

**FILED**

07/15/2022

**Bowen Greenwood**  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: OP 22-0349

**Exhibit 1**

1 MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT  
2 CARBON COUNTY  
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4 )  
5 STATE OF MONTANA, ) **TRIAL**  
6 )  
7 Plaintiff, ) MARCH 8-10, 2022  
8 )  
9 vs. ) CAUSE NO. DC 19-17  
10 )  
11 NATHAN SAMUEL POLAKOFF, )  
12 )  
13 Defendant. ) **JUDGE MATTHEW WALD**  
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CARBON COUNTY COURTHOUSE

RED LODGE, MONTANA

MARCH 8, 2022

DAY ONE OF TRIAL

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(Wherein, the following took place in chambers.)

THE COURT: I'll call DC 19-17, State versus Nathan Polakoff. We are in chambers the morning of trial.

Counsel, give your appearance, please.

MR. NIXON: Alex Nixon for the State.

MR. SPOJA: Robert Spoja for the State.

MR. SNIVELY: Robert Snively for the defendant, who is present.

THE COURT: The defendant, Mr. Polakoff, is present.

All right. This is day one of the jury trial in this case. We've already had a final pretrial hearing. Just a couple final matters we need to address. There was a Motion to Continue the matter. I did communicate to the lawyers, after consideration, that I was denying the motion. I have -- there will be

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a written order and it should be filed today. I just didn't get it out.

However, I think your record is well made, Mr. Snively, and your motion is on the record, so we'll go on from here.

I do need to address a couple of things. One, we do have a snowstorm. A lot of the good citizens have appeared here despite that. There might be a couple of late ones. Ordinarily, I may have those parties brought forward where they're supposed to be. Given the storm, my intent is to have them come on in, but go to the end of the line so we don't disrupt voir dire.

Does that make sense?

MR. NIXON: Yes.

MR. SNIVELY: Yes.

THE COURT: It does kind of reward them for being late, but I don't think anybody wants to today. We want to make sure we've got enough so they can still come and be a part of the panel.

MR. SNIVELY: Judge, if I can just clarify, if somebody does come in that was 1 through 27 late, are you going to make them number 28 or are they going to be 53?

THE COURT: 53. So, basically, because once

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we call roll call -- if they come in during roll call, we're okay. But once we call roll call, though, then we start calling the first 27, I'm not going to bump somebody because the right number 16 came in.

MR. SNIVELY: I just -- they're going to go clear to the end?

THE COURT: Yes. I think that there's no right or wrong to it, but I think that there's a good excuse to be a little bit late today probably.

Anybody have a problem with that?

MR. NIXON: No.

THE COURT: Okay.

MR. SNIVELY: No.

THE COURT: I'm going to give -- once we get a jury sworn, I've looked at the proposed jury instructions proffered by the State, Instructions 1 through 5 are stock, other than, of course, the specificity in No. 4, which contains language from the charging docs.

MR. SPOJA: Yes.

THE COURT: I intend, once we get the jury sat, to go ahead and give State's 1 through 5.

Mr. Snively, any objection?

MR. SNIVELY: No.

THE COURT: Okay. On -- at some point after

1 the final pretrial, there was -- my understanding was  
2 there still might have been an offer made by the State  
3 that the defense was considering. I do understand that  
4 that was rejected, but I want to make sure you're on the  
5 record.

6 Is that the case, Mr. Snively, that you  
7 considered the final offer and have rejected that?

8 MR. SNIVELY: Yes, that's correct.

9 THE COURT: And you've passed that on to Mr.  
10 Polakoff?

11 MR. SNIVELY: Yes. After the last court  
12 hearing, my client and I discussed that and he made that  
13 decision.

14 THE COURT: Mr. Polakoff, is that correct?

15 THE DEFENDANT: That is correct, Your Honor.

16 THE COURT: Again, I'm not going to repeat  
17 everything that we did on Wednesday as far as the final  
18 pretrial and I'm not trying to dissuade you in any way,  
19 but I do want to make sure you're fully informed of the  
20 risks and possible benefits of proceeding to trial and  
21 rejecting those orders. Do you understand that?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: You're well aware of the maximum  
24 sentences that could be imposed upon conviction?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Okay. It appears from the  
2 State's trial brief that the parties are cognizant that  
3 there could be some 404(b) language or issues -- well, I  
4 should say there might be some potential areas.  
5 However, it looks like the parties are on the same plane  
6 as far as avoiding 404(b), other acts evidence.

7 And as always, I do ask counsel if you're  
8 getting close to where you think the door has been open,  
9 approach the bench at first with a sidebar before you go  
10 there.

11 Mr. Snively, would you like to just make sure  
12 we are on the same page with regard to the 404 evidence?

13 MR. SNIVELY: I would, Judge.

14 THE COURT: Go ahead.

15 MR. SNIVELY: I'll just highlight the areas  
16 that I believe there's a stipulation that are not  
17 admissible without addressing it in front of the Court.  
18 One is any reference to a lie detector test. There's  
19 what I'm going to refer to as the "Missoula incident."  
20 There's some activity that happened in Missoula, and  
21 while Mr. Polakoff was never charged or anything there,  
22 he was involved in some incidents that led to other  
23 people being charged.

24 THE COURT: Okay.

25 MR. SNIVELY: Although he wasn't directly

1 involved in what they were charged with. But we've sort  
2 of generically referred to that as the "Missoula  
3 incident."

4 Also, any prior cocaine or heroine use by the  
5 defendant. There's an alleged knife incident that  
6 occurred here in Red Lodge and an incident where he was  
7 at the parking lot of the people working at the mine.

8 And there's also an incident where they were  
9 -- the police were trying to transport him to Billings  
10 for mental health concerns. The last three are post  
11 charging incidents and so...

12 THE COURT: Say that again? Knife incident  
13 in Red Lodge. What was the second one?

14 MR. SNIVELY: He was in the parking lot where  
15 the cars of people who work at the mine were at and  
16 there was some suspicion as to what was going on there.

17 And the third thing is there's a mental  
18 health -- I guess I would call it they were getting  
19 ready to transport him to Billings for mental health  
20 concerns and there was an issue between him and the Red  
21 Lodge Police.

22 THE COURT: Okay. Mr. Nixon, is that your  
23 understanding of the things to avoid?

24 MR. NIXON: I believe the last one also  
25 stemmed from a domestic dispute that -- I think there's

1 mention with the law enforcement thought there was some  
2 paramilitary-type gear.

3 I think that's a fairly accurate statement as  
4 far as of the 404 issues. I don't anticipate that those  
5 would come in. The only thing that I believe might be  
6 an exception is that, as the State expressed in its  
7 trial brief, there may be an issue of prescription drug  
8 and marijuana use that was brought up by the defendant  
9 in his interview with Officer Stuber. When he stated  
10 that -- basically presented the possibility, although  
11 unlikely, that he may have blacked out and during that  
12 he could have potentially thrown a baby and injured it.

13 That was put in context as being part and  
14 parcel with this use of medication and marijuana. And I  
15 think that that would be an exception as, I guess,  
16 ostensibly that could be seen as some sort of defense,  
17 because of impairment. And that is why the State has  
18 asked that if that is played to the jury that it may be  
19 wise to consider some sort of an impairment not being a  
20 defense instruction for the jurors to consider.

21 THE COURT: All right. I'll let you weigh in  
22 at the time of the settling of instructions, we'll talk  
23 about those again.

24 But it sounds like your concern specifically  
25 is harder drugs, the cocaine and the heroine use?

1 MR. SNIVELY: Correct.

2 THE COURT: Okay. It doesn't sound like  
3 you're not on board with that.

4 MR. NIXON: No. And I can tell you that  
5 there is -- the State has edited the interview with  
6 Officer Stuber. Specifically, the portion of the  
7 introduction of the video where he is read the Miranda  
8 rights and the defendant can be heard saying something  
9 to the effect that that's not the first time he's been  
10 read his rights. That has been simply taken out and it  
11 starts right afterwards.

12 And it stops immediately before the defendant  
13 identifies a cocaine and heroine-use problem that he had  
14 when he was in Missoula. So we have taken care to make  
15 sure that the video that we'll be introducing does  
16 excise those particular 404(b) issues.

17 THE COURT: Well, there's also looked like  
18 what could be 404, but the State in their trial brief  
19 did mention, I guess, reserving rebuttal if the defense  
20 chooses to offer character evidence and some of those  
21 incidents referred to in the trial brief appear to me to  
22 be potentially 404(b). But that kind of depends on  
23 where you guys go, I think.

24 But clearly, you're not going into those  
25 incidents with the defendant's parents and stuff unless,

1 don't think it's at all appropriate to try to bring in  
2 their experience as nurses, because that would seem to  
3 be possibly trigger some sort of expert testimony.

4 And if that is the case, the State most  
5 certainly should have been provided with some sort of  
6 statement or some ability to get a statement from them,  
7 but that was refused. Initially, the State was told  
8 that there would be an opportunity to conduct interviews  
9 and then that was withdrawn yesterday afternoon late.

10 So I think it's very important that they not  
11 try to tell the jury that they possess some sort of  
12 expertise in assessing the baby, because we simply don't  
13 have the opportunity, one, to know what they're going to  
14 testify to or prepare for it.

15 There may also be an issue, there's a  
16 voicemail recording that is intended to be introduced by  
17 the defendant. My concern is that there may not be able  
18 to be an appropriate foundation laid to avoid, you know,  
19 the hearsay issues. But that one is not as concerning  
20 to the State at this point in time.

21 But I do think that it's important to -- that  
22 all observations have to be absolutely clearly referred  
23 to as simply lay observations. And I don't think  
24 there's going to be any evidence that they, in fact, did  
25 examine the child. And if there is, I think that would

1 as you've reserved, unless you come to me and say, "I  
2 think they've opened the door to that," correct?

3 MR. NIXON: Correct. And frankly, I think if  
4 there was an issue that the door is open, I would  
5 probably request a meeting in chambers rather than  
6 simply a sidebar.

7 THE COURT: Well, something that important,  
8 yeah. Well, it sounds like the parties have discussed  
9 the potential 404(b) evidence and are on the same page  
10 and I do appreciate that, obviously, and get only  
11 admissible evidence before this jury so they can do  
12 their job.

13 Is there anything else either party needs to  
14 address before we go in?

15 MR. NIXON: I don't know if it necessarily  
16 needs to be addressed now, but the State does have one  
17 issue potentially with the defendant's witnesses. My  
18 concern is that the State has not been provided a  
19 statement or a transcript and was denied the opportunity  
20 to speak with both the witnesses. They're the  
21 defendant's parents, they're also nurses.

22 And my concern is that there's going to be an  
23 attempt to have them testify regarding their  
24 observations of the baby on the 17th and 18th, I  
25 believe. I apologize for not having the exact date. I

1 be a real problem.

2 THE COURT: Okay. Obviously, we don't need  
3 to take this up now, unless, Mr. Snively, would -- do  
4 you want to address that at all at this point?

5 MR. SNIVELY: Judge, I --

6 THE COURT: Let me just ask, is it your  
7 intent to go beyond lay observations?

8 MR. SNIVELY: No.

9 THE COURT: Okay.

10 MR. SNIVELY: As far as their observations of  
11 the baby is merely lay -- I mean, we're not going into  
12 because you're a nurse this or that kind of thing.

13 MR. NIXON: I don't think it's appropriate to  
14 even going into the nurse profession at all, if you're  
15 asking for some sort of observations.

16 THE COURT: Why don't you guys discuss before  
17 those witnesses are called, see whether there is a legal  
18 dispute as to how far it can go so we don't taint the  
19 jury either way.

20 MR. SNIVELY: Judge, if I can just -- so the  
21 record is clear --

22 THE COURT: Sure.

23 MR. SNIVELY: -- the witnesses decided not to  
24 talk with Mr. Nixon or Mr. Spojka. It's the two  
25 witnesses that made that decision. I encouraged --

1 MR. NIXON: To make it clear, I meant in no  
2 way to say that Mr. Snively was responsible for that.  
3 MR. SNIVELY: And there is, to my knowledge,  
4 no prior statement, no transcript, there's nothing to  
5 provide, other than the voicemail, which we have  
6 provided. And I guess if that's an issue of foundation,  
7 I wish I would have known that so -- I mean, we can lay  
8 the foundation, if that's what the State's wanting us to  
9 do.  
10 MR. NIXON: I think I may have a proposal  
11 that resolves that. Like I say, that's not what gives  
12 me heartburn, the voicemail. It's the possibility of  
13 trying to attempt to lay testimony as having some sort  
14 of professional foundation.  
15 THE COURT: Well, it doesn't sound like  
16 that's going to happen. And honestly, it's a shame,  
17 really, that they did refuse to be interviewed because,  
18 obviously, the Court's going to have to error on the  
19 side of being very cautious to avoid any sort of  
20 hybrid-witness-expert-sort-of-testimony.  
21 And again, as we get near there, if you're  
22 not on the same page, Counsel -- or Mr. Snively, you can  
23 bring it back before the Court and make your argument.  
24 It looks like we're really not on a different  
25 page and so I'll leave it to you to make sure to avoid

1 any areas that are improper.  
2 MR. SNIVELY: Yes, Your Honor.  
3 THE COURT: We have a little bit of time  
4 before the defense.  
5 Anything else?  
6 MR. NIXON: I don't think the State has any  
7 more issues. So far I think that Mr. Snively and I have  
8 worked effectively at addressing the problems and I  
9 don't think either of us wants to create any issues.  
10 THE COURT: Very good. Just so you guys  
11 know, I'll give you each an hour for voir dire. And  
12 then, you know, I'm not going to pull you off stage if  
13 it gets to be an hour and a minute. Clearly, we want to  
14 get these -- the whole out of here as soon as possible.  
15 We also want to give you every opportunity to explore  
16 what you need to in voir dire.  
17 I have a tendency to really want to push so  
18 that the jurors -- so we can get our final jurors and  
19 get rolling. I've kind of learned my lesson and I'm  
20 likely to take a break between the State's voir dire and  
21 defense's voir dire. It's just too long for a lot of  
22 people to sit. I don't like doing it, because it makes  
23 kind of a mess and there's a lot of jurors milling  
24 around.  
25 Unless things go real quick and I look at the

1 clock and think we can do it. The last trial we had I  
2 -- unfortunately, the defendant had to kind of split the  
3 voir dire because we didn't take a break, because I  
4 didn't. So I'm going to error on the side of letting  
5 everybody stand up. And, you know, this building  
6 there's not a lot of rest rooms, I'll give them a chance  
7 to refresh. We'll still move on as efficiently as we  
8 can towards our jury.  
9 I'm going to have one alternate. It's a  
10 fairly short trial and I believe that given the size of  
11 the jury room that ultimately they'll have to share and  
12 I think for the trial we should be okay.  
13 Is that all right with you, Mr. Snively?  
14 MR. SNIVELY: I don't have any objection,  
15 Judge.  
16 MR. NIXON: We'll be taking an hour and a  
17 half lunch, then, is that what you anticipate?  
18 THE COURT: Yeah, I usually do an hour and  
19 15.  
20 MR. NIXON: Okay. An hour and 15.  
21 Mr. Snively, it seems like the concept of  
22 "lunch hour" is a tough one here in Red Lodge.  
23 THE COURT: It is.  
24 MR. NIXON: Especially, when it's like this.  
25 It's kind of a sloppy mess.

1 THE COURT: You never know, at least on the  
2 cusp of 11:30 or either 12:30 sometimes that helps, but  
3 I know to give that extra 15 minutes.  
4 MR. SNIVELY: Judge, is it your intent to  
5 break at a reasonable witness break to 5:00, 5:30?  
6 THE COURT: Yes. I do not -- the clock is a  
7 -- what do they say? A guideline and not rules. I  
8 believe the presentation of the case takes precedence.  
9 And so, yeah, if you've got a witness on and  
10 you're finishing and it's 5 o'clock we're going to  
11 finish that witness absent some extraordinary thing.  
12 Same with lunch. We'll try to work with the  
13 case presentation for the sake of the jury. So you can  
14 plan those witnesses around that. And you can always  
15 approach me, have some idea of your time frames and  
16 witness length, probably. You never know how long cross  
17 will take.  
18 Does that answer your questions?  
19 MR. SNIVELY: Yes.  
20 THE COURT: Okay.  
21 Probably start at 8:30 tomorrow, so we can  
22 keep rolling.  
23 (Off the record.)  
24 (Wherein, the following took  
25 place in open court.)

1 THE BAILIFF: All rise.  
 2 THE COURT: Thank you. Please be seated.  
 3 For the record this is State of Montana  
 4 versus Nathan Polakoff, DC 19-17.  
 5 The prosecutors are present.  
 6 The defense counsel is present. The  
 7 defendant is present.  
 8 The panel of potential jurors are also  
 9 present.  
 10 Folks, I'm speaking for the record, this is a  
 11 court of record and every word we say is taken, so  
 12 sometimes it sounds like I'm talking to myself and  
 13 that's why.  
 14 Good morning. My name is Matt Wald. I'm the  
 15 district court judge for this district, the 22nd  
 16 District Court for the state of Montana, that includes  
 17 Carbon County, Stillwater and Big Horn Counties.  
 18 I recognize some of you have been here quite  
 19 awhile already and it's one of those Montana days  
 20 outside and I truly appreciate you getting here.  
 21 As Americans our fundamental rights include  
 22 the right to serve on a jury and the right to a trial  
 23 before a jury of our peers. So the jury system really  
 24 is a foundation of our legal system. It was put in our  
 25 constitutions, both the U.S. Constitution and the

1 Montana Constitution, as one of the foremost protections  
 2 of our liberties and our rights as citizens of Montana  
 3 and of America.  
 4 So the right and duty to serve on a jury is  
 5 one of the most important of our fundamental rights and  
 6 duties of citizenship. I realize it's a hardship, as  
 7 well, but I ask all of you, please, remember one never  
 8 knows when you or someone you love may need to appeal to  
 9 the wisdom of a jury and the system that we put in place  
 10 over hundreds of years. By appearing today, you are  
 11 taking part in a unique role in the American justice  
 12 system.  
 13 I do welcome you, the members of the  
 14 potential juror panel. I do thank you for putting aside  
 15 your regular responsibilities. And believe me, I do  
 16 know how hard it is. I do know how hectic life is now,  
 17 but it is so essential to our freedoms and rights as  
 18 citizens that we're able to on occasion when you're  
 19 called to serve that we're able to do this so that we  
 20 can have that jury -- that right to a jury trial as it's  
 21 enshrined. No citizen is too important to do the job of  
 22 a juror because it's as important a job that you will  
 23 ever do.  
 24 You might be only called to do it a handful  
 25 of times, once your whole life. And the good news is if

1 you are chosen today, you'll be off the panel for the  
 2 rest of the year. But I and all the parties to this  
 3 case do thank you.  
 4 I'm going to introduce a few other folks real  
 5 quick.  
 6 The court reporter is Stacy Fortune. She'll  
 7 be taking a word-for-word transcript of all things that  
 8 are said in this proceeding.  
 9 Later this morning, pretty quickly, there  
 10 will be questions asked of some of you and so it's very  
 11 important that you speak clearly. And even though it's  
 12 kind of scary to speak in public for many of us, I'll  
 13 have to ask you to speak up. And I might even have to  
 14 ask you to speak up when you're talking and it's not  
 15 trying to be rude, but we do need to make sure she gets  
 16 every word down, because that's the way she works.  
 17 Rochelle Loyning is the clerk of court for  
 18 Carbon County. She's assisting here today.  
 19 The bailiff is Ralph Dawson, who is serving  
 20 in that capacity today, as well as helping him is  
 21 Jeremiah Lotz in the back.  
 22 The matter to be tried here today is a  
 23 charged criminal offense. Nathan Polakoff is the  
 24 defendant. Mr. Polakoff is represented by Robert  
 25 Snively.

