [Pause]

2 THE MARSHAL: Doctor, remain standing, please raise your right hand, be
3 sworn in by our clerk.

4 JONATHAN ARDEN

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

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

8 THE WITNESS: I'm Dr. Jonathan Arden. First name is J-o-n-a-t-h-a-n. My
9 last name is A-r-d-e-n.

10 THE COURT: Whenever you're ready.

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

12 DIRECT EXAMINATION OF JONATHAN ARDEN

13 BY MS. VON MAGDENKO:

14 Q And Dr. Arden, would you tell the jury your educational experience and
15 work experience?

16 A I attended college for two years at the Johns Hopkins University in
17 Baltimore and then for two years at the University of Michigan where I received my
18 Bachelor of Science degree in 1976. I then attended and graduated from the
19 University of Michigan Medical School, receiving my M.D. or Doctor of Medicine in
20 1980. I then followed that with two medical specialty training programs, what you
21 commonly hear people call residency training programs. The first of those was a
22 three-year program in the field of anatomic pathology which took place at the New
23 York University Medical Center in New York City, and the second was a one-year
24 program in forensic pathologic and that took place at the Office of the Chief Medical
25 Examiner for the State of Maryland. That's located in Baltimore.

1 Subsequent to completing my education and training, I have become
2 board certified by the American Board of Pathology in 1985 in both anatomic and
3 forensic pathology. And then I embarked upon a career as a medical examiner. I
4 spent a total of 20 years working as a government medical examiner in four different
5 offices. I had shorter stints in Suffolk County, New York and the State of Delaware.
6 Then I spent nine years working for the City of New York in the Office of Chief
7 Medical Examiner where I finished as the first deputy chief medical examiner or the
8 second in command for that system. I followed that with about five and a half years
9 as chief medical examiner in Washington, DC.

10 At the completion of that 20-year block, I then embarked primarily on a
11 private practice, in essence a consulting practice, the type of work that brings me
12 here today. And so I have a private consulting practice in forensic pathology and
13 medicine which has been ongoing since 2004.

14 Overlapping with that, in the -- in the earlier portion of my consulting
15 career, I spent about 18 months with a part-time appointment in the medical
16 examiner system for Northern Virginia where I live. That was more of a community-
17 based kind of position. I wasn't doing autopsies for them, but I was functioning as
18 they have physicians in the community kind of the -- the frontline, the eyes and the
19 ears, making case decisions and investigations and so on.

20 And for the past six years, I have a part-time appointment with the
21 Office of the Chief Medical Examiner for the State of West Virginia and that -- that is
22 still active and ongoing, and in that position I do function the same that a medical
23 examiner does so when I make my -- my visits to West Virginia, I perform autopsies,
24 I sign death certificates, I author autopsy reports, I participate in their conferences,
25 and I'm available to testify in court on behalf of the work that I do for the medical