1 MR. SNIVELY: Good morning.  
 2 THE COURT: The State is represented by  
 3 county attorney, Alex Nixon, and deputy county attorney,  
 4 Robert Spoja.  
 5 Is the State ready for trial?  
 6 MR. NIXON: Yes, Your Honor.  
 7 THE COURT: The defense?  
 8 MR. SNIVELY: Yes, Your Honor.  
 9 THE COURT: All right. So as you've probably  
 10 gathered by now, you the jury panel have been called  
 11 here for possible selection as a juror to hear the trial  
 12 in this case. Your name was randomly drawn from the  
 13 list of citizens who reside in Carbon County.  
 14 From this group, the attorneys will end up  
 15 selecting a panel of 12 of you to hear the case as the  
 16 jury. In addition, you will have one alternate juror  
 17 that will sit through the case and hear evidence, as  
 18 well.  
 19 All right. The clerk will now call the roll  
 20 of prospective jurors.  
 21 THE CLERK: Jo Anne Herem.  
 22 MS. HEREM: Here.  
 23 THE CLERK: Sabina Giovetti.  
 24 MS. GIOVETTI: Here.  
 25 THE CLERK: Elizabeth Sommerdorf.

1 MS. SOMMERDORF: Here.  
 2 THE CLERK: Brittney Dimich.  
 3 MS. DIMICH: Here.  
 4 THE CLERK: Richard Myers.  
 5 MR. MYERS: Present.  
 6 THE CLERK: Nancy Monforton.  
 7 (No response.)  
 8 THE CLERK: Samantha Anttila.  
 9 MS. ANTILA: Here.  
 10 THE CLERK: Bradley Freeman.  
 11 MR. FREEMAN: Here.  
 12 THE CLERK: Elizabeth Korth.  
 13 MS. KORTH: Here.  
 14 THE CLERK: Amanda Powell.  
 15 MS. POWELL: Here.  
 16 THE CLERK: Debra Hull.  
 17 MS. HULL: Here.  
 18 THE CLERK: Earl Zumbrun.  
 19 MR. ZUMBRUN: Here.  
 20 THE CLERK: Jody Klessens.  
 21 MR. KLESSENS: Here.  
 22 THE CLERK: Janice Ward.  
 23 MS. WARD: Here.  
 24 THE CLERK: Lonnie Taylor.  
 25 MS. TAYLOR: Here.

1 THE CLERK: Denaye Kern.  
 2 MS. KERN: Here.  
 3 THE CLERK: Megan Bauwens.  
 4 MS. BAUWENS: Here.  
 5 THE CLERK: Ryan Sweeney.  
 6 MR. SWEENEY: Here.  
 7 THE CLERK: Kerrilee Boggio.  
 8 MS. BOGGIO: Here.  
 9 THE CLERK: Cheryl McCarten.  
 10 (No response.)  
 11 THE CLERK: Jamie Krug.  
 12 MS. KRUG: Here.  
 13 THE CLERK: Cyndra Nelson.  
 14 MS. NELSON: Here.  
 15 THE CLERK: Robert Mensik.  
 16 MR. MENSIK: Here.  
 17 THE CLERK: Michael Bohleen.  
 18 MR. BOHLEEN: Here.  
 19 THE CLERK: James Maize.  
 20 MR. MAIZE: Here.  
 21 THE CLERK: Stephanie Fletcher.  
 22 MS. FLETCHER: Here.  
 23 THE CLERK: Beverly Haggerty.  
 24 (No response.)  
 25 THE CLERK: Baylee Nicholson.

1 MS. NICHOLSON: Here.  
 2 THE CLERK: Diane Giesick.  
 3 MS. GIESICK: Here.  
 4 THE CLERK: Richard Lee.  
 5 MR. LEE: Here.  
 6 THE CLERK: Jennifer Brown.  
 7 MS. BROWN: Here.  
 8 THE CLERK: Christopher Ewing.  
 9 MR. EWING: Here.  
 10 THE CLERK: Christine Faulkner.  
 11 MS. FAULKNER: Here.  
 12 THE CLERK: Erica Hash.  
 13 MS. HASH: Here.  
 14 THE CLERK: Debran Anderson.  
 15 MS. ANDERSON: Here.  
 16 THE CLERK: Candace Dworshak.  
 17 MS. DWORSHAK: Here.  
 18 THE CLERK: Nancy Malnaa.  
 19 MS. MALNAA: Here.  
 20 THE CLERK: John Bennett.  
 21 MR. BENNETT: Here.  
 22 THE CLERK: Trevor Culp.  
 23 MR. CULP: Here.  
 24 THE CLERK: Burgess Bond.  
 25 (No response.)

1 THE CLERK: David Zeiler.  
 2 MR. ZEILER: Here.  
 3 THE CLERK: Timothy Blair.  
 4 MR. BLAIR: Here.  
 5 THE CLERK: Andrea Kreft.  
 6 MS. KREFT: Here.  
 7 THE CLERK: Ivy Kriner.  
 8 MS. KRINER: Present.  
 9 THE CLERK: Jane Engebretson.  
 10 MS. ENGBRETSON: Here.  
 11 THE CLERK: Joshua Bekel.  
 12 MR. BEKEL: Here.  
 13 THE CLERK: Katherynn Adams.  
 14 MS. ADAMS: Here.  
 15 THE CLERK: Robert Berens.  
 16 (No response.)  
 17 THE CLERK: Joe Enterline.  
 18 THE COURT: Joy, right?  
 19 THE CLERK: Oh, I'm sorry. Joy.  
 20 MS. ENTERLINE: Here.  
 21 THE CLERK: Marilyn Vukonich.  
 22 MS. VUKONICH: Here.  
 23 THE CLERK: Faye Lauren Fox.  
 24 (No response.)  
 25 THE CLERK: Nanette Blair.



1 MS. BLAIR: Here.  
 2 THE CLERK: Justin Moore.  
 3 (No response.)  
 4 THE COURT: All right. Thank you, Madam  
 5 Clerk.  
 6 I will ask the clerk to prepare show cause  
 7 orders for the jurors that did not appear. They will  
 8 have to be brought before the Court to explain if they  
 9 have good cause as to why they failed to honor the  
 10 summons.  
 11 All right. To serve as a juror each of you  
 12 must affirm that you will provide truthful answers  
 13 during the process of juror selection, so we do have to  
 14 administer an oath. So I'll ask that you all please  
 15 stand.  
 16 I'll ask the clerk of court to administer the  
 17 oath to the jury panel.  
 18 (Wherein, the prospective jury  
 19 panel was sworn.)  
 20 THE COURT: You can be seated. Thank you.  
 21 So the process of picking a jury we call in  
 22 the law "voir dire". Different people say it  
 23 differently, because none of us speak Latin very good  
 24 anymore, but it means "to speak the truth."  
 25 What it really is is a process of questioning

1 prospective jurors under oath to determine whether  
 2 they're qualified to serve. And that's not as specific  
 3 as you may think. It doesn't mean that some are  
 4 qualified and some aren't as individuals, but it does  
 5 mean, essentially, whether you can decide this case  
 6 fairly and whether you are an appropriate juror to sit  
 7 in judgment of this case.  
 8 There's no intention to embarrass anyone or  
 9 make anyone uncomfortable. I do recognize being asked  
 10 to answer questions in a room full of others can be  
 11 intimidating and scary. I was a trial lawyer for over  
 12 25 years and it always made me nervous. And a lot of  
 13 you just avoid like the plague anything like this. I do  
 14 understand that.  
 15 Some of the questions may seem personal.  
 16 It's not intended to be that way. But the questions are  
 17 to assist the lawyers to determine your qualifications  
 18 to sit on this case and no other reasons.  
 19 There was a short questionnaire that was sent  
 20 out with regards to some questions about different  
 21 people's -- whether they've been impacted by different  
 22 potential offenses or things of that nature or with  
 23 their family, things like that. That helps a lot so  
 24 that the lawyers have already kind of gathered that and  
 25 they might ask you a few more things about that.

1 I will say, though, it doesn't happen often,  
 2 but if there's a question asked and you really feel like  
 3 this is just too personal to answer here in open court,  
 4 you just need to let me know. And what we can do is at  
 5 an appropriate time is we can go back in my chambers and  
 6 have that conversation in private.  
 7 Again, the goal is to make a true  
 8 determination of each individual's qualifications to  
 9 serve as a juror, not to embarrass anyone or put you on  
 10 the spot in that manner.  
 11 So the way it works is because the State  
 12 bears the burden of proof, which we'll talk about a  
 13 little later, but the State bears the burden of proof in  
 14 a prosecution in a criminal case. So counsel from the  
 15 State will question you first, then defense counsel may  
 16 question you.  
 17 If counsel believes one of you should be  
 18 excused based on some specific issue and the nature of  
 19 this case, you may be what we called challenged for  
 20 cause. Then I, as the judge, must decide whether you  
 21 will be excused for that reason or not.  
 22 If a juror is excused in that manner they  
 23 will be replaced by another and the process will  
 24 continue until both parties have done what we call  
 25 "passed for cause" all the remaining jurors.

1 And then what we do is do what we call  
 2 peremptory challenges, and that's a challenge to which  
 3 no cause needs to be given. That will be done outside  
 4 of your presence with just the lawyers and myself and  
 5 that will be done until only 12 is left and an  
 6 alternate. Then we'll come back in here and the  
 7 remainder will be excused.  
 8 Please don't take either kind of challenge  
 9 personally. A juror that ends up serving today might be  
 10 excused in a different case and one excused today might  
 11 well be able to serve in a different case.  
 12 Is there anyone having trouble hearing me?  
 13 Okay. Good.  
 14 So as a trial juror -- and most of you have  
 15 already signed this, but just in case somebody wasn't  
 16 able to do it on your questionnaire, but I do have to  
 17 ask three questions. Is everybody here at least 18  
 18 years of age, a citizen of the United States, and a  
 19 resident of Carbon County for at least the proceeding 30  
 20 days?  
 21 (Wherein, prospective jurors  
 22 answer in the affirmative.)  
 23 THE COURT: All right. Is there anyone who  
 24 has been convicted of malfeasance in office or other  
 25 high crime or felony the sentence of which has not been

1 expired and your rights restored?

2 I'm seeing nobody. All right. You are all  
3 competent to sit as jurors in this case.

4 What we're going to do now is have the clerk  
5 call the first 27 potential jurors. When they call your  
6 name, you'll come forward and be seated in the jury box  
7 and then the chairs that are labeled, beginning -- well,  
8 just like they're numbered. One is closest to me, and  
9 down the line to 6, 7 and 14, here and there.

10 But I will tell the rest of you if your name  
11 isn't called you're not off the hook, because it's very  
12 important that you listen to the questions that are  
13 asked because if you end up called to fill a spot if  
14 someone is excused, generally the first question is,  
15 "Were you listening to all those other questions and do  
16 you have any comments or anything to add?"

17 Which -- well, it's just much more efficient  
18 for all of you. The goal is to get a jury seated and to  
19 get the rest of you on with your lives as soon as  
20 possible. But it is very important that the group in  
21 the back, even though you're not having questions  
22 addressed specifically to you, that you listen very  
23 carefully to the whole process.

24 Let's see. Let's go ahead and call the  
25 panel.

1 THE CLERK: Jo Anne Herem.

2 THE COURT: Just come up in the box, the  
3 chair closest to me.

4 THE CLERK: Sabina Giovetti, Elizabeth  
5 Sommerdorf, Brittney Dimich, Richard Myers, Samantha  
6 Anttila, Bradley Freeman, Elizabeth Korth, Amanda  
7 Powell, Debra Hull, Earl Zumbrun, Jody Klessens, Janice  
8 Ward, Lonnie Taylor, Denaye Kern, Megan Bauwens, Ryan  
9 Sweeney, Kerrilee Boggio, Jamie Krug, Cyndra Nelson,  
10 Robert Mensik, Michael Bohleen, James Maize, Stephanie  
11 Fletcher, Baylee Nicholson, Diane Giesick, Richard Lee.

12 THE COURT: Okay. So the prosecution and  
13 defense will each ask you questions related to service  
14 as a juror in this case. And again, to emphasize to  
15 those of you left, please listen carefully so you can  
16 respond to any questions if you do get called up.

17 As part of the jury-questioning the attorneys  
18 might discuss hypothetical facts, but you as a juror  
19 will be the finders of fact based on the testimony and  
20 evidence presented in this trial.

21 None Of the hypotheticals, if there are any,  
22 are meant to be applied or speculated on as facts during  
23 the deliberations. You'll deliberate solely on evidence  
24 that is provided to you in this case.

25 Also, during voir dire, counsel may discuss

1 certain legal concepts, as well. I'll tell you in this  
2 trial you will be instructed on what law to apply. It's  
3 Montana law that's passed by our legislature. I will  
4 read that to you and you will take it to the jury room  
5 in written form so you can refer to it so you know what  
6 law to apply.

7 So any legal concepts discussed during voir  
8 dire are just to aid you and the parties to discuss it,  
9 but the law will come from me.

10 Just a couple of more questions of the 27  
11 here. Has anyone heard or read anything about Mr.  
12 Polakoff, or this matter before us, this case, that  
13 leads you to have formed an opinion already in your mind  
14 that would not allow you to give Mr. Polakoff a fair  
15 trial?

16 MS. GIOVETTI: I have.

17 THE COURT: Okay. You are?

18 MS. GIOVETTI: Sabina Giovetti.

19 THE COURT: Okay. Without talking much about  
20 that, did you see -- what did you see or hear?

21 MS. GIOVETTI: I know Nathan Polakoff from --  
22 I baby-sat him when he was young. He attended daycare  
23 at my parents' home and just have had conversations  
24 because of that, I guess.

25 THE COURT: Okay. Very close knowledge of

1 the defendant?

2 MS. GIOVETTI: Yes.

3 THE COURT: Does that knowledge at this time  
4 make you believe you would be unable to serve as a  
5 neutral juror in this case?

6 MS. GIOVETTI: It does.

7 THE COURT: Counsel?

8 MR. NIXON: No objection to releasing Ms.  
9 Giovetti.

10 THE COURT: Mr. Snively.

11 MR. SNIVELY: No objection.

12 THE COURT: And that's the kind of  
13 relationship we do need to know about, a perfect  
14 example. Thank you for coming here today, but you're  
15 released from this trial.

16 MS. GIOVETTI: Am I allowed to leave?

17 THE COURT: Yes, you are.

18 THE COURT: We'll catch you next time.

19 Will the clerk please call the next juror.

20 THE CLERK: Jennifer Brown.

21 THE COURT: All right. If you can just come  
22 to Juror Number 2, please.

23 Yes?

24 MS. BROWN: Can I have a little bit more  
25 information about what the case would be about so I know

1 if I know about something?  
 2 THE COURT: You will get it.  
 3 MS. BROWN: Okay.  
 4 THE COURT: But as you sit right here now,  
 5 it's not ringing any bells, you're going to get past me  
 6 and the lawyers will be able to ask.  
 7 Anyone else? Okay.  
 8 Very good. One more thing and then I'm going  
 9 to let the lawyers start. It's helpful in a criminal  
 10 case, that a lot of concepts, in this room they're  
 11 somewhat formalistic, they're different, a lot of times  
 12 you'll have heard them in movies or read books or things  
 13 like that, but there are certain rules that must be  
 14 applied.  
 15 So I remind you of those right now before  
 16 voir dire so you can think about them as the lawyers can  
 17 talk.  
 18 An Information, that's a formal charging  
 19 document, has been filed charging the defendant here  
 20 with a couple of criminal offenses. The defendant has  
 21 entered pleas of not guilty. So the jurors' tasks in  
 22 this case will be to decide whether the defendant is  
 23 guilty or not guilty based on the evidence and the law  
 24 as stated in my instructions.  
 25 But these are some of the rules you must

1 follow to do that: The filing of the Information, that  
 2 formal charge, is just part of the legal process to  
 3 bring this case into court for trial and to notify the  
 4 defendant of the charges against him.  
 5 Neither the Information or the charges  
 6 contained in that Information is to be taken by you as  
 7 any indication of evidence or proof that the defendant  
 8 is guilty of any offense.  
 9 By a plea of not guilty the defendant denies  
 10 every allegation of each charge. The State of Montana  
 11 has the burden of proving the guilt of the defendant  
 12 beyond a reasonable doubt.  
 13 Proof beyond a reasonable doubt is proof of  
 14 such a convincing character that a reasonable person  
 15 would reply and act upon it in the most important of his  
 16 or her own affairs. Beyond a reasonable doubt does not  
 17 mean beyond any doubt or beyond a shadow of a doubt.  
 18 The defendant is presumed to be innocent of  
 19 the charges against him. This presumption remains with  
 20 him throughout every stage of the trial and during your  
 21 deliberations on the verdict.  
 22 It is not overcome unless from all the  
 23 evidence in the case you are convinced beyond a  
 24 reasonable doubt that the defendant is guilty. The  
 25 defendant is not required to prove his innocence or

1 present any evidence.  
 2 So are those the concepts and rules in a  
 3 criminal prosecution.  
 4 The prosecution may proceed with questioning  
 5 the panel.  
 6 MR. NIXON: Thank you, Your Honor.  
 7 Good morning, everyone. Thank you for  
 8 coming. I appreciate you making the effort to get here  
 9 this morning with the weather.  
 10 My name is Alex Nixon. I have the pleasure  
 11 of serving as your elected Carbon County attorney. I'm  
 12 joined by Mr. Spojka, he is the deputy county attorney.  
 13 And I guess I'm a creature of habit. Every  
 14 time I come into a trial, can't sleep, wake up very  
 15 early, drink an ungodly amount of coffee, put my lucky  
 16 tie on, have my little dogs on it, and I'm going to ask  
 17 the same question every time.  
 18 Would you please show me by raising your hand  
 19 who's happy to be here this morning?  
 20 (Wherein, a show of hands.)  
 21 MR. NIXON: Well, I'm glad to see a few  
 22 hands. There's a pretty good crowd so far. I don't  
 23 always get that good of a response.  
 24 I'm glad to hear that. And I can tell you  
 25 this is really probably one of the more enjoyable parts

1 of the trial, even though it may seem like I'm nervous,  
 2 because I am, because this is really my chance to talk  
 3 to you. And if you happen to see me walking by this  
 4 morning and maybe somebody nodded at me and I'm looking  
 5 at my shoes, it's because I'm not allowed to talk to  
 6 you.  
 7 As soon as we pick this jury, if it looks  
 8 like I'm pretending that you don't even exist, it is  
 9 because I have an ethical obligation not to look at  
 10 anybody and not to interact. So if you see Mr. Snively  
 11 or Mr. Spojka or I seemingly ignore people, it's just  
 12 because we have to.  
 13 Now, when the trial is over, and this goes  
 14 for anybody in the room, if somebody would like to come  
 15 in and talk, I'm happy to make time for you.  
 16 But during this -- this is my only time  
 17 during this trial to talk with you and so it's really  
 18 important to have a conversation and go back and forth.  
 19 I can tell you sometimes these are great  
 20 discussions. Sometimes they're not. And if you want to  
 21 see me kind of sweat and stammer, all you need to do is  
 22 just be quiet and sit on your hands and not participate,  
 23 because it's really hard.  
 24 Both Mr. Snively and I have really kind a  
 25 duty on behalf our clients, me, the State of Montana,

1 Mr. Snively, Mr. Polakoff, to really try to get down to  
2 who can be a fair and impartial juror.

3 **VOIR DIRE EXAMINATION**

4 **BY MR. NIXON:**

5 Q. Now, Mr. Myers, do you think everybody is a  
6 good fit for every particular trial?

7 A. No.

8 Q. People do have different biases, right?

9 A. Uh-huh.

10 Q. I'll use kind of a hokey example that a lot  
11 of lawyers use. What's your favorite kind of pie?

12 A. Chocolate.

13 Q. Okay. So if you're the judge of a pie  
14 contest and it's chocolate versus cherry, do you suppose  
15 you're always going have a little bit of a bias towards  
16 that chocolate pie?

17 A. Yeah, I hate cherry.

18 Q. Yeah. I know you seemed like a good guy.  
19 I'm not a cherry fan myself.

20 And that's not saying anything bad about  
21 anybody, but everybody has different prejudices,  
22 different likes. Everybody has got different work  
23 experiences.

24 Just like maybe not every actor is right for  
25 every movie, not every person is going to be a perfect

1 Now, neither one of those answers is really  
2 fair to the rest of the pool, is it?

3 We want somebody that's going to be able to  
4 be impartial and make up their own mind and fairly  
5 evaluate the facts. So please keep that in mind if you  
6 do have an answer for me that you do be careful about  
7 the other jurors.

8 Now, this is not going to be a pleasant sort  
9 of a charge we're dealing with today. Mr. Polakoff is  
10 charged with two counts of assaulting a minor.

11 Now, Mr. Sweeney, what do you think of when  
12 you hear about the offense assault on a minor?

13 A. It's not good.

14 Q. Okay. Now, I think there's -- I'm going to  
15 make an important distinction. Who here likes crimes?  
16 Nobody likes them, right?

17 But it's -- I'm not asking you to make your  
18 decision on what the charges are. What I'm really going  
19 to focus on is whether you can be fair and impartial.  
20 Because if we had to find somebody that was opened  
21 minded toward something like child abuse, that would be  
22 a pretty tough task, right?

23 So, Ms. Boggio, what do you think of when you  
24 hear about the offense of child abuse? I should say,  
25 assault on a minor?

1 fit for every jury because we do bring things to the  
2 table with us.

3 Would you agree with that, Ms. Kern?

4 A. Yes.

5 Q. I'm going to ask you some questions about  
6 different people, we're going to talk about the  
7 different jurors and we're going to talk about some  
8 different concepts. And I think that Ms. Giovetti did a  
9 good job about not really telling anybody else too much,  
10 because it's important that we let everybody else, you  
11 know, kind of make up their own mind. If somebody has a  
12 prejudice or knows something, we don't want to hear too  
13 much.

14 So please keep in mind when you're answering  
15 that you don't want to potentially bias anybody else on  
16 the jury pool.

17 For instance, if it was Stacy standing trial  
18 here today, and I'm asking and I say, "Ms. Anttila, what  
19 do you think of Stacy Fortune?" And you tell me, "She  
20 is the lyingest, crookedest person I have ever met."

21 THE COURT: She should take that as a  
22 compliment.

23 Q. (BY MR. NIXON) But then I ask Ms. Bauwens and  
24 she says, "Stacy is an angel. If she says anything, I'm  
25 going to one hundred percent believe it."

1 A. I guess it depends on what type of assault.  
2 Like I don't -- I would have to know like the age  
3 difference and the circumstances. And I mean, I don't  
4 think any kind of assault is good, but...

5 Q. And can you agree with me that right now  
6 there's not a reason in the world for you to think that  
7 Nathan Polakoff is guilty?

8 A. Yeah. I don't know him.

9 Q. Can everybody by a show of hands show me that  
10 they agree right now at this point in time that Nathan  
11 Polakoff is absolutely considered an innocent man?

(Wherein, a show of hands.)

13 Q. (BY MR. NIXON) Okay. Let's see. Mr. Maize,  
14 why is that?

15 A. I'm sorry?

16 Q. Why is that?

17 A. Why is that?

18 Q. Yeah.

19 A. Well, we don't know any of the details yet --  
20 I mean, he's obviously innocent right now.

21 Q. You haven't heard any evidence at all?

22 A. We haven't heard anything yet.

23 Q. Ms. Giesick, do you agree with that?

24 A. Yes. Innocent until proven guilty.

25 Q. That's a very important concept, isn't it?

1 Mr. Lee, do you have anything to offer in  
2 that regard?  
3 A. I believe the same way.  
4 Q. Ms. Nicholson?  
5 A. I guess I would be a little bit biased. I  
6 would want to know what type of assault we're talking  
7 about, physical assault, sexual assault. I'm a  
8 certified SANE nurse and so I've been on the other side  
9 examining assaulted victims. So I would say that I have  
10 a bias against that.  
11 Q. Sure. But -- and I very much appreciate the  
12 kind of work that you do. As a SANE nurse, don't you go  
13 into things and collect evidence and try to figure out  
14 what happened by examining the physical showing?  
15 A. Yes.  
16 Q. So really, on a day-to-day basis don't you  
17 try to evaluate things in an evidence-based manner?  
18 A. Correct.  
19 Q. And so you don't go in biased when you meet a  
20 victim, do you?  
21 A. Correct.  
22 Q. Do you think that even though you get to see  
23 some truly terrible things as a SANE nurse, that you can  
24 be fair here today?  
25 A. I'm not sure I can answer that.

1 THE COURT: I'm going to interject, Mr.  
2 Nixon. I think it's fair for the jury pool just to  
3 understand, there is no allegation of any sexual assault  
4 of the youth. This is not that kind of charge. I don't  
5 want there to be a misunderstanding.  
6 Go ahead, Mr. Nixon.  
7 MR. NIXON: Absolutely not. And if any of  
8 you thought that, I apologize. That was not the case.  
9 THE COURT: Sorry to interrupt. I just  
10 wanted to clear that up.  
11 Go ahead, Mr. Nixon.  
12 Q. (BY MR. NIXON) Ms. Nicholson, do you want a  
13 moment to think about that and I'll get back to you?  
14 A. Sure.  
15 Q. Well, Ms. Fletcher, you're next in line. Any  
16 thoughts on how things are going so far?  
17 A. Nope. I mean, I agree with he's innocent  
18 until proven guilty. So, yeah, I don't have anything to  
19 add.  
20 Q. Well, I've picked on Mr. Maize before. How  
21 about you, Mr. Bohleen?  
22 A. He's innocent until proven guilty. We  
23 haven't heard nothing yet.  
24 Q. Mr. Mensik, do you have anything to add?  
25 A. No.

1 Q. How about you, Ms. Nelson?  
2 A. I agree. Innocent until proven guilty.  
3 Q. I'm also going to talk about briefly here  
4 today the different witnesses that I'm going to call  
5 today and tomorrow in the course of the trial. And as I  
6 mention a witness's name, if you do know that person,  
7 would you please raise your hand and we'll have a brief  
8 discussion. You know, try to keep in mind that we want  
9 to make sure that we don't taint the rest of the jury.  
10 Okay?  
11 I anticipate that we're going to call today  
12 Ryann Self, formally Ryann Wells. Does anybody know  
13 Ryann?  
14 Okay. We'll also call former Red Lodge  
15 police detective and officer, Al Stuber. Does anybody  
16 know Al Stuber?  
17 (Wherein, a show of hands.)  
18 Q. (BY MR. NIXON) Let's start with you, Ms.  
19 Kern. How do you know Al Stuber?  
20 A. I worked with Al Stuber. I work for the City  
21 of Red Lodge, so I've worked with all of our police  
22 officers.  
23 Q. And do you think that in any way effects your  
24 ability to fairly analyze testimony and hear evidence?  
25 A. I don't believe so.

1 Q. Okay. Let's see. Mr. Klessens, you also  
2 know Al Stuber?  
3 A. Yeah. When I run the rodeo we had dealings  
4 with Al Stuber, you know, City stuff.  
5 Q. Is there anything that might effect your  
6 ability to be fair?  
7 A. I don't think so. I don't think so.  
8 Q. Okay. Let's see. Ms. Taylor I believe you  
9 also raised your hand?  
10 A. I just recall him from when I was working  
11 with DSVS, but nothing that stands out.  
12 Q. Nothing that would impact your ability to  
13 fairly serve here today?  
14 A. No.  
15 Q. Okay. Did I miss anybody that knew Mr.  
16 Stuber?  
17 I'm sorry. I missed you in the corner, Ms.  
18 Herem. How do you know Al Stuber?  
19 A. He and his wife are friends of ours.  
20 Q. Okay. Well, is it a close friendship?  
21 A. Yeah.  
22 Q. Okay. Do you think that would keep you from  
23 being fair or listening impartially to what he has to  
24 say on the stand?  
25 A. No. I'm willing to listen to what happened.

1 Q. He doesn't hold such sway over you that you  
2 couldn't possibly --  
3 A. No. No.  
4 Q. Okay. Thank you. All right. I think that's  
5 everybody that knew Al.  
6 PROSPECTIVE JUROR: There's one more.  
7 Q. (BY MR. NIXON) Oh, I'm sorry.  
8 A. He gave me a ticket one time. I ran a  
9 four-way stop accidentally and he nailed me. I have no  
10 problem with him.  
11 Q. So you can acknowledge, Mr. Zumbrun, he was  
12 just doing his job?  
13 A. Doing his job.  
14 Q. No hard feelings?  
15 A. No.  
16 Q. I'm going to go right into another former Red  
17 Lodge police sergeant and that's Matt Grieshop. Does  
18 anybody know Officer Grieshop.  
19 I'm going to ask you the same questions, Ms.  
20 Kern. Any problems knowing that Matt Grieshop might  
21 testify?  
22 A. No.  
23 Q. Okay. Does anybody know MATIC agent Jesse  
24 Thompson? He's out of Helena. It doesn't look like I  
25 see anybody that knows him.

1 How about Dr. Brad Fouts?  
2 (Wherein, a show of hands.)  
3 Q. (BY MR. NIXON) Okay. It looks like a lot of  
4 you may know Dr. Fouts.  
5 Ms. Giesick, do you know Dr. Fouts?  
6 A. Just because I work for the school system and  
7 I interact with his children and he comes to events and  
8 I just know him -- I just know him, because I talk to  
9 him at every game he takes his kids to.  
10 Q. Is having him testify going to effect you?  
11 A. No.  
12 Q. Okay. Great. Ms. Nicholson?  
13 A. I know Dr. Fouts because I'm a registered  
14 nurse, I work at Billings Beartooth Clinic and I've  
15 worked with him taking care of his patients.  
16 Q. And would that effect your ability to be  
17 impartial and listen to him testify?  
18 A. No.  
19 Q. Since I'm talking to you now, let's go back  
20 to our last subject. How are you feeling so far? Do  
21 you think you can put things aside?  
22 A. Probably.  
23 Q. Okay. And I anticipate that if you're  
24 selected for this jury that you would take an oath that  
25 would -- that you would agree to be fair and impartial

1 and determine the facts as you hear them and also follow  
2 the law as instructed by Judge Wald. Do you think that  
3 you could take that oath and follow it?  
4 A. Yes.  
5 Q. Let's see. I know a lot of folks that knew  
6 Dr. Fouts. Who is next here?  
7 Okay. Mr. Mensik.  
8 A. He's our family doctor. And I consider Dr.  
9 Fouts a friend, somebody that I would confide in.  
10 Q. And do you think you could be fair if you're  
11 listening to him testimony?  
12 A. I think I could.  
13 Q. There's nothing that would unduly influence  
14 you?  
15 A. No.  
16 Q. All right. Let's see. Ms. Taylor.  
17 A. Primary care physician.  
18 Q. And you've heard the other questions I've  
19 asked. Do you have any concerns?  
20 A. No.  
21 Q. Ms. Anttila?  
22 A. Yes.  
23 Q. How do you know Brad?  
24 A. Just recently he became a family doctor.  
25 Q. And do you think that would impact your

1 decisions here today if you are selected for the jury?  
2 A. No.  
3 Q. All right. Mr. Klessens?  
4 A. I've taken my parents in to see him. That's  
5 the only interaction that I've had with him.  
6 Q. No problems having him as a juror?  
7 A. No.  
8 Q. Let's see. Who is next?  
9 How do you know Dr. Fouts, Ms. Dimich?  
10 A. I've been to his workplace, he's been to mine  
11 and I used to work at the pharmacy, so I talked with him  
12 from time to time, work related.  
13 Q. Do you have any problems trying to  
14 impartially analyze what he might have to say?  
15 A. No.  
16 Q. Okay. Up in the corner. Mr. Freeman?  
17 A. I work at Beartooth Billings Clinic and he  
18 has ER privileges and I've just had minimal interaction  
19 with him there, actually.  
20 Q. Nothing that would cause you any concern?  
21 A. No.  
22 Q. Okay. Ms. Herem.  
23 A. He's just my husband's primary care doctor.  
24 Q. And does that cause you any grief?  
25 A. I'm not sure I've met him in person,

1 actually.  
 2 Q. Oh, okay. The next person that the State is  
 3 going to call is Professor Antoinette Laskey, M.D., from  
 4 the University of Utah. Does anybody know Dr. Laskey?  
 5 Okay. Does anybody know Physician Assistant  
 6 Doug Whitehead?  
 7 (Wherein, a show of hands.)  
 8 Q. (BY MR. NIXON) Okay. Another popular guy  
 9 here.  
 10 Well, I'll swing over to this side again.  
 11 Ms. Giesick, I'll put you in the hot seat.  
 12 A. Yeah, he used to be my -- I would go see him,  
 13 he used to be my doctor, to do whatever. I have no  
 14 problem.  
 15 Q. Okay. Ms. Nicholson?  
 16 A. I've worked with him before.  
 17 Q. Okay. Would that cause you any concern if he  
 18 were to testify?  
 19 A. No.  
 20 Q. Okay. And who is next here for who knows Mr.  
 21 Whitehead? Okay.  
 22 (Wherein, a show of hands.)  
 23 Q. (BY MR. NIXON) I'll get back to you, Ms.  
 24 Boggio. How do you know him?  
 25 A. He was my primary care doctor until he moved.

1 Q. And does that cause you any concern?  
 2 A. No.  
 3 Q. How about you, Mr. Sweeney?  
 4 A. I went to high school with his son, Josh  
 5 Whitehead. And I'm on the fire department and he comes  
 6 to the fire department to train us on new techniques and  
 7 stuff.  
 8 Q. Does that cause you any concern?  
 9 A. No.  
 10 Q. And let's see. Ms. Anttila, do you know him,  
 11 as well?  
 12 A. I do. I coached his daughter and taught at  
 13 the school that the daughter and son attended.  
 14 Q. Does that create any problems for you?  
 15 A. No.  
 16 Q. Okay. I know there's a bunch of you here.  
 17 Let's see. I haven't talked to you, Ms. Ward. How do  
 18 you know Doug Whitehead?  
 19 A. The same deal. He's -- his daughter goes to  
 20 the school that my kids do and she's actually in the  
 21 same class as my senior this year. And just knowing  
 22 that he is a doctor and he comes to most of the  
 23 emergencies when athletes are hurt, he usually helps  
 24 with them.  
 25 Q. And Mr. Klessens?

1 A. He stitched my finger back on.  
 2 Q. How did he do?  
 3 A. Good. It's still there.  
 4 Q. Do you think you could be fair considering  
 5 that?  
 6 A. I can be fair.  
 7 Q. Ms. Ward, I'm not sure I asked you. Is that  
 8 going to bother you at all if you're selected to be a  
 9 jury?  
 10 A. No.  
 11 Q. Right. I know I'm still missing quite a few  
 12 of you. Okay. Mr. Zumbrun.  
 13 A. No. Because he was medical doctor, too.  
 14 Q. Any problems with that?  
 15 A. No.  
 16 Q. All right. Ms. Dimich?  
 17 A. Same phone conversations, when I worked at  
 18 this pharmacy.  
 19 Q. Any problems still?  
 20 A. No.  
 21 Q. I'll start with Mr. Freeman.  
 22 A. Yep, I worked for with him for a number of  
 23 years, but no problems.  
 24 Q. Okay. And back to you, Ms. Kern?  
 25 A. He saw my son medically. No issues.

1 Q. No issues. Okay. Great.  
 2 I think I got everybody. Am I missing  
 3 anybody yet?  
 4 Okay. How about EMT Amy Hyfield? Does  
 5 anybody know Amy?  
 6 How about paramedic Joel Anthes? Does  
 7 anybody know him?  
 8 How about Bonnie Rothe, who is a supervisor  
 9 at the Department of Public Health and Human Services  
 10 Child Protection Service? Does anybody know Bonnie?  
 11 Does anyone know Jennifer Cormier? She lives  
 12 in Billings.  
 13 How about Katherine Kolpin, also from  
 14 Billings?  
 15 How about Diane Goedde? Does anybody know  
 16 her?  
 17 It looks like you might be one of the  
 18 popularity awards so far, Ms. Herem. How do you know  
 19 Diane?  
 20 A. I sort of used to work with her in my job.  
 21 Q. What job was that?  
 22 A. I worked at the Yellowstone County attorneys  
 23 office.  
 24 Q. And do you have any concern about her?  
 25 A. No.

1 Q. If you were to hear her testify, you could  
2 still be fair and impartial?  
3 A. Yes.  
4 Q. And how about Mark Polakoff? Does anybody  
5 know him?  
6 Okay. How about Nathan Polakoff? Does  
7 anybody know the defendant, Nathan Polakoff?  
8 MR. NIXON: And I did see a hand back there.  
9 I appreciate everybody listening, if you get called up  
10 I'll ask you to kind of recap all the questions to see  
11 if you have any concerns. So thank you very much. I  
12 will talk with you later if you're called up.  
13 Q. (BY MR. NIXON) And does anybody know Robert  
14 Snively? He practices law in Hardin and around this  
15 area.  
16 How about Robert Spojka? Okay. You again.  
17 How do you know Bob?  
18 A. He was my co-worker at the office, the  
19 Yellowstone County attorneys.  
20 Q. Is there going to be any problem listening to  
21 Bob and giving him too much import?  
22 A. No.  
23 Q. Okay. So you can still be fair?  
24 A. I believe I can.  
25 Q. And how about myself? Does anybody here know

1 me?  
2 Well, I see Mr. Mensik raised his hand. How  
3 do you know me?  
4 A. You're my neighbor.  
5 Q. Okay.  
6 A. And I can see you out my bedroom window. And  
7 I talked to you once before about a piece of property.  
8 Q. And it's -- you know, unfortunately, I guess  
9 we don't know each other very well, do we?  
10 A. No.  
11 Q. Our houses aren't --  
12 A. Your dogs bark and we blame it on the  
13 coyotes. That's it.  
14 Q. All right. Is there anything about being my  
15 neighbor that would keep you from being fair here today?  
16 A. I don't believe so.  
17 Q. Okay. And who's next? Lonnie. How do we  
18 know each other?  
19 A. Not work directly, but when I worked at DSVS  
20 and also when I worked as a contract paralegal, that we  
21 had interactions.  
22 Q. You worked for Steve Thuesen here in town,  
23 right?  
24 A. And Ray Kuntz. And I had contract work with  
25 him, yes.

1 Q. Is there any reason that would cause you any  
2 difficulty serving as a juror?  
3 A. No.  
4 Q. And who is next? Mr. Klessens.  
5 A. We dealt with a neighboring litigation case  
6 five to seven years ago. I don't have a problem with  
7 you.  
8 Q. Ms. Anttila.  
9 A. We just, like, conversed about a student that  
10 I had, but nothing that would effect that.  
11 Q. Anything about that that would cause you  
12 concern listening to me yammer on here today?  
13 A. No.  
14 Q. Anybody else? Ms. Bauwens?  
15 A. I testified in a case a few years back for  
16 you.  
17 Q. Okay. And hopefully, it wasn't a terrible  
18 experience?  
19 A. Well, it wasn't great. Nerve racking.  
20 Q. And anything about that that would keep you  
21 from being fair here today?  
22 A. No.  
23 Q. And that was a bad case. What type of case  
24 was it?  
25 A. Murder.

1 Q. And is there anybody else? I'm going to go  
2 ahead and follow up with you right away, Ms. Bauwens,  
3 since you did have a chance to testify. What was that  
4 experience like?  
5 A. It was very nerve racking. It really was  
6 very nerve racking, because I was sitting right there  
7 and he was sitting right there. It was kind of freaky.  
8 Q. So based on that experience, do you think  
9 you'd have a pretty good idea what somebody that has to  
10 sit in that seat goes through?  
11 A. Yeah.  
12 Q. And what would you expect them to be like?  
13 A. Nervous. Very, very nervous.  
14 Q. Does that seem understandable?  
15 A. Yes.  
16 Q. You may even be nervous now talking in front  
17 of all of these people.  
18 A. For sure. For sure.  
19 Q. Okay. Well, can everybody agree that it  
20 would be a tough situation to go ahead and sit in that  
21 witness stand?  
22 Ms. Korth, I haven't picked on you yet.  
23 A. No.  
24 Q. Am I saying your name correctly?  
25 A. You are.



1 Q. Okay. Do you think it would be hard to tell  
2 a room full of strangers about something that was  
3 terrifying or scary?  
4 A. Yes. Very hard.  
5 Q. Okay. How would you expect somebody that had  
6 to relive something like that to act on the stand?  
7 A. Probably very nervous, might be emotional.  
8 Q. Do you think that would be understandable?  
9 A. Yes.  
10 Q. Would you, in fact, kind of expect it?  
11 A. Yes.  
12 Q. Okay. Ms. Powell, would you agree with that?  
13 A. Yeah, absolutely.  
14 Q. Let's see. I don't think I have picked on  
15 you much, Ms. Sommerdorf. What are you thinking so far?  
16 A. I don't know. I agree with everything that's  
17 been said. I definitely think somebody up there would  
18 be nervous. I don't know any of the people.  
19 Q. Okay. And do you think you could be a fair  
20 juror here today?  
21 A. I think so.  
22 Q. Okay. You probably know what's coming, Ms.  
23 Brown. I haven't picked on you yet, either.  
24 What do you think about what we've talked  
25 about so far?

1 A. Oh, so far all good. You know, I do believe  
2 in innocence until proven guilty. And I guarantee it  
3 would be hard for people to sit up here and relive  
4 things that were not pleasant.  
5 Q. And I'll just open it up. From what you've  
6 listened to so far, does that beg any questions from  
7 anybody here in the jury panel so far?  
8 You're always welcome, if something pops up,  
9 if you have a question for me, get my attention.  
10 Now this is, as I said, going to be kind of a  
11 difficult subject matter. I've asked you a little bit  
12 about what people think about assault with a minor --  
13 assault on a minor.  
14 How many of you have children?  
15 (Wherein, a show of hands.)  
16 Q. (BY MR. NIXON) Okay. It looks like most of  
17 you. Now, does having a child in any way prejudice any  
18 of you hearing about a child being abused?  
19 I see you agreeing, Ms. Korth. I'll get  
20 right back to you here again. Why is that?  
21 A. I think I can still remain impartial even  
22 though I do have my own child.  
23 Q. It's a very different thing. It doesn't  
24 involve your child, does it?  
25 A. Right.

1 Q. So you can stay open minded?  
2 A. Yes.  
3 Q. Now, sometimes when there's cases that are  
4 tough to deal with emotionally, like for instance, you  
5 know somebody that had a loved one murdered or suffered  
6 a terrible crime or somebody had been the victim of a  
7 crime, like, say maybe in a DUI trial there is a juror  
8 that a family member was killed by a DUI driver. It's  
9 hard to be opened minded.  
10 I don't want to embarrass anybody, but  
11 because this is a child abuse issue, if any of you think  
12 that you need to address Mr. Snively and I and the judge  
13 separately, please get our attention. I don't want to  
14 embarrass anybody if there's something that is very  
15 emotional, maybe hard to share with the group, but I do  
16 want you to know that is an option.  
17 We're going to go ahead and add a little bit  
18 more detail now.  
19 Mr. Polakoff is charged with assaulting a  
20 nine-month-old boy.  
21 Does that change anybody's perspective? Can  
22 you still remain open minded? Mr. Krug?  
23 A. Yes.  
24 Q. I haven't talked to you much anyway. You've  
25 got some concerns?

1 A. I do.  
2 Q. Okay. Without saying too much, do you think  
3 you can be fair and impartial here today?  
4 A. You know, I probably can't. I may not have  
5 kids, but I have taken care of a lot of kids and at that  
6 age they don't have the ability to defend themselves and  
7 take care of themselves and there's really no right for  
8 that.  
9 Q. Okay. Now, you certainly would think that if  
10 somebody was guilty, right?  
11 A. Right.  
12 Q. And I believe you told me earlier that you  
13 agreed that Mr. Polakoff isn't guilty right now?  
14 A. True.  
15 Q. We talked a little bit earlier about how it  
16 is important to separate the concept versus reality.  
17 Like I said --  
18 A. True.  
19 Q. -- I sure hope if I ask a show of hands who  
20 is in favor of assaulting a nine year old [sic], I'm not  
21 going to see any. Does that seem fair?  
22 A. Yes.  
23 Q. But when you think of it that way, do you  
24 think you can still remain fair here today?  
25 A. The best that I can do is try.

1 Q. Well, that's all I can ask now. I gave Ms.  
2 Nicholson a chance to think about her answer for awhile  
3 do you want to stew on that for a little bit?

4 A. Yes.

5 Q. Were there any other show of hands besides  
6 Ms. Krug?

7 I guess one thing I'd forgot to talk to you  
8 about earlier as you look around the jury panel, do you  
9 know -- do any of you know each other?

10 Okay. Are there any situations where you  
11 have a close friendship or an intense  
12 hatred for each other?

13 Or can you -- as everybody looks around, do  
14 you see a group of people that you think you can work  
15 with?

16 Okay. Nobody has any concerns looking around  
17 thinking I might have to spend the next few days with  
18 this person? Okay.

19 Well, if that changes, please let me know.

20 Now, we started talking a little bit about  
21 the charged offenses. And Judge Wald has talked about  
22 it earlier, that he'll be in charge of instructing you  
23 on the law.

24 Does anybody have any problem with relying on  
25 Judge Wald to instruct you on the law and following it?

1 have any problems here today?

2 A. No.

3 Q. Okay. Anybody else that served before and  
4 think they would have any issues? Okay.

5 How many of you here today watch crime-type  
6 shows?

7 (Wherein, a show of hands.)

8 Q. (BY MR. NIXON) A lot of you. Now, in these  
9 shows there's a lot of times there's somebody right on  
10 the spot and they've got DNA evidence and they have  
11 fingerprints and they have video and everything.  
12 Knowing that you might enjoy shows like that, does  
13 anybody expect all of those things here today?

14 Can we agree television may take some  
15 liberties?

16 Mr. Myers, would you have any concern if I  
17 was to tell you that the State doesn't know exactly how  
18 the nine-month-old boy's injuries occurred? Does that  
19 cause you pause?

20 A. No. I'm assuming this is why we're here to  
21 find out and find out who is responsible.

22 Q. Okay. Ms. Powell, what is it a  
23 nine-month-old child can't do?

24 A. A lot of things.

25 Q. That's right. Can he take the witness stand

1 No concerns?

2 And conceivably, somebody could have a  
3 problem with how the law is written. If you didn't  
4 agree with exactly what the law said, could you still  
5 rely on Judge Wald to tell you what needs to be done  
6 legally?

7 No concerns there?

8 Let's give by a show of hands here --

9 Well, I think for the first thing I'm going  
10 to pick on Ms. Hull. I don't think I've picked on you.  
11 You've kind of been hiding back there.

12 A. Yes.

13 Q. What do you think so far?

14 A. Just being interested so far. And hopefully  
15 I can be fair and listen to everything.

16 Q. No concerns so far?

17 A. Well, a lot of concerns, but hopefully I can  
18 be fair.

19 Q. Okay. So far you think you can be a fair and  
20 impartial juror?

21 A. I think so.

22 Q. Now, has anybody served on a jury before?

23 (Wherein, a show of hands.)

24 Q. (BY MR. NIXON) Quite a few, again. Mr. Lee,  
25 based on your prior experience, do you think you would

1 and tell the jury what happened?

2 A. Absolutely not.

3 Q. And, Ms. Nelson -- I kind of lost my place  
4 here a second -- do you have any concerns with the State  
5 not being able to say exactly how the injuries were  
6 inflicted?

7 A. No, I don't. I think that a lot of cases are  
8 probably like that because you're not in the room when  
9 it happened.

10 Q. Mr. Maize, do you think that most serious  
11 crimes take place with lots of witnesses?

12 A. Probably not.

13 Q. It would make law enforcement jobs a lot  
14 easier, wouldn't it?

15 A. Boy, I'll say.

16 Q. If you have a serious crime -- we'll go back  
17 to Ms. Bauwens' case -- he didn't do it -- there wasn't  
18 a murder in front of a lot of people, was there?

19 A. No.

20 Q. And had to draw evidence from a lot of  
21 different people and a lot of different ways in that  
22 trial, right?

23 A. Yes.

24 Q. And so kind of to reiterate that question,  
25 does anybody have any concerns that there may be some

1 mysteries because it does involve a very young child?  
 2       Anybody going to have a problem, assuming the  
 3 State's going to be able to prove its case, deciding  
 4 that the defendant's guilty just because we don't have  
 5 DNA? Just because there's no eye witnesses? No  
 6 videotape?  
 7       That does bring us to a little bit different  
 8 concept. Do any of you have any problem with the notion  
 9 that you're, to a degree, standing in judgment of  
 10 somebody else?  
 11       Who here has heard, "Judge not lest you be  
 12 judged"?  
 13       No problems for anybody?  
 14       We've talked a little bit about how it might  
 15 be very stressful to take the stand. Do you think  
 16 sometimes that just like the jurors we talked about,  
 17 some witnesses may have a bit of a bias?  
 18       And maybe I'll ask another question here.  
 19 How many of you have teen-age children?  
 20       (Wherein, a show of hands.)  
 21       Q. (BY MR. NIXON) Ms. Ward, have you ever been  
 22 lied to?  
 23       A. Yes.  
 24       Q. Not by your children, of course?  
 25       A. Of course.

1       Q. To a degree, when your child -- assuming they  
 2 ever got in trouble -- you evaluate that story every  
 3 time you talk to your child, don't you?  
 4       A. Yes.  
 5       Q. What do you look for if you think your child  
 6 is not being truthful with you?  
 7       A. Just kind of how he's talking, how he's  
 8 trying to prove his case so hard that he doesn't want me  
 9 to investigate it anymore, kind of prove that he's being  
 10 truthful even though I have that mom feeling that I know  
 11 there's something missing.  
 12       Q. Okay.  
 13       A. And that's that mom intuition, I guess.  
 14       Q. Has anybody else here had similar  
 15 experiences?  
 16       I see Ms. Korth and Mr. Brown shaking their  
 17 heads.  
 18       Ms. Brown, why don't I start with you?  
 19       A. Oh, I think most parents can tell if their  
 20 child is not honest with them. They're mannerisms, you  
 21 know, you get to know them and you can tell when they're  
 22 stretching the truth. And eventually, you can get them  
 23 to face it and fess up.  
 24       Q. It's not just children, is it? To a degree,  
 25 doesn't everybody do that when they interact with

1 people?  
 2       A. Boy, nowadays you probably can't do that too  
 3 much anymore. Accuse someone of anything.  
 4       Q. Ms. Korth, do you have anything to add about  
 5 that?  
 6       A. Yeah, I think it's definitely easy for  
 7 someone to tell when their child is lying to them  
 8 because they know them so well. I think when it comes  
 9 to a stranger that could be a little bit more difficult.  
 10 I certainly think we see similar mannerisms in people  
 11 when they're untruthful.  
 12       Q. True. And we're talking about a case that  
 13 happened almost three years ago. How do you think that  
 14 passage of time effects people's memories?  
 15       Ms. Kern, do you think it's normal to expect  
 16 little inconsistencies?  
 17       A. I guess it depends on who it would relate to.  
 18 If somebody was directly affected they might remember  
 19 things more clearly than just somebody from the public  
 20 who might have read or come across something.  
 21       Q. I'll ask you a personal question. Are you  
 22 married, Ms. Kern?  
 23       A. I am.  
 24       Q. Do you remember getting married fairly well?  
 25       A. Yes.

1       Q. What did you have breakfast that morning?  
 2       A. I have no idea.  
 3       Q. That is kind of the way people's memories  
 4 work, right? Everybody agree with that?  
 5       You remember the important things, don't you?  
 6       I'm pretty sure I got married, I couldn't  
 7 tell you much else about it. I do remember the date.  
 8       Mr. Myers, what do you think?  
 9       A. Well, sure, people, you know, depending on  
 10 how important it is, it sticks with them, you know,  
 11 longer. So if it effects them personally, they're going  
 12 to remember facts a little better than somebody that was  
 13 just standing there watching, I guess.  
 14       Q. Can we agree just because Ms. Kern doesn't  
 15 remember what she had for breakfast doesn't mean she  
 16 didn't get married?  
 17       You remember the big things, right? And  
 18 little details, if you forget those, it doesn't  
 19 necessarily affected somebody's truthfulness or  
 20 veracity, right?  
 21       And that's what you're going to be asked here  
 22 to do as a juror, is you're going to be asked to assess  
 23 people's testimony and decide who you find credible,  
 24 decide who you find unbelievable.  
 25       Does that cause anybody pause? Any concerns

1 there?  
 2 We'll talk a little bit now about -- and I'm  
 3 almost done, I promise. I will promise I'll try to move  
 4 things along as quickly as I can during this trial. But  
 5 I do appreciate your time, and you do have a promise  
 6 from Mr. Spoja and I that we'll do everything that we  
 7 can to keep this moving along, even though it may not  
 8 seem like it.  
 9 Who here has heard of the term "reasonable  
 10 doubt"?  
 11 (Wherein, a show of hands.)  
 12 Q. (BY MR. NIXON) Everybody, right? What does  
 13 that concept mean to you, Mr. Krug?  
 14 A. Reasonable doubt?  
 15 Q. Beyond a reasonable doubt.  
 16 A. To have to be proven that it's not true. I  
 17 don't know.  
 18 Q. Ms. Dimich, what do you think when you hear  
 19 proof beyond a reasonable doubt?  
 20 A. I would say based on, like, the evidence  
 21 shown -- I don't know how to explain it, I guess.  
 22 Q. And does everybody understand that it's Bob's  
 23 job and my job during this trial to prove to you beyond  
 24 a reasonable doubt that Mr. Polakoff committed these  
 25 crimes or you have to decide that he's not guilty?

1 Does everybody agree with that? Okay.  
 2 And if you at the end of the trial decide  
 3 that we have proved both of the charges beyond a  
 4 reasonable doubt you have to find Mr. Polakoff guilty.  
 5 Does that seem fair?  
 6 Okay. Let's talk about that concept a little  
 7 bit now. It says beyond reasonable doubt. What does  
 8 reasonable mean to you, Mr. Bohleen?  
 9 A. Reasonable. Wow. We have to have all the  
 10 facts, in this situation.  
 11 Q. And it also means your doubt can't be  
 12 unreasonable?  
 13 A. You have to know for positive that what we  
 14 heard today was real and not real.  
 15 Q. Ms. Fletcher, is anything ever a hundred  
 16 percent?  
 17 A. Nope. Never a hundred percent.  
 18 Q. And my guess is you'll hear something to the  
 19 effect that beyond a reasonable doubt is the type of  
 20 information that you would trust to make your most  
 21 important life decisions. Does that clear anything up  
 22 at all, Mr. Krug?  
 23 A. Yeah.  
 24 Q. Ms. Boggio, if you were about to jump out of  
 25 an airplane with a parachute would you take a pretty

1 close look at it?  
 2 A. I've done it.  
 3 Q. Good for you.  
 4 A. Just close your eyes and go. I mean, yeah,  
 5 your fight and flight kicks in.  
 6 Q. When you look at that parachute you're  
 7 checking everything twice and you're making sure  
 8 everything is in order, right?  
 9 A. I didn't check it. I was young.  
 10 Q. Somebody was?  
 11 A. Yeah.  
 12 Q. What's your expectation when you pull that  
 13 ripcord?  
 14 A. I didn't have to pull it, either. It just  
 15 pulled when I went out.  
 16 Q. Let's talk about the next time you jump out  
 17 of a plane.  
 18 A. If I did it now?  
 19 Q. Let's say you're --  
 20 A. That was like when I was 10, 12.  
 21 Q. You're looking at that parachute and you're  
 22 going to check it pretty carefully, right?  
 23 A. I would have some reasonable doubt. Yeah, I  
 24 would be checking it.  
 25 Q. But when you make the decision to jump out

1 it's because you fully believe it's going to open when  
 2 you pull that rip cord, right?  
 3 A. Yes.  
 4 Q. It doesn't mean it always will, there's also  
 5 that odd chance, right?  
 6 Do you think it's still reasonable to trust  
 7 your careful inquiry, your diligence when you do make  
 8 that jump?  
 9 A. Can you repeat that?  
 10 Q. Do you think it's --  
 11 A. I'm going through my head going, "Would I do  
 12 that now?"  
 13 Q. Do you think it's reasonable if you are  
 14 diligent and you make careful inquiry and you know what  
 15 you're doing, that it is reasonable to rely on that?  
 16 A. Uh-huh.  
 17 Q. That's really the kind of the same thing.  
 18 Mr. Mensik, we had a brief discussion about  
 19 dogs here earlier.  
 20 A. Yes.  
 21 Q. Still not sure it's my dogs. Do you have a  
 22 pet or have you had a pet ever?  
 23 A. Yes.  
 24 Q. And have you had to make the tough decision  
 25 to put your pet down?

1 A. Yes.  
 2 Q. And it's not a decision you want to make  
 3 willy nilly is it?  
 4 A. No, it isn't.  
 5 Q. So how do you approach that problem?  
 6 A. Get all the facts, listened to the vet's  
 7 advise, what the chances were, and then made my  
 8 decision.  
 9 Q. That was a decision based on the  
 10 determination that it was beyond a reasonable doubt that  
 11 your dog was not going to improve, right?  
 12 A. Correct.  
 13 Q. Sorry to bring that up. I've had to go  
 14 through that more than a few times. It's not very  
 15 pleasant.  
 16 Ms. Nelson, I haven't picked on you for in  
 17 awhile. Any thoughts or concerns so far?  
 18 A. No.  
 19 Q. Okay. Please keep in mind that Stacy has to  
 20 record every word. Can I get you to talk a little bit  
 21 louder?  
 22 A. There's no problem. You guys defined  
 23 everything that we needed to do and I'm fine with that.  
 24 Q. Well, I appreciate your time. I'm wrapping  
 25 it up here. I just want to ask one final question.

1 If the State succeeds in proving that Nathan  
 2 Polakoff did in fact assault a nine-year-old [sic] boy  
 3 on two different occasions, can you --  
 4 A. Nine years or nine months?  
 5 Q. Nine months old. -- can you come back with a  
 6 guilty verdict? Can I see a show of hands?  
 7 (Wherein, a show of hands.)  
 8 MR. NIXON: Thank you, Judge. I'm going to  
 9 pass the jury.  
 10 THE COURT: Okay. Thank you, Mr. Nixon.  
 11 So my job is to try to balance your comforts  
 12 with efficiency, because a lot of you are going to get  
 13 to go home, but it's been a long morning, so I'm going  
 14 to take a break. I would kind of like to keep going,  
 15 but I really think a lot of us have been here at least  
 16 two hours. This building doesn't have a lot of  
 17 bathrooms, but you can't leave the building property.  
 18 So before the defense questions you, we're  
 19 going to take a break. And it's very important right  
 20 now, I'm going to read you an advisement, but when the  
 21 break is over, you'll come right back here. The 27 will  
 22 be right where they are and the rest of the gallery will  
 23 be there.  
 24 So I've got to make sure that you do  
 25 understand certain conditions. Everything we do is very

1 important and has to be done properly or we risk,  
 2 essentially, a mistake that makes all the hard work of  
 3 everybody go down the drain and we have to do everything  
 4 again. So that's a little formalistic and a little  
 5 irritating at times, but that's why.  
 6 So I need to tell you that a jury has not  
 7 been selected. Any member of the panel can still be  
 8 selected at this point as a juror in this matter.  
 9 So during this break, I just need you to  
 10 consider that it will be your duty if you're chosen to  
 11 base your decision only on the evidence presented to you  
 12 in this courtroom. So during the trial you'll be  
 13 repeatedly advised to keep yourself separate from any  
 14 other source of information that's possibly could be --  
 15 could be made.  
 16 So it is your duty not to talk about the  
 17 substance of the case in any way, among yourselves or  
 18 with anyone else, during this break. Don't look at or  
 19 access any information. It's so easy now to Google  
 20 something, you can't do it, don't do it. It will  
 21 jeopardize this entire process.  
 22 Your decision if you're a juror has to be  
 23 based on evidence that is brought in this room according  
 24 to the Rules of Evidence and the law.  
 25 So even during this break, please -- you can

1 talk about anything you want except the substance at  
 2 issue. You can talk about the process, of being here,  
 3 but just don't talk about speculation about the case  
 4 itself, not with each other. And clearly, as I should  
 5 have said, and I usually do, the lawyers can't even look  
 6 at you.  
 7 I've told them they can't and it's the only  
 8 way that we know that we can be fair.  
 9 So during this break, again, don't Google,  
 10 don't look at any sort of newspaper, Facebook, anything.  
 11 Don't talk about that. If you need to call a loved one  
 12 and say, "I'm still here," that's fine, but don't talk  
 13 about what we talked about in this process.  
 14 All right? We don't have -- don't have  
 15 anything influenced by anything else. I'm going to  
 16 shoot for 25 till, because like I said, there's not very  
 17 many restrooms. If it takes a little longer, I'll work  
 18 with you and we'll start right with the defense voir  
 19 dire.  
 20 We'll be in recess until 25 till.  
 21 (Wherein, a recess was taken.)  
 22 (Wherein, the following took  
 23 place in chambers.)  
 24 THE COURT: We're on the record in chambers.  
 25 We're in the middle of voir dire and we have taken a

1 break after the State passed the panel for cause, before  
2 the defense voir dire.

3 During the voir dire -- or I mean, during the  
4 break a juror approached the bailiff with an issue.  
5 Appropriately, the bailiff brought that to my attention.  
6 Since the jury's on already break, we felt like the best  
7 way to deal with it is to have her come in here and  
8 express to all of you the issue and we see where we go  
9 from here.

10 (Pause.)

11 THE COURT: Hi. There's a chair. Are you  
12 Ms. Ward?

13 MS. WARD: I am.

14 THE COURT: Here I go again, let the record  
15 reflect that Juror No. 13, Janice Ward is in chambers  
16 with the lawyers and the defendant is present, as well.

17 Ms. Ward, again, a lot of formality, very  
18 cautious, and since we were on a break, rather than -- I  
19 was informed that you may have a question or something.  
20 Rather than going in there and if it raises an issue  
21 that we have to come in here anyway, I just thought,  
22 heck, we'll just bring you in right now and ask you.

23 MS. WARD: That's kind of why I waited.

24 THE COURT: If you could, could you please  
25 let me know your concern that you wish to express about

1 of the child?

2 MS. WARD: I have no idea.

3 THE COURT: Oh, you just remembered it.

4 MR. NIXON: I know I passed the jury, but  
5 would it be okay if I inquired, Mr. Snively?

6 THE COURT: I believe, as far as I'm  
7 concerned, we need to make this inquiry and you  
8 certainly can, Mr. Nixon.

9 MR. NIXON: Okay.

10 THE COURT: Do you have a problem, Mr.  
11 Snively?

12 MR. SNIVELY: No.

13 MR. NIXON: So I believe your Howard's wife,  
14 is that correct?

15 MS. WARD: I am.

16 MR. NIXON: Okay. And I have dealt with Mr.  
17 Ward before.

18 MS. WARD: Oh.

19 MR. NIXON: In a good way.

20 MS. WARD: Okay. Okay.

21 MR. NIXON: And you mentioned this has  
22 something to do with the Squire Lounge; is that right?

23 MS. WARD: Yes. My kiddos did wrestling with  
24 Central High and so I would drive the wrestlers from  
25 Joliet to the co-op with Central High. And I made it my

1 serving as a juror in this case.

2 MS. WARD: As you were speaking I was kind of  
3 putting things together. When you said nine-month-old,  
4 and I'm an establishment owner in the Carbon County  
5 area, I own three establishments, and two of them are  
6 bar and casinos and one of them is an ice cream place.

7 And when this happened they had started a  
8 fundraiser from the Squire Lounge and we had pots  
9 distributed to our businesses. And I, in the last year,  
10 have made it my goal to get this money to the right  
11 person, because it's been sitting in our safe since it  
12 has been at our establishment, which was there prior to  
13 our ownership of this establishment.

14 THE COURT: Can I stop you? It was kind of a  
15 donation fund?

16 MS. WARD: Yes.

17 THE COURT: It was specific to the child that  
18 is involved in this trial?

19 MS. WARD: It had the picture of the child on  
20 the front of it.

21 THE COURT: And you know that's the child  
22 that is the alleged victim in this case?

23 MS. WARD: I do not know that but I'm putting  
24 things together and wondering if --

25 THE COURT: What's the name? What's the name

1 mission to finally figure out who the rightful hands is  
2 for this jar of money to go to. And it had said on the  
3 front of it "Squire Lounge."

4 And so in February, I went there and asked  
5 the bartender about this situation, and that I had this  
6 thing of money and would it be the right spot to drop it  
7 with the right -- would it get in the rightful hands if  
8 I brought it here, because it had been sitting in my  
9 safe at my bar.

10 And they said yes. The new owner said yes  
11 and gave me her phone number and we talked back and  
12 forth. And I finally dropped it off to the gentleman  
13 that was behind the bar, and I think he was very close  
14 within the whole fundraising thing, because he was very  
15 appreciative and very nice and heart-warming.

16 MR. NIXON: I can tell the Court that the  
17 mother of the victim and the grandmother of the victim  
18 did, in fact, work at Squire Lounge.

19 THE COURT: Oh.

20 MR. NIXON: So I guess the next question is  
21 you didn't know the child or the family at all?

22 MS. WARD: No. My other concern is that I  
23 have five boys and I've lost my 17-year-old son and I  
24 don't know if I'm fully, fully grief past that, where I  
25 think I can be impartial, but I don't know one hundred

1 percent after losing my child three years ago if I can  
2 hear and see images that would not make that one hundred  
3 percent honest.

4 MR. NIXON: Okay. Do you believe because of  
5 your situation you did very much sympathize with the  
6 plight of this young boy that was injured, the  
7 nine-month-old?

8 MS. WARD: I -- I don't know. As a mom -- as  
9 a grieving mom still I don't know if I could.

10 MR. NIXON: So you don't think emotionally  
11 that you could withstand this process?

12 MS. WARD: I don't think so.

13 MR. NIXON: I have no objection to releasing  
14 Ms. Ward.

15 THE COURT: Do you have any questions or  
16 what's your position on her release?

17 MR. SNIVELY: Judge, I agree. I think she  
18 should be excused.

19 THE COURT: Yes. Ms. Ward, I appreciate --  
20 and I know how sometimes as you go and you start  
21 thinking issues arose that didn't come up during voir  
22 dire originally and I appreciate you bringing this to  
23 our attention.

24 I don't think this is the right case for you  
25 to sit on at this time and I think Mr. Polakoff deserves

1 she heard that automatically disqualifies her and then  
2 we'll go automatically to you.

3 MR. NIXON: 15, 20 minutes.

4 THE COURT: Are you guys ready to go?

5 MR. NIXON: I am, Judge. And I can't imagine  
6 that I would have more than a few questions.

7 (Off the record.)

8 (Wherein, the following took  
9 place in open court.)

10 THE BAILIFF: All rise.

11 THE COURT: Please be seated. Thank you.

12 We're back on the record in DC 19-17, State  
13 very Nathan Polakoff.

14 Counsel is present. The defendant is  
15 present.

16 Do you stipulate that the panel is present?

17 MR. NIXON: I do, Your Honor.

18 THE COURT: Mr. Snively?

19 MR. SNIVELY: Yes, Your Honor.

20 THE COURT: We'll start right up again. Just  
21 for the record, an issue arose with regards to Ms. Ward,  
22 who is in seat number 13, and I did release her, so I'll  
23 ask the clerk to call the next juror.

24 THE CLERK: Christopher Ewing.

25 THE COURT: Mr. Ewing, if you wouldn't mind

1 to have a juror that isn't -- is able to just focus on  
2 the intellectual challenge of the case. And you just  
3 are not in that position right now and you did exactly  
4 the right thing.

5 So I am going to release you. I don't know  
6 if you -- do you have your stuff by your chair or back  
7 in the --

8 MS. WARD: I was in the second chair with my  
9 coat and my purse and my bottled water is under my  
10 chair.

11 THE COURT: Do you want to go in there or I  
12 can get the bailiff? It doesn't matter.

13 Why don't you just go get it and you can be  
14 free to leave.

15 MS. WARD: Okay. Thank you.

16 THE COURT: Thanks again for expressing this.  
17 My condolences for you.

18 MS. WARD: Thank you.

19 THE COURT: Counsel, obviously, we'll call  
20 the next juror.

21 What I'm going to do, Mr. Nixon, is I'm going  
22 to open your voir dire again just very briefly.

23 MR. NIXON: Oh, okay.

24 THE COURT: Because of the new -- I mean, the  
25 new person, just to make sure there's not anything that

1 taking seat number 13. Thank you.

2 Now, because of that, even though the State  
3 has passed the panel for pause, because Mr. Ewing was  
4 back there listening carefully to everything, I'm going  
5 to let Mr. Nixon step back up, ask a couple of questions  
6 and then we'll turn it over to the defense.

7 Mr. Nixon.

8 MR. NIXON: Thank you, Judge.

9 **VOIR DIRE EXAMINATION (CONT.)**

10 **BY MR. NIXON:**

11 Q. Good morning, Mr. Ewing.

12 A. Good morning.

13 Q. Well, hopefully I didn't put you to sleep  
14 back there.

15 A. No.

16 Q. Were you able to hear all the questions and  
17 kind of follow our conversations so far?

18 A. Yes.

19 Q. Do you have any sort of concerns at this  
20 point in time?

21 A. No, sir.

22 Q. Do you have any personal knowledge of THE  
23 witnesses named off by the State?

24 A. Just Dr. Fouts. He's my personal doctor.  
25 Other than that, no, sir.

1 Q. And that doesn't cause you any concern about  
2 being a juror here today?  
3 A. No, sir.  
4 Q. And do you have any issues with sitting and  
5 impartially taking in evidence and potentially rendering  
6 a verdict if asked?  
7 A. No, sir.  
8 Q. Is there anything else that you think we need  
9 to know based on my previous conversation with the jury  
10 panel?  
11 A. No, I just agreed with almost everybody else,  
12 innocent until proven guilty. That's why we're here.  
13 Q. You don't have any problems with the notion  
14 of proof beyond a reasonable doubt?  
15 A. No, sir.  
16 Q. If the State proves its case, you believe  
17 that you could find the defendant, Nathan Polakoff,  
18 guilty?  
19 A. Yes, sir.  
20 MR. NIXON: No further questions. The State  
21 passes the jury for cause.  
22 THE COURT: Thank you.  
23 Mr. Snively, do you wish the question the  
24 panel?  
25 MR. SNIVELY: I do, Judge. Thank you.

1 **VOIR DIRE EXAMINATION**  
2 **BY MR. SNIVELY:**  
3 Jurors, as the judge has already told you,  
4 I'm Robert Snively and I have a practice here in Hardin,  
5 Montana. And I'm here today representing Nathan  
6 Polakoff during this trial.  
7 And I appreciate, as does Mr. Polakoff, your  
8 attention in answering the questions that are presented  
9 to you here today so that we can select a fair and  
10 impartial jury to hear the evidence.  
11 And I'd like to just follow up with -- start  
12 out with the point that was made earlier. Ms. Kern, you  
13 had initially said you wanted to know some more  
14 information that you thought maybe there was something.  
15 Based on what you've heard since then, is  
16 that still a concern for you?  
17 A. No, I don't think so.  
18 Q. All right. And you work for the City of Red  
19 Lodge in human resources; is that correct?  
20 A. Yes.  
21 Q. Do you in that position interact -- well, let  
22 me rephrase. Are you human resources for the police  
23 department, as well?  
24 A. Yes.  
25 Q. And do you interact with them in that

1 capacity as needed?  
2 A. Yes, sir.  
3 Q. And based on that interaction with them in  
4 that capacity, does that cause you to be more believable  
5 of a police officer than not?  
6 A. I believe so.  
7 Q. All right. And in that capacity, I'm  
8 assuming that both Al Stuber and Matt Grieshop you had  
9 personally interacted with them as an HR person?  
10 A. Very little. They are night officers, so I  
11 don't deal with them very often. So my interactions  
12 with them are more limited than daytime officers.  
13 Q. Okay. But in your capacity, you're not  
14 involved in any of their reports or anything like that,  
15 it's the traditional HR of benefits and dealing with  
16 those kind of issues mostly, right?  
17 A. Yes, sir.  
18 Q. All right. Thank you. Now, I expect some of  
19 the evidence that you're going to see and hear is going  
20 to be emotional. Do you as a potential juror agree that  
21 you can set the emotion aside and decide this case on  
22 the facts and not the emotion of a witness or the  
23 reaction -- the emotional reaction that you may have to  
24 evidence?  
25 Every juror is comfortable with that?

1 Ms. Krug, you seem hesitant to agree with  
2 that statement. Is it from your earlier statement that  
3 you made about being a nine-month-old, you have  
4 difficulty with?  
5 A. No. I think I can take the emotion out of  
6 it. I think I'll be okay.  
7 Q. And I'm not trying to put you on the spot.  
8 A. I know.  
9 Q. I'm trying to make sure -- and let me put the  
10 question to you a different way. If you were sitting  
11 accused of a crime, would you want a juror with your  
12 mindset -- and I'm not saying right or wrong -- but with  
13 your mindset being on your jury?  
14 A. Probably not.  
15 Q. And is it because you have some beliefs that  
16 are pretty hard and fast that are going to be difficult  
17 for you to overcome?  
18 A. Yeah, I do. But I also have some -- I  
19 thought about it and I think I can be biased and listen  
20 to the evidence, because as it has happened in the past  
21 to people that I know that were misaccused of the same  
22 thing and so, hopefully, I can get by that.  
23 Q. When you say you've known people who have  
24 been misaccused, is that someone close to you?  
25 A. An ex-co-worker that we do hang out a lot



1 with and talk with and stuff, yes.  
 2 Q. So in the capacity of a co-worker?  
 3 A. Yes.  
 4 Q. You were fairly close to that person?  
 5 A. Yes.  
 6 Q. And was that trial here?  
 7 A. I don't -- no. And I don't think it ever  
 8 went to trial. It was she was questioned and...  
 9 Q. Was the incident in Carbon County?  
 10 A. No.  
 11 Q. Was it in Montana?  
 12 A. I do not believe so.  
 13 Q. Okay. I want to make sure I understood your  
 14 comment earlier is do you think you would be biased or  
 15 that you would not be biased?  
 16 A. Would not.  
 17 Q. Would not. Okay. Thank you.  
 18 Do you all agree that part of a job as a  
 19 juror is you're going to have to weigh and decide the  
 20 credibility of various witnesses and in what they say  
 21 and how they interact?  
 22 Do you all agree that part of that evaluation  
 23 is your experiences and your common sense in evaluating  
 24 somebody?  
 25 Is everyone comfortable doing that?

1 And do you also agree that one of the factors  
 2 that goes into that is whether the statements by that  
 3 person have been consistent or not at different times,  
 4 if they've given statements at various times is what  
 5 that consistency is or isn't, would be part of the  
 6 equation that you would take into account?  
 7 Everyone's agreeable with that. Nobody has  
 8 any issue with that being one of the factors that you  
 9 would take in?  
 10 Because the State had asked you -- I mean,  
 11 Mr. Polakoff sits here with the presumption of  
 12 innocence. So Mr. Sweeney, if you were asked to vote  
 13 right now as to whether Mr. Polakoff was innocent or  
 14 guilty, what would you vote?  
 15 A. I'd have to see more.  
 16 Q. I'm sorry?  
 17 A. I'd have to see more evidence.  
 18 Q. All right. But as he sits here right now?  
 19 A. As of now, he is innocent.  
 20 Q. And does everyone else agree with that, at  
 21 this point he is innocent because there is no evidence  
 22 to show anything else at this point?  
 23 And do you agree that stays with him  
 24 throughout this trial?  
 25 A. Yes.

1 Q. And do all of you agree that he and myself,  
 2 as his attorney, we never have a burden to prove  
 3 anything to the jury? That the burden of proof never  
 4 shifts to us.  
 5 And, Mr. Myers, are you comfortable with that  
 6 concept?  
 7 A. Sure.  
 8 Q. And that if the State fails to prove their  
 9 case beyond a reasonable doubt, Mr. Myers, do you agree  
 10 that the verdict would have to be not guilty?  
 11 A. Yes.  
 12 Q. And do you agree that also would go as to  
 13 each charge or count that the judge instructs you on?  
 14 A. Yes.  
 15 Q. If you were to believe one count to be true  
 16 but not another or hadn't been proven beyond a  
 17 reasonable doubt, as to the one that you didn't believe  
 18 was proven beyond a reasonable doubt you'd have to find  
 19 not guilty?  
 20 A. Correct.  
 21 Q. Does everyone else understand that concept  
 22 and are comfortable with that concept?  
 23 That proof beyond a reasonable doubt is for  
 24 the entire decision that you have to make. It's not  
 25 certain parts that have to be proof beyond a reasonable

1 doubt.  
 2 And the judge will instruct you as to what it  
 3 is for each count that has to be proven beyond a  
 4 reasonable doubt.  
 5 Does anyone have an issue with the idea -- I  
 6 expect he's going to tell you there are four different  
 7 parts that have to be proven for one count. That if one  
 8 of those four is not proven beyond a reasonable doubt  
 9 you have to return a not guilty verdict. Even if you  
 10 believe the other three parts have been proven beyond a  
 11 reasonable doubt.  
 12 Is everyone comfortable with that concept, as  
 13 well?  
 14 I'm asking you to assume. It's Bohleen,  
 15 right?  
 16 A. Bohleen, yes.  
 17 Q. Bohleen, I'm sorry. I'm asking you to assume  
 18 that the judge is going to give you an instruction with  
 19 four elements.  
 20 A. Yes.  
 21 Q. I understand that comes later and it's how  
 22 the judge tells you, but if there are multiple parts to  
 23 it, do you have a problem with the concept of that?  
 24 A. I have no problem if that's the law, that's  
 25 the law. So, yeah, I have no problem with doing what's

1 right.  
 2 Q. Okay. And you agree that you can follow  
 3 whatever the judge instructs you as to the law, even if  
 4 you have an idea that, well, I thought it should have  
 5 been this way, it may be different than what the judge  
 6 says, you're able to follow the judge's instruction?  
 7 A. Yes.  
 8 Q. Does everyone else agree with that? Even if  
 9 you have a perception, if you will, that the law was a  
 10 different way than what the judge instructs you, that  
 11 you can follow the instruction you're given for this  
 12 case? And everyone agrees with that?  
 13 A. I have a --  
 14 Q. Hold on a second. You're?  
 15 A. Maize.  
 16 Q. Maize.  
 17 A. I have a little trouble hearing you. I mean,  
 18 I can -- if I one hundred percent concentrate, I can  
 19 hear you but it's so marginal that -- I know it's hard  
 20 to tell somebody to --  
 21 Q. No.  
 22 A. -- change their normal speaking voice.  
 23 THE COURT: I will. Speak up, Mr. Snively.  
 24 MR. SNIVELY: Yes.  
 25 A. I would be concerned during the trial that I

1 missed something that is important. Do you know?  
 2 Q. And I appreciate you telling me that. Is  
 3 this better that I talk a little louder? Is this a  
 4 better --  
 5 THE COURT: Let me address that, Mr. Snively.  
 6 Mr. Maize, do you have a little bit of  
 7 trouble with your hearing itself?  
 8 MR. MAIZE: A little bit, yes.  
 9 THE COURT: Well, are they working?  
 10 MR. MAIZE: If it's only me, don't...  
 11 THE COURT: No, no. We have two different  
 12 things. Once we get to putting in evidence, every  
 13 witness will have one of these and they will have a  
 14 mike. And actually, we could have Mr. Snively speak  
 15 into that.  
 16 MR. MAIZE: That's okay. I can deal with it.  
 17 I was just concerned.  
 18 THE COURT: The other thing is we do have --  
 19 they're kind of a hearing aid that is actually hooked to  
 20 the mikes and they've been very helpful for people that  
 21 had hearing issues. I've had jurors -- two in one jury  
 22 once that couldn't hear very well at all, but with these  
 23 -- they're kind of a little bit bulky, but they are tied  
 24 right to the system and they were able to deliberate.  
 25 MR. MAIZE: I think I'll be okay now that

1 he's speaking up. He trails off at the end of the  
 2 sentence sometimes.  
 3 THE COURT: I just want you to be able to  
 4 serve if necessary. Let me know on that. We'll make  
 5 Mr. Snively speak up.  
 6 Go ahead.  
 7 MR. SNIVELY: Thank you, Judge. If I trail  
 8 off again, stop me, please.  
 9 MR. MAIZE: I will. I'll tell him. He's  
 10 really good at it. Speak up. Thanks a lot.  
 11 MR. SNIVELY: Thank you. Does anyone else  
 12 having trouble hearing me? The same thing would apply  
 13 to anyone, because if you are...  
 14 THE COURT: The people in the gallery are.  
 15 MR. SNIVELY: I'll try to speak louder so  
 16 everyone can hear better.  
 17 THE COURT: There's folks in the gallery that  
 18 aren't hearing very well. It's hard when you're  
 19 speaking when your voice doesn't carry that well.  
 20 It is important that you're able to hear.  
 21 And not -- you know everyone, so there's no  
 22 misunderstandings.  
 23 MR. SNIVELY: Does that pick me up at all?  
 24 THE COURT: You might just hold it.  
 25 MR. SNIVELY: Do you want me to hold it?

1 THE COURT: However.  
 2 MR. SNIVELY: We'll try it with the mike.  
 3 MR. MAIZE: That is awesome.  
 4 MR. SNIVELY: If I get too loud, somebody  
 5 give me a signal.  
 6 THE COURT: Very good. Thank you, Mr.  
 7 Snively.  
 8 MR. SNIVELY: Thank you, Judge.  
 9 MS. BOGGIO: Maybe you can do a little  
 10 karaoke first and we can make sure we can hear you  
 11 really well.  
 12 MR. SNIVELY: I don't think the judge would  
 13 tolerate that because I would be so far off key nobody  
 14 would want to hear that. I can assure you of that.  
 15 Q. (BY MR. SNIVELY) Do you all agree that if I  
 16 ask a question that you find offensive during this trial  
 17 or to a witness that you will not hold that against Mr.  
 18 Polakoff, and that you would hold with me?  
 19 If I ask something that you thought was  
 20 inappropriate, you know, and I understand the judge  
 21 would stop me as well, but if you believed it was and  
 22 the judge didn't stop it, do you all agree that you  
 23 would not hold that against Mr. Polakoff?  
 24 Affirmative response from all members.  
 25 Do you also understand that I may ask

1 follow-up questions and not take the first answer that a  
2 witness gives, to try to point out an inconsistency or  
3 something that they have said in this trial, and that do  
4 you all of you agree, I mean, that's part of my job is  
5 to seek the truth and get the statement from the witness  
6 not just their first response. Is everyone comfortable  
7 with that concept, as well?

8 Is there anything -- well, several of you  
9 have indicated that you know various witnesses and I  
10 think the conclusion by everyone was nobody was that  
11 close to any witness that they couldn't fairly and  
12 impartially evaluate that witness's testimony, even if  
13 there was, for example, Dr. Fouts had been your doctor  
14 or your family doctor. Is that true from everyone?

15 And, Ms. Herem, you worked at the county  
16 attorney's office in Yellowstone County, correct?

17 A. Yes.

18 Q. Were you a paralegal for them?

19 A. Well, legal assistant.

20 Q. Legal assistant. Working in the criminal  
21 area?

22 A. For most of the time.

23 Q. Okay. And when you say "most of the time," I  
24 mean, my understanding is you retired from there?

25 A. Yes.

1 Q. So 20-plus years?

2 A. Actually, I could retire after 17.

3 Q. Oh, okay. So 17 years you worked mostly in  
4 criminal matters?

5 A. Mostly, yes. And then in another department.

6 Q. Were some of those responsibilities helping  
7 attorneys prepare for trial?

8 A. No.

9 Q. Did you draft pleadings or help draft  
10 pleadings?

11 A. At the very beginning, I used to type up  
12 Informations, but that was at the very beginning.  
13 I was --

14 Q. I'm sorry to cut you off. But maybe you  
15 could tell me in the last, say, four years that you  
16 worked there, kind of what your area of work entailed,  
17 just in a general sense.

18 A. Well, the last two, three years, I was  
19 helping with sanities. And before that, property  
20 returns.

21 Q. Okay. And my understanding is the way the  
22 office is structured is you work for a number of  
23 attorneys?

24 A. Yeah, all of them.

25 Q. All right. And is there anything about that

1 experience having worked in a prosecution office that  
2 would cause you to lean towards the State because of  
3 that background?

4 A. I would hope not. I don't think so.

5 Q. Do you think you can set that aside and be  
6 objective with what you hear today?

7 A. I do.

8 Q. All right. When did you retire from that  
9 office?

10 A. 2016.

11 Q. Okay. Is there any juror who has something  
12 in their background that would cause you to say you're  
13 not comfortable sitting here as a juror with what you  
14 know about this case at this point?

15 A negative answer from all the jurors.

16 Ms. Michaelson -- or Nicholson, I'm sorry.  
17 You look nonresponsive to that. Would you agree with  
18 that or...

19 A. I shook my head. I went like that.

20 Q. Okay. I'm just checking to make sure. Is  
21 there anything in your personal life that is going on  
22 that would draw your attention away from being able to  
23 devote it here at this case while you're at the  
24 courtroom?

25 Do you all agree -- and I think you've

1 already answered this, but I'm asking again -- that you  
2 can be objective and evaluate the testimony that you  
3 hear in the courtroom in reaching a decision following  
4 the law the judge gives you and holding the State to  
5 their proof beyond a reasonable doubt?

6 And everyone is comfortable with that  
7 concept?

8 Thank you. I don't have any other questions.

9 THE COURT: Do you pass the panel for cause?

10 MR. SNIVELY: I do, Judge.

11 THE COURT: All right. So now the parties  
12 are going to complete the process of selecting a jury.  
13 By necessity, as I alluded to before, that process is  
14 completed outside of your presence. So in a moment the  
15 parties and I will go back into chambers and complete  
16 that.

17 You don't have to sit here, kind of like  
18 during the break, but any one of you could still remain  
19 and potentially be a juror, so don't leave the  
20 courthouse premises.

21 Those of you who are going to be picked are  
22 going to get to know that -- my wife always says my  
23 estimates of time are never right. Thirty minutes for  
24 everything always takes two hours. This should take no  
25 more than 30 minutes. I know that is a long time and it

1 may be shorter. That's the only way we can do it.  
 2 Once we do that, we'll come back, we'll have  
 3 you not come back to these seats, we'll have you all  
 4 back where you were at the beginning or somewhere in the  
 5 gallery and at that time then the juror members will be  
 6 called forward.

7 So I know we're -- well, it's actually okay,  
 8 so timewise. I've got to -- again, I'm not insulting  
 9 your intelligence, it is very important, though, that I  
 10 make sure that you know how important it is not to  
 11 discuss the case or do any sort of independent  
 12 investigation or anything like that at this time as  
 13 again a jury has not been selected.

14 During this break, it is your duty not to  
 15 talk about the substance of this case in any way, among  
 16 yourselves or with anyone else, or look at or access any  
 17 information about the case in any way, including  
 18 electronic devices or phones or form or express any  
 19 opinion on the case until the case is submitted to you.  
 20 And again, don't call your loved ones and  
 21 visit with them about the substance of this case. You  
 22 can tell them where we are in the process and that is  
 23 just fine.

24 We'll be in recess. Again, I'm going to say  
 25 until a quarter till, so you have a realistic view. If

1 Boggio; 19, Jamie Krug; 20, Cyndra Nelson; 21, Robert  
 2 Mensik; 22, Michael Bohleen; 23, James Maize; 24,  
 3 Stephanie Fletcher; 25, Baylee Nicholson; 26, Diane  
 4 Giesick; 27, Richard Lee.

5 Is that right?

6 MR. NIXON: Yes, Judge.

7 THE COURT: How about you, Mr. Snively?

8 MR. SNIVELY: Mine matches that, Judge.

9 THE COURT: Okay. So we'll do the peremptory  
 10 challenges of the first 24 and get a jury and then allow  
 11 each of you -- of the 25 through 27, you can each have  
 12 one, leaving our alternate. Okay?

13 MR. SNIVELY: Right. So 25, 26, 27, whoever  
 14 isn't struck of those three becomes the alternate?

15 THE COURT: Yes. So we'll do our first six  
 16 of the first 24. Go ahead, Mr. Nixon. What's the  
 17 State's first?

18 MR. NIXON: Ryan Michael Sweeney.

19 THE COURT: What number?

20 MR. NIXON: 17. Do you want seat number or  
 21 juror number?

22 THE COURT: Juror number.

23 MR. NIXON: His juror number is 18 sitting in  
 24 seat 17.

25 THE COURT: That helps. Okay.

1 it gets done quicker, it's not a very big building and  
 2 we'll be able to round you up and at that time the jury  
 3 will be picked and the remainder of the panel will be  
 4 released.

5 We'll be in recess.

6 (Wherein, a recess was taken.)

7 (Wherein, the following took  
 8 place in chambers.)

9 THE COURT: We're on the record, we're in  
 10 chambers.

11 Counsel for the State is present.

12 Counsel for the defendant is present. The  
 13 defendant is present.

14 The parties have both passed the jurors for  
 15 cause. We're about to do peremptory challenges.

16 Before we do, I'm just going to -- please  
 17 listen carefully, because I'm going to run through who I  
 18 have for the first 27. All right?

19 Number 1, Jo Anne Herem; number 2, Jennifer  
 20 Brown; number 3, Elizabeth Sommerdorf; number 4,  
 21 Brittney Dimich; 5, Richard Myers; 6, Samantha Anttila;  
 22 7, Brad Freeman; 8, Elizabeth Korth; 9, Amanda Powell;  
 23 10, Debra Hull; 11, Earl Zumbrun; 12, Jody Klessens; 13,  
 24 Christopher Ewing; 14, Lonnie Taylor; 15, Denaye Kern;  
 25 16, Megan Bauwens; 17, Ryan Sweeney; 18, Kerrilee

1 Mr. Snively, defendant's first?

2 MR. SNIVELY: We would strike Mr. Freeman,  
 3 who is juror number 8 sitting in seat number 7.

4 THE COURT: Freeman?

5 MR. SNIVELY: Yes.

6 THE COURT: Okay. What's the State's second?

7 MR. NIXON: Juror number 31 seated in seat 2,  
 8 Jennifer Brown.

9 THE COURT: Thank you. Mr. Snively.

10 MR. SNIVELY: Strike juror number 23 sitting  
 11 in seat 21, Robert Mensik.

12 THE COURT: Robert Mensik?

13 MR. SNIVELY: Yes.

14 THE COURT: State's third?

15 MR. NIXON: Strike juror number 10 sitting in  
 16 seat 9, Amanda Powell.

17 THE COURT: Mr. Snively, defense's third.

18 MR. SNIVELY: We'd strike Ms. Kern, who is  
 19 juror number 6 sitting in -- no, I'm sorry -- juror  
 20 number 16 sitting in seat 15.

21 THE COURT: Denaye Kern.

22 Okay. And State's 4th?

23 MR. NIXON: Juror number 5 seated in seat  
 24 five, Richard Myers.

25 THE COURT: Defendant's 4th.

1 MR. SNIVELY: Jody Klessens, who is juror 13,  
2 sitting in seat 12.  
3 THE COURT: State's 5th.  
4 MR. NIXON: Juror number 11 seated in seat  
5 10, Debra Hull.  
6 THE COURT: Mr. Snively, defense's fifth?  
7 MR. SNIVELY: We would strike Megan Bauwens,  
8 who is juror number 17 seated in seat 16.  
9 THE COURT: Okay. And final for the State.  
10 MR. NIXON: Juror number 22 seated in seat  
11 20, Cyndra Nelson.  
12 THE COURT: Okay. And Mr. Snively, defense?  
13 MR. SNIVELY: Judge, if I could have just a  
14 moment?  
15 THE COURT: Sure.  
16 MR. SNIVELY: Judge, we would strike juror  
17 number 15 Lonnie Taylor sitting in seat 14.  
18 THE COURT: And I believe that leaves us our  
19 12. Now, for our alternate, we have Baylee Nicholson,  
20 25; Diane Giesick, 26; Richard Lee, 27.  
21 Mr. Nixon.  
22 MR. NIXON: Juror number 30 sitting in seat  
23 27, Richard Lee.  
24 THE COURT: Mr. Snively.  
25 MR. SNIVELY: I would strike juror number 27,

1 THE CLERK: He'll be in 7.  
2 MR. NIXON: 32 goes to 7.  
3 THE COURT: Okay. Counsel, before we go in  
4 there, looking at our clock, so my thought -- my thought  
5 is we'll call the jurors, swear them, release the rest  
6 of the panel, and I'll go ahead and provide an overview  
7 of the trial and read State's 1 through 5 and then  
8 release for lunch.  
9 MR. NIXON: Please, Your Honor.  
10 THE COURT: Sounds good?  
11 MR. SNIVELY: Yes.  
12 THE COURT: Otherwise, we've been here too  
13 long. We'll start right with openings. Please help me  
14 with my math when I try to figure an hour and a 15. The  
15 last time I gave them like ten minutes.  
16 Anything else anyone wants to place on the  
17 record before we go back and call in a jury?  
18 MR. NIXON: No, thank you, Your Honor.  
19 MR. SNIVELY: No, sir.  
20 THE COURT: Okay. You guys have a chance use  
21 restroom or whatever we need so we're ready to go?  
22 Let's go on in there and call and swear in  
23 the jury.  
24 (Wherein, off the record.)  
25 (Wherein, the following took

1 Baylee Nicholson sitting in seat 25.  
2 THE COURT: Which leaves Diane Giesick as our  
3 alternate, correct?  
4 MR. NIXON: Correct.  
5 MR. SNIVELY: Yes, sir.  
6 THE COURT: Let's make sure we're on the same  
7 page.  
8 It would appear that we have Jo Anne Herem,  
9 Elizabeth Sommerdorf, Brittney Dimich, Samantha Anttila,  
10 Elizabeth Korth, Earl Zumbrun, Christopher Ewing,  
11 Kerrilee Boggio, Jamie Krug, Michael Bohleen, James  
12 Maize, and Stephanie Fletcher.  
13 MR. NIXON: That's what I have, Your Honor.  
14 MR. SNIVELY: I agree.  
15 THE COURT: And our alternate is Diane  
16 Giesick, correct?  
17 MR. SNIVELY: Yes, sir.  
18 MR. NIXON: Yes.  
19 THE CLERK: Which number was Christopher  
20 Ewing?  
21 THE COURT: Well, he was way back there and  
22 he came in.  
23 MR. NIXON: 32. He was in seat 13 and --  
24 THE COURT: I apologize. I was talking about  
25 where he was after.

1 place in open court.)  
2 THE BAILIFF: All rise.  
3 THE COURT: Please be seated. Thank you.  
4 We're back on the record in DC 19-17, State  
5 v. Polakoff.  
6 The attorneys are -- I'll make sure everybody  
7 is here. Very good.  
8 The attorneys are present for the State. The  
9 attorney for the defendant is present. The defendant is  
10 present.  
11 The members of the jury panel are present and  
12 now seated in the gallery.  
13 At this time I'll ask for the clerk of court  
14 to please call the list of the jury panel of 12 and the  
15 one alternate. And so if your name is called, then just  
16 forget about where you were sitting before, we'll start  
17 just like we did before, it's self-explanatory maybe,  
18 number 1 will come and sit at number 1, on down the line  
19 to 13.  
20 THE CLERK: Jo Anne Herem, Elizabeth  
21 Sommerdorf, Brittney Dimich, Samantha Anttila, Elizabeth  
22 Korth, Earl Zumbrun, Christopher Ewing, Kerrilee Boggio,  
23 Jamie Krug, Michael Bohleen, James Maize, Stephanie  
24 Fletcher, and Diane Giesick.  
25 THE COURT: All right. Do the parties

1 stipulate that these individuals are the chosen jury  
 2 panel and the alternate?  
 3 MR. NIXON: The State so stipulates.  
 4 MR. SNIVELY: The defense stipulates.  
 5 THE COURT: All right. I'll ask then, Ms.  
 6 Loyning, will you please provide the oath to the jurors  
 7 and alternate.  
 8 Please raise your right hand.  
 9 (Wherein, the jury panel was  
 10 sworn.)  
 11 THE COURT: All right. Be seated. Thanks.  
 12 I'm going to let you sit for a minute and I'm  
 13 going to address these individuals who are still here.  
 14 I just want to thank you. You've been here a  
 15 long time this morning, I'm not going to go on and on.  
 16 I do appreciate the fact that you answered the call for  
 17 jury service.  
 18 Obviously, you've not been selected on this  
 19 jury, but it's so valuable and necessary to the system  
 20 to have you all here for this process so that the pool  
 21 reflects a true cross-section of the community. That is  
 22 what everybody deserves and is entitled to when it comes  
 23 to a request for a jury trial.  
 24 Again, the importance of this process, I  
 25 can't overstate it. Simply, we can't have the rule of

1 it's a witness that might be a 30-minute witness just so  
 2 you can get a better feel for the testimony. I'll be  
 3 weighing that.  
 4 For that reason, I do run by the clock as a  
 5 guideline, but try to make the presentation of evidence  
 6 paramount. But again, it won't go long -- if we were to  
 7 get the case to you guys in a late afternoon or  
 8 something, at that time, it could be that you would be  
 9 here later deliberating. We'll talk about that later.  
 10 As you've already kind of figured out there  
 11 are times when I meet with the parties not in your  
 12 presence, that can get a little frustrating because  
 13 you're wondering what is taking place and you have,  
 14 obviously, lives, as well.  
 15 But I can just tell you it's part of the  
 16 process. I assure you if there's something that happens  
 17 and I've got to send you to the jury room to take a  
 18 break or something or a long lunch or something like  
 19 that, it's because we're working on things. We're  
 20 trying to get this thing done as most efficiently as we  
 21 can and try to get that information to make your  
 22 decision.  
 23 I know you've already seen the process in  
 24 this room. And especially during a jury trial, it may  
 25 seem overly formal and kind of ritualistic at times.

1 law and appropriate due process without the citizens  
 2 able to do this when it is necessary, as hard as it is.  
 3 So, again, I thank you all for your attention  
 4 for the seriousness that you took this matter. You are  
 5 now released from your summons. You can come -- well,  
 6 we're going to do some things, have lunch. You're free  
 7 to go home, go do your things, but if you want to watch  
 8 this trial it's a public matter, as well.  
 9 That's up to you, but you are released to  
 10 leave. So thank you.  
 11 (Pause.)  
 12 THE COURT: Let me talk to you about what we  
 13 expect from this process. We do anticipate this case to  
 14 be easily done this week. We'll start tomorrow at 8:30  
 15 so that we can get plenty of work done.  
 16 We'll have a morning break, we'll try to time  
 17 it with an appropriate witness, so we're not splitting  
 18 things up and the trial presentation is smooth.  
 19 But we'll have a break at least for 15  
 20 minutes in the morning and then we'll go until lunch.  
 21 I'll give you an hour and 15 for lunch, because I know  
 22 in Red Lodge it's hard to get lunch in an hour. We'll  
 23 try to go to 5:00 just like a workday.  
 24 Sometimes, depending on presentation, I might  
 25 choose to not put a witness on for five minutes when

1 And again, it can seem not very efficient, but there's  
 2 no other way. It's been developed over such a long time  
 3 that we can assure that the State and the defendant gets  
 4 a fair trial.  
 5 So that's that my task, but I hope you  
 6 understand that. That's the only way we can assure  
 7 that.  
 8 We are going to give you each a notebook.  
 9 You don't have to take notes, but each of you will have  
 10 one and if you want to you can. What we'll do is write  
 11 your juror number on it, so your name won't be on it or  
 12 anything. That's your property.  
 13 Again, you can take them if you want. If you  
 14 feel like you're sitting there just listening is a  
 15 better way for you that's just fine. Your notes can be  
 16 helpful to refresh your own memory of testimony.  
 17 But I'm telling you right now, even though we  
 18 have a court reporter you will not receive a transcript,  
 19 I will not give you one of the process. You will have  
 20 to deliberate based on what you hear in the trial.  
 21 So you'll only have your notes and your  
 22 memory or either as evidence. But I also tell you don't  
 23 rely on someone else's notes if you have a clear memory.  
 24 Basically, what a jury is is 12 individuals  
 25 doing a job together and that's the power of it, really.

1 So you're an independent and make sure that you keep  
2 that in mind.

3 When you leave during the night, we'll have  
4 you leave your notebooks on your chair. I'll have the  
5 bailiff take control of them. Nobody is going to look  
6 at them and you'll get them back the next day. So we  
7 can do that. They will be locked in the fault. That's  
8 the way we'll do it.

9 Lunch and meals will be on your own until  
10 you're deliberating.

11 You won't come into the courtroom anymore  
12 when we start in the morning. I'll have you go to the  
13 jury room. The bailiff will take control, and every now  
14 and again there might be an issue we've got to deal with  
15 before we bring you in. That way, you're down there and  
16 hopefully can have some coffee and doughnuts or some  
17 good stuff in there while you're waiting. And then  
18 we'll bring you in. We'll have the bailiff just bring  
19 you in each time.

20 So that will be where you go after lunch,  
21 come back to the jury room downstairs, everything, and  
22 then we'll have you brought back in.

23 But again, even though you're together now as  
24 a group and I kind gave you that jury room to go to,  
25 you're still not supposed to deliberate, you're not

1 supposed to talk about the case. You're just kind of  
2 individually listening and weighing the evidence until I  
3 finally submit the case to you for deliberation. It's  
4 really important.

5 What I'm going to do now is some of that law  
6 we talked about that I'm providing you, very briefly,  
7 there's a few that you need to -- some law that need to  
8 know now before the evidence is taken. And I'm going to  
9 read these preliminary instructions. That will give you  
10 an idea of where we are.

11 And then we'll break for lunch, we'll come  
12 back and have opening statements from the State. And  
13 then the defense whether he wishes to or he can reserve,  
14 that's up to them. I don't know what they're going to  
15 do. But get right into the case.

16 So I will now be reading some preliminary  
17 instructions. These instructions will be sent into the  
18 deliberation room for you to review. They're given now  
19 to assist you in how to listen to evidence and provide  
20 an overview of the trial procedure.

21 The trial today will be conducted as follows:  
22 First, the State is allowed to give a brief opening  
23 statement. The defendant may also give an opening  
24 statement or reserve the statement for a later time.

25 Following the opening statement, witnesses

1 will testify and exhibits may be produced. When all the  
2 evidence and testimony have been given, the parties will  
3 argue the merits of the case. The opening statements  
4 and the closing arguments are not evidence. The case  
5 will be submitted to you then for your deliberations.

6 So now is the time to read the first written  
7 jury instructions. And, again, this is one thing you  
8 don't have to count on your memory, because you will get  
9 a copy of every instruction that I read just like this  
10 so you can review those as deliberate.

11 "It is important that as officers and jurors  
12 of this court that you obey the following instructions  
13 at any time you leave the jury box, whether it be for  
14 recesses of the court during the day or when you leave  
15 the courtroom to go home at night.

16 "First, do not talk about the case either  
17 among yourselves or with anyone else during the course  
18 of this trial. In fairness to the defendant and to the  
19 State of Montana, you should keep an open mind  
20 throughout the trial and not form or express an opinion  
21 about the case.

22 "You should only reach your decision after  
23 you've heard all the evidence, after you've heard my  
24 final instruction and after the attorney's final  
25 arguments. You may only enter into discussion about

1 this case with the other members of the jury after it's  
2 submitted to you for your decision. All such discussion  
3 should take place in the jury room.

4 "Second, do not let any person talk about  
5 this cause in your presence. If anyone does talk about  
6 it, tell them you're a juror on the case. If they  
7 won't stop talking, leave and report the incident to me  
8 as soon as you're able to do so."

9 Probably the best way to do that is to tell  
10 the bailiff.

11 "You should not tell any of your fellow  
12 jurors about what's happened and don't talk to your  
13 fellow jurors about anything you feel necessary to bring  
14 attention to me.

15 "Third, although it is a normal human  
16 tendency to talk with people, both at home and in  
17 public, you may not during the time you serve on this  
18 jury talk with any of the parties or the attorneys or  
19 any witnesses.

20 "By this, I mean, not only do not talk about  
21 the case, but do not talk at all, even to pass the time  
22 of day. In no other way can all parties be assured of  
23 the fairness they're entitled to expect from you as  
24 jurors.

25 "Fourth, during the trial you may not make

1 any investigation of this case or inquiry outside of the  
2 courtroom on your own. You may not go to any place  
3 mentioned in the testimony without explicit order from  
4 me to do so.

5 "You must not consult any books,  
6 dictionaries, encyclopedias, research online using  
7 Google, Yahoo, Bing or any other internet search  
8 engines, or any other reference materials or source of  
9 information unless I specifically authorize you to do  
10 so.

11 "Fifth, do not read about the case in the  
12 newspapers, don't listen to radio or television  
13 broadcasts about the trial, if there are any. News  
14 accounts may be incomplete or may contain matters that  
15 are not proper evidence for your consideration.

16 "This prohibition extends to all forms of  
17 communication, whether in-person, written, or through  
18 any electronic device or media such as the telephone, a  
19 cell or SmartPhone, Blackberry, PDA, computer, the  
20 internet, any internet service, any text or instant  
21 messaging service or any other internet chatroom, blog,  
22 Facebook, MySpace, YouTube and Twitter.

23 "You must base your verdict solely on what is  
24 presented in court. You are now sworn jurors in this  
25 case and you'll hear the evidence and thus be in a

1 any individual point or instruction and ignore the  
2 others. You are to consider all the instructions as a  
3 whole and are to regard each in the light of all the  
4 others.

5 "The order in which the instructions are  
6 given has no significance as to their relative  
7 importance.

8 "The function of the jury is to decide the  
9 issues of fact resulting from the charge filed in this  
10 court by the State, and the defendant's plea of not  
11 guilty to the charge.

12 "You must perform this duty uninfluenced by  
13 passion or prejudice. You must not be biased against  
14 the defendant because he's been charged with this  
15 offense or because charges have been filed or because  
16 he's been brought before the Court to stand trial.

17 "None of these facts is evidence of guilt and  
18 you are not permitted to infer or speculate from any or  
19 all of them that the defendant is more likely to be  
20 guilty than innocent.

21 "You are to be governed solely by the  
22 evidence introduced in this trial and the law has stated  
23 to you by me. The law forbids you to be governed by  
24 mere sentiment, conjecture, sympathy, passion,  
25 prejudice, public opinion or public feeling.

1 better position than anyone else to know the true facts.

2 "Sixth, if during the course of this trial  
3 there's reason to believe any of these rules have been  
4 violated, I will make inquiry of individual jurors and  
5 take appropriate action.

6 "Ladies and gentlemen of the jury, it is my  
7 duty to instruct the jury on the law that applies to  
8 this case and it is your duty as jurors to follow the  
9 law as I shall state it to you.

10 "No remarks I make or instructions that I  
11 give are intended to express my opinion as to the facts  
12 in this case or what verdict you should return.

13 "You should take the law in this case from my  
14 instructions alone. You should not accept anyone's  
15 version as to what the law is in this case. You should  
16 not decide this case contrary to these instructions,  
17 even though you might believe the lawsuit ought to be  
18 otherwise.

19 "Counsel, however, may comment and argue to  
20 the jury upon the law as it is given in these  
21 instructions. If in these instructions any rule,  
22 direction or idea is stated in varying ways, no emphasis  
23 thereon is intended by me and none must be inferred by  
24 you.

25 "You are not to single out any sentence or

1 "Both the State and the defendant have the  
2 right to demand, and they do demand, and expect that you  
3 will act conscientiously and dispassionately in  
4 considering and weighing the evidence and applying the  
5 law of the case.

6 "You are the sole judges of the credibility,  
7 which is the believability of all the witnesses  
8 testifying in this case and of the weight, that is the  
9 importance to be given to their testimony.

10 "In judging the effect of evidence, you must  
11 be fair and impartial and unarbitrary. While you have  
12 discretion in judging the effect of evidence, you must  
13 exercise that discretion in accordance with these  
14 instructions.

15 "The evidence presented by one witness whom  
16 you believe is sufficient for the proof of any fact in  
17 this case. You are not bound to decide any fact based  
18 upon the testimony of a larger number of witnesses whose  
19 testimony does not convince you against the testimony of  
20 a smaller number of witnesses or against a presumption  
21 or other evidence which does convince you.

22 "In determining what the facts are in this  
23 case it may be necessary for you to determine what  
24 weight should be given to the testimony of each witness.  
25 To do this, you should carefully consider all the



1 testimony given, the circumstances under which each  
2 witness has testified, and every matter in evidence that  
3 tends to indicate whether a witness was worthy of  
4 belief.

5 "You may consider, one, the appearance of  
6 each witness on the stand, their method of testifying,  
7 their apparent candor, their apparent fairness or lack  
8 of fairness, their apparent intelligence, their  
9 knowledge and means of knowledge on the subject upon  
10 which they have testified.

11 "Two, whether the witnesses have an interest  
12 in the outcome of the case or any motive, bias or  
13 prejudice.

14 "Three, the extent to which the witnesses are  
15 either supported or contradicted by other evidence in  
16 the case.

17 "Four, the capacity of the witness to  
18 perceive and communicate information.

19 "Five, proof that the witness has a bad  
20 character for truthfulness.

21 "If you believe that any witnesses has  
22 willfully testified falsely as to any material matter in  
23 the case, you must reject such of his testimony as you  
24 believe to be false and you have the right to view the  
25 rest of his testimony with distrust and in your

1 the case into court for trial and to notify the  
2 defendant of the charge and the charges against him.  
3 Neither the Information nor the charge contained therein  
4 is to be taken by you as any indication, evidence or  
5 proof that the defendant is guilty of any offense.

6 "Two, by a plea of not guilty, the defendant  
7 denies every allegation of the charges.

8 "Three, the State of Montana has the burden  
9 of proving the guilt of the defendant beyond a  
10 reasonable doubt. Proof beyond a reasonable doubt is  
11 proof of such a convincing character that a reasonable  
12 person would rely and act upon it in the most important  
13 of his or her own affairs.

14 "Beyond a reasonable doubt does not mean any  
15 doubt or beyond a shadow of a doubt.

16 "The defendant is presumed to be innocent of  
17 the charge against him. This presumption remains with  
18 him through each stage of the trial and during your  
19 deliberations on a verdict.

20 "It is not overcome unless from all of the  
21 evidence in the case you are convinced beyond a  
22 reasonable doubt that the defendant is guilty.

23 "The defendant is not required to prove his  
24 innocence or present any evidence.

25 "During the trial, a bailiff will keep you

1 discretion disregard it, unless after examination of all  
2 the evidence you find such testimony worthy of belief.

3 "This rule does not apply if a witness, one,  
4 unintentionally commits an error in the witness  
5 testimony.

6 "Or, two, is unintentionally mistaken as to  
7 some matters or facts about which the witness testifies.

8 "Or, three, gives evidence concerning matters  
9 not material in this case without intention of deceiving  
10 the Court or jury.

11 "An Information has been filed charging the  
12 defendant, Nathan Samuel Polakoff, with the offenses of  
13 Count I, assault on a minor, or in the alternative,  
14 Alternative Count I, assault on a minor; and Count II,  
15 assault on a minor.

16 "Alleged to have been committed in Red Lodge,  
17 Carbon County, state of Montana, on or about April 17th,  
18 2019, and April 19th, 2019.

19 "The defendant has pled not guilty. The  
20 jury's task in this case is to decide whether the  
21 defendant is guilty or not guilty based upon the  
22 evidence and the law as stated in my instructions.

23 "These are some of the rules of law that you  
24 must follow. The filing of an Information against this  
25 defendant is simply a part of the legal process to bring

1 together and will prevent inappropriate conversations  
2 between you and any other persons. The bailiff will see  
3 to your needs during the trial.

4 "However, the bailiff cannot answer any  
5 questions about this case or provide you with any  
6 information, books or materials, as I have strictly  
7 forbidden the bailiff to do so.

8 "I will instruct you on the law as you must  
9 apply the evidence presented in the case in order to  
10 reach a verdict, both orally and giving you a set of  
11 written instructions which you will take with you during  
12 your deliberation. These instructions are intended to  
13 cover all necessary laws which are pertinent to the  
14 case."

15 Those are the preliminary instructions. This  
16 is the perfect time to take our lunch break.

17 I'll tell you, too, now that you're basically  
18 hired, if you need to sip on water you can bring it with  
19 you. Anything for your comfort. Bring a quilt.  
20 Obviously, we need you to be able to be as comfortable  
21 as you can while you do this.

22 Again, we will let you go, we'll come back  
23 and start with opening statements. It looks like about  
24 1:20.

25 Am I right this time, Mr. Nixon?

1 MR. NIXON: You are, Judge.  
 2 THE COURT: All right. During this lunch  
 3 break -- again, you will take the break, go to the jury  
 4 room when you come back from lunch.  
 5 It is your duty not to talk about the  
 6 substance of the case in any way, among yourselves or  
 7 anyone else, or look at or access any information about  
 8 this case in any way, including electronic devices or  
 9 phones or form or express any opinion on the case until  
 10 the case is submitted to you.  
 11 We'll see you back here at 1:20. We'll be in  
 12 recess.  
 13 (Wherein, the jury is not  
 14 present.)  
 15 THE COURT: Does neither either counsel have  
 16 to place anything on the record?  
 17 MR. NIXON: Nothing from the State.  
 18 MR. SNIVELY: Nothing, Your Honor.  
 19 THE COURT: Have you made up your mind if  
 20 you're going to reserve or do your opening?  
 21 MR. SNIVELY: Not a hundred percent.  
 22 THE COURT: Okay. Very good. We'll see you  
 23 back here at 1:20. We're in recess.  
 24 (Wherein, a recess was taken.)  
 25 THE BAILIFF: All rise.

1 THE COURT: Please be seated. Thank you.  
 2 We're back on the record in DC 19-17, State  
 3 versus Polakoff.  
 4 Counsel for the State is present.  
 5 Counsel for the defense is present. The  
 6 defendant is present.  
 7 The jury is not present.  
 8 Mr. Nixon, any issues that you need to  
 9 present to the Court before we bring in the jury?  
 10 MR. NIXON: No, Your Honor.  
 11 THE COURT: Mr. Snively?  
 12 MR. SNIVELY: No, Your Honor.  
 13 THE COURT: All right. I'll ask the bailiff  
 14 to please bring up the jury. I'll ask the parties to  
 15 please stand when the jury comes in the courtroom.  
 16 (Wherein, the jury is present.)  
 17 THE COURT: All right. Please be seated.  
 18 Thank you.  
 19 All right. The jury is now present.  
 20 Mr. Nixon, do you stipulate that all jurors  
 21 and the alternate are present?  
 22 MR. NIXON: I do, Your Honor.  
 23 THE COURT: Mr. Snively, do you so stipulate?  
 24 MR. SNIVELY: Yes, sir.  
 25 THE COURT: I'll just speak to the jury

1 briefly. When I come in the room people stand. It's  
 2 not because of who I am, but it's what I represent. And  
 3 while you're doing this, we're going to show you the  
 4 same courtesy because you're doing that job.  
 5 So that's why we'll stand when you come in  
 6 you. You don't have to wait. I know it's hard when  
 7 you're filling the jury box. So when you get there, you  
 8 can sit or stand, whatever you want to do. But that's  
 9 what we're going to be doing throughout the trial, just  
 10 so you understand that, why we're doing it.  
 11 All right. Mr. Nixon, are you prepared to go  
 12 forward with an opening statement?  
 13 MR. NIXON: I am, Your Honor.  
 14 THE COURT: Let me just say before that  
 15 happens, again, attorneys are not witnesses, statements  
 16 by counsel during this trial are not evidence, but  
 17 counsel may speak to the evidence that may be introduced  
 18 during the trial.  
 19 You may proceed.  
 20 MR. NIXON: Thank you, Your Honor.  
 21 This trial is basically going to be a story  
 22 about a healthy nine-month-old boy and his mother that  
 23 visited Carbon County in April of 2019.  
 24 And you're going to hear from Everett Musch a  
 25 nine-month-old boy's mother about how she had a

1 long-term relationship with her high school sweetheart  
 2 and that together they had a boy named Everett. Despite  
 3 being born a month premature, Everett was a happy,  
 4 healthy boy.  
 5 Could I please have you show State's Exhibit  
 6 1.  
 7 Developmentally, Everett was meeting all of  
 8 his health goals and there was no concerns about his  
 9 health. He'd never been sick, he'd never been injured.  
 10 Could I have you show State's Exhibit 3,  
 11 please.  
 12 And even though things didn't work out with  
 13 Richard, his mother Ryann, at the time, Wells, lived  
 14 with her stepfamily and you're going to -- her stepdad,  
 15 her mom and family, you're going to hear how close that  
 16 family was.  
 17 And Everett did very well. There was  
 18 absolutely no health concerns at that time.  
 19 Thank you.  
 20 You're going to hear about how attentive  
 21 Ryann -- she goes by Ry -- was as his mother. You're  
 22 going to hear about how close she was with her family,  
 23 like I said. And you're going to hear about how she  
 24 doesn't believe in physical discipline. She's never  
 25 spanked a child, either Everett or any of the children

1 that she nannied, for which are nephews and nieces.  
 2 And certainly, she's going to say that she  
 3 never physically punished Everett, who was only nine  
 4 months old in April of 2019.  
 5 You're going to hear that after the  
 6 relationship with Everett's father, Richard, didn't work  
 7 out, that she eventually decided to try dating again.  
 8 She'd only had one serious relationship and the first  
 9 person that she started dating after that was the  
 10 defendant, Nathan Polakoff.  
 11 She's going to tell you that they dated for  
 12 about two to three months and that when she met him,  
 13 Nathan was respectful, he showed interest in spending  
 14 time with Everett and he told her about how he was an  
 15 EMT and had medical knowledge.  
 16 And things seemed to be going pretty well.  
 17 She was starting to learn to trust having her son around  
 18 Nathan Polakoff and she didn't have any concerns about  
 19 him.  
 20 She's also going to tell you on April 17th,  
 21 2019, it started like a normal day. She woke up in  
 22 Billings in her family's house, Everett has happy,  
 23 healthy, in good spirits. He wasn't sick. He didn't  
 24 show any signs of injury and he had a good time spending  
 25 time and playing with his older cousin.

1 She's also going to tell you later on that  
 2 day, she went to Red Lodge. She and Nathan had made  
 3 plans to spend time together. There was no concerns  
 4 about Everett and everything looked like there was a  
 5 great weekend ahead.  
 6 She shows up in Red Lodge and, again, there's  
 7 no issues. She spends time with Nathan, she spends time  
 8 with Everett. And Everett is happy and healthy. There  
 9 are no concerns.  
 10 Unfortunately, that does change. Everett,  
 11 although he was a very sound sleeper, generally slept on  
 12 the bed. And what Ry would do is she would get pillows  
 13 and she would put four pillows on the bed and she would  
 14 set Everett in the middle of those pillows.  
 15 And that way, she could rest a little easier  
 16 that if she wasn't in the room that he wasn't going to  
 17 escape from his pillow corral or fall off the bed or  
 18 anything like that. And to that date, he hadn't ever  
 19 gotten out of that little pillow blockade that she set  
 20 up.  
 21 So the three of them have dinner and  
 22 eventually Everett is tired so she puts him to bed.  
 23 He's asleep. And Ry and Nathan are spending time in the  
 24 other room of this very small apartment that Nathan  
 25 lived in.

1 Now, even though Ry is going to tell you she  
 2 was a very attentive mother, Ry [sic] is her first baby,  
 3 she's worried, she tended to really keep an eye out for  
 4 him, the two were inseparable. As she's sitting there  
 5 with Nathan, Nathan says, "I hear something."  
 6 He says, "I think he's gurgling."  
 7 Ry didn't hear it. She hears nothing, but  
 8 Nathan decides that he needs to go check on Everett.  
 9 From that point, Nathan moves out of sight,  
 10 he goes into the bedroom where Ry can't see him.  
 11 Shortly thereafter, she hears a thump. She's  
 12 instantly up. She hears Everett crying. She goes to  
 13 see what's going on, and she sees Nathan holding  
 14 Everett. He's got vomit on him. There's vomit on the  
 15 floor, the bed possibly.  
 16 And Nathan provides a story that you're going  
 17 to hear again and again and again during this trial.  
 18 He's going to say that Everett rolled off his futon.  
 19 Now, this is not a big, tall bed. This is an  
 20 almost-ground-level futon. You'll hear Nathan describe  
 21 it as being about six inches off the ground and you're  
 22 going to see that there is carpet on the sides.  
 23 Now, keep in mind, Everett is only nine  
 24 months old, it's not like he's running across the thing.  
 25 He can't walk. He can't -- he has no significant speech

1 ability.  
 2 But what we have is this story that Nathan is  
 3 in the room, nobody else sees it, you hear a thump and  
 4 all of a sudden Everett is crying. But also, by  
 5 description of both Nathan and Ry, is that there's a  
 6 bump, a little mark on Everett's forehead. And what  
 7 you're also going to hear from Ry is that Everett is  
 8 never really the same.  
 9 He's never the happy, healthy, energetic boy  
 10 from that point on. It's a series of downhill events  
 11 for the of that several-day period in Red Lodge.  
 12 Eventually, Ry does get Everett to stop  
 13 crying and she gets into bed with him and they go to  
 14 sleep. Nathan joins later.  
 15 Now, you're going to hear both Ry and the  
 16 defendant, Nathan Polakoff, talk about how they were  
 17 concerned that he might have some sort of a head injury.  
 18 Ry is going to tell you from right there. You're going  
 19 to be able to watch a video interview with Nathan and  
 20 Red Lodge police officer, Al Stuber.  
 21 You're also going to hear Ry talk about that  
 22 she had a lot of concerns because there was vomiting,  
 23 there was at least one incidence of diarrhea and Everett  
 24 is lethargic and he's not the energetic boy she's used  
 25 to. He's not eating like he usually does and he's just

1 not himself.

2 And maybe she's a worrier. It's her first  
3 baby, her boy that she loves so much. And she doesn't  
4 understand what can be wrong with him. You're going to  
5 hear that she reaches out to Nathan and wants to get him  
6 some medical attention. And you're going to hear her  
7 say that Nathan repeatedly discouraged that idea.

8 And eventually, though, they do take Everett  
9 to the clinic on April 18th. It's at that point in time  
10 that she goes in and sees Physician Assistant Doug  
11 Whitehead. And you're going to hear Doug Whitehead  
12 testify about how he does examine Everett.

13 He's going to say that he looked at what was  
14 presenting. There was vomiting, there was some  
15 diarrhea, and he instantly thinks this is probably going  
16 to be some sort of a viral thing, maybe the flu. But  
17 he's also going to say that Nathan -- and remember this  
18 is the story he's going to tell time and time again --  
19 tells him about this six-inch fall off of a futon.

20 And there's an examination. You're going to  
21 hear Doug Whitehead say that, yes, he saw a bruise.  
22 He's going to say it was not necessarily a bruise that  
23 was so significant that it caused problems. However,  
24 also maybe isn't what you'd expect if a baby just rolls  
25 off a six-inch surface into carpet.

1 And he's also going to say that he takes a  
2 look at basically the vital signs of Everett and his  
3 eyes are normal, he's breathing regularly. He's got  
4 good mobility, he's got good strength. He's moving his  
5 extremities and there's no signs of any catastrophic  
6 injury.

7 You're going to hear that Ryann was at least  
8 somewhat relieved to hear that there was not a head  
9 injury. She was still worried about how he's acting,  
10 because he's still not the little boy she's used to.  
11 You're going to hear about she goes to Nathan's  
12 parents' house so that they can do laundry and so that  
13 she can clean him up.

14 You're going to hear her talk about, once  
15 she's there, she's alarmed because Everett has always  
16 loved to take a bath. He loves the water, never minded  
17 it. And on that evening, she can't touch Everett's  
18 head. He's fussy, doesn't want to let her touch his  
19 head and he seems to have some sort of soreness there.

20 She asks what's wrong and she says that  
21 Nathan tells her, "Oh, it's a headache, don't worry  
22 about it."

23 The rest of the day, Everett continues to  
24 have a period of vomiting, still not feeling very well,  
25 and the rest of the day is spent without much important

1 happening.

2 The next day, Ry is going to tell you that  
3 she stayed at home with Everett, because he still wasn't  
4 feeling well. There's still some vomiting and it's just  
5 still not what she expects from her boy.

6 They spent the day together and then towards  
7 the evening, there is a decision made that they're going  
8 to try to go out and get something to eat, the three  
9 of them. On the way to go to the Boxcar, Everett throws  
10 up and that changes the plan and the three of them go  
11 back to Nathan's apartment.

12 At that point in time, Nathan offers to take  
13 a shower with Everett. He says, "Don't worry, I've got  
14 this." He agrees to take the shower and tells Ry to go  
15 and clean up and she can change her clothes.

16 And that's exactly what Ry is going to tell  
17 you that she did. She leaves, changes her clothes.  
18 She's picking up around the house, when she hears  
19 Nathan, who is in the bathroom alone with Everett behind  
20 a closed door, shout out that Everett is not breathing.

21 Ry immediately runs over and there's Everett  
22 holding -- excuse me -- there's Nathan holding Everett.  
23 He looks limp and he's just being held.

24 The EMT, whose medical opinion she trusted,  
25 was not providing any sort of CPR, he was not calling

1 911. And, in fact, it was Ry who started CPR based on  
2 what she learned on Grey's Anatomy. She didn't have any  
3 experience, but she was fighting for her boy. She asked  
4 Nathan to call 911, and that is what happens.

5 You'll hear the 911 call, where you'll hear  
6 Nathan Polakoff ask for medical help. And you're also  
7 going to get a chance to hear from Officer Matt Grieshop  
8 formerly of the Red Lodge Police Department. He's at  
9 the Town Pump parking lot when he hears this dispatch  
10 and he's got an officer that he's training with him.

11 And Matt is going to tell you that is one of  
12 the most terrifying calls that you can hear in law  
13 enforcement. "Baby not breathing." And he's -- you'll  
14 see the video, you'll hear him tell the training  
15 officer, "Go faster, go faster." He's going to  
16 back-seat drive, he's going to tell him you need to get  
17 there fast. They show up very quickly.

18 And one of the first things you're going to  
19 see is Nathan coming through the door of this apartment  
20 and you're going to see him hand off. He discontinues  
21 CPR, hands him to this police officer. And you're going  
22 to hear Matt Grieshop say this pale, limp, little boy  
23 looks like he's dead. And in fact, Matt thinks he is  
24 being handed a dead baby.

25 He then takes charge of the situation and

1 gets a blanket and puts the baby on the ground and tries  
2 to assess if the baby is breathing, which fortunately,  
3 he is.

4 Now, very luckily, Red Lodge Ambulance is  
5 close behind and there are EMTs. You're going to hear  
6 from one, possibly two, of the EMTs. Amy Hyfield is an  
7 EMT and Joel Anthes is a paramedic.

8 And you're doing to hear from them. You're  
9 going to hear about how they saw this boy who was having  
10 great difficulty breathing. You're going to hear about  
11 how they watch this boy start having seizures. You're  
12 going to hear about how the boy seemed to lose the  
13 ability to move the extremities on his right side. And  
14 you're going to hear about the only thing they want to  
15 do is get this boy to the Beartooth Billings Clinic as  
16 soon as they can, and so that's what they do. They go  
17 ahead and they rush Everett over to Beartooth Billings  
18 Clinic.

19 Once he's there, he's seen by the doctor on  
20 call, who is Dr. Brad Fouts. And you're going to get a  
21 chance to hear Dr. Fouts talk about his treatment of  
22 Everett. You're going to hear about there was about two  
23 and a half hours of all critical care. Meaning that  
24 this boy was facing the most serious medical conditions,  
25 meaning this boy could die.

1 You're going to hear very quickly what Dr.  
2 Fouts hears that this is nonaccidental trauma. What  
3 that means is this isn't the kind of thing that can  
4 happen just by happenstance, by a small accident. This  
5 isn't a boy that rolls six inches off a bed. This is  
6 not the type of injury that a nonambulatory  
7 nine-month-old can get by running into something.

8 You're, in fact, going to hear from Dr.  
9 Laskey from Primary Children's Center that this injury  
10 is more equivalent to a baby being ejected from a  
11 vehicle. This is more equivalent to a baby rolling off  
12 the top of a two-story house. This involves an  
13 acceleration and a rapid deceleration.

14 You're going to hear about how serious these  
15 injuries are and you're going to hear about the many  
16 consequences they caused.

17 Once Dr. Fouts realizes that there are these  
18 two terrible skull fractures, he realizes this is far  
19 beyond what Beartooth Billings Clinic can handle.

20 In fact, he finds out this is beyond what  
21 Billings Clinic can handle in Billings. As a result,  
22 they make plans to fly Everett directly to Primary  
23 Children's Hospital in Salt Lake City. There's a  
24 fixed-wing airplane that is set up and there's  
25 arrangements made for him to fly there and Ry makes

1 And you're going to hear Dr. Fouts, who hears  
2 this alarming call, looks at this child, and realizes  
3 that Everett is facing very, very serious medical  
4 issues.

5 He's not breathing well on his own. He does  
6 seem to have what might be some sort of paralysis on the  
7 right side. He's nonresponsive, his coloring is off.  
8 And he's going to hear about how the only explanation  
9 offered is Nathan's story about how he rolled off a  
10 six-inch futon, maybe it's the flu. And you're going to  
11 hear Dr. Fouts say there's no way in the world that's  
12 what caused this. It's medically not feasible.

13 Because of the seriousness of the injuries,  
14 Dr. Fouts asks for scans. And it's at that point in  
15 time, he realizes that Everett's skull was fractured.  
16 You're going to hear he's not a radiologist, but he says  
17 he looks and there's going to be a parietal fracture of  
18 Everett's skull that is obvious even to him as a  
19 nonradiologist. It's a very serious fracture.

20 You're also going to learn that later on that  
21 there's a second skull fracture. That skull fracture  
22 you're going to hear about later on is a terrible  
23 fracture of the back of Everett's skull called an  
24 occipital fracture. You're going to hear more about  
25 that, as well.

1 arrangements to travel with him.

2 You're also going to hear Dr. Fouts say that  
3 because of the absolutely implausible explanation  
4 provided that he has a duty to call not only law  
5 enforcement but also Child Protective Services.

6 He's going to say that both parents -- you  
7 might wonder how they're responding, but mom seems  
8 appropriate. He says that Nathan, who he misidentifies  
9 as father, also seemed appropriate, but also that he  
10 kept reaching for explanations.

11 He kept looking to perhaps change his story.  
12 Well, maybe he hit his head on the heater on the floor,  
13 maybe he hit his head on the nightstand. It doesn't  
14 matter. Dr. Fouts says those still are not plausible.  
15 That still doesn't cause one skull fracture, much less  
16 two.

17 And you're going to hear as plans are being  
18 made to fly out Everett and Ry to Salt Lake City that  
19 Nathan leaves and goes back to his apartment.

20 And keep in mind, Everett and Ry are waiting  
21 to hop on an airplane and fly to get life-saving  
22 treatment for Everett. And Nathan goes home and he has  
23 the opportunity -- takes some time out to take a picture  
24 of his futon. In the middle of all of that, he takes a  
25 picture of the futon.

1 And you're going to find out why. Because  
2 you're going to watch the interview and when Al Stuber  
3 questions him, out comes the phone, "Here's the picture  
4 of my futon." Still not plausible. Doesn't explain  
5 anything.

6 So Ry flies to Salt Lake City, she's already  
7 made plans that Nathan is going to join her and that  
8 he's going to be with Ry and Everett, who he tells Al  
9 Stuber he loves like a son. He's going to go be there  
10 for his girlfriend and for the baby he cares about so  
11 much.

12 While that is going on, Matt Grieshop goes  
13 off duty and Al Stuber, who is the next officer on duty,  
14 starts the investigation. He hears from a number of  
15 different people. He hears from Matt Grieshop as to  
16 what he saw.

17 And he's also going to have access to a  
18 report that Matt Grieshop writes about the incident.  
19 Strangely, he hears the story when he's responded to the  
20 scene that there is a baby in the shower with an adult  
21 and one of the things that he notices as he looks is the  
22 baby is not wet, Nathan doesn't appear wet and that  
23 doesn't add up to him.

24 Why wouldn't he be wet if this happened in  
25 the shower? This baby shops breathing in the middle of

1 She's having a hard time figuring out where  
2 he is. You're going to hear an agent for MATIC talk  
3 about how he was able to track Nathan's phone using  
4 tower data. And that Nathan, in fact, leaves Red Lodge,  
5 and he's bouncing off towers in this area. Strangely,  
6 he never gets there.

7 He and Ry communicate. And Ry tells him that  
8 the police want to talk to him -- or to her. And she  
9 hears for the second time a request from Nathan, "Don't  
10 tell anybody that I was alone with Everett." You're  
11 going to hear that's not the first time, it's the second  
12 time.

13 She's going to tell you the first time  
14 happened when she was at the Beartooth Billings Clinic,  
15 when everything is going on, she's going to tell you  
16 that he told her the very same thing while they're  
17 waiting to see what's wrong with Everett at Beartooth.

18 Now, after hearing about the police interview  
19 and they want to talk to her and to Nathan, as well,  
20 because Al has asked them to please interview Nathan  
21 again if he, in fact, does show up, there's kind of some  
22 silence.

23 He talks to Ry's sister, Jennifer. And she  
24 says that she asked, "Hey, when are you going to be  
25 here?" And the answer is, "I don't know. I'm sleepy, I

1 the shower, and he starts to wonder if the story makes  
2 sense.

3 You're going to hear that before Nathan  
4 decides to go and try to visit Ry and Everett in Salt  
5 Lake City, he has an interview with Officer Stuber. He  
6 tells him about the futon, he shows him the picture. He  
7 spitballs several different possibilities as to how the  
8 child could have been hurt, puts several different  
9 people under suspicion.

10 And during this interview, it appears that  
11 Nathan is crying. What Al Stuber notices is there's no  
12 tears. It doesn't make sense to Al Stuber. He thinks  
13 that there might be something suspicious.

14 Meanwhile, Ry is in Salt Lake City, she's by  
15 herself. She doesn't really get much of a chance to see  
16 her child, who has had seizures and she's watched  
17 basically fight for his life on this flight to Salt Lake  
18 City.

19 When she gets there, she is interviewed by  
20 Child Protective Services and she's also told that the  
21 Salt Lake City Police would like to talk to her, because  
22 Al Stuber has asked that they do a courtesy interview.

23 Now, Ry is in touch with Nathan, because he's  
24 coming down.

25 Exhibit one, please.

1 don't know where I am."

2 And then eventually says that he's too tired  
3 and he's going to go home. Well, as you can see, he was  
4 near the Utah border with Wyoming when this decision is  
5 made.

6 And as that happened, that evening in fact Ry  
7 is interviewed by the Salt Lake City Police and you're  
8 going to learn that she comes to believe that she is a  
9 suspect. She comes to believe that Nathan is a suspect.  
10 And even after Nathan doesn't show up, she still can't  
11 see this as being anything but an accident.

12 Who would hurt a nine-month-old boy? Why  
13 would anybody hurt Everett? She can't wrap her head  
14 around why anybody would want to do that.

15 It's only later that she and her family  
16 realize that the description of the fall from the futon  
17 doesn't make sense. You're going to hear how her and  
18 her family decide to cooperate with law enforcement and  
19 Child Protective Services, because they want to know  
20 what happened.

21 You're going to hear Ry say that she tells  
22 Nathan about this plan. And at that point in time,  
23 you're going to hear that Nathan threatens suicide. He  
24 told Ry that she -- he might as well commit suicide  
25 because he's being blamed for it anyway.

1 And shortly afterwards, there was no more  
2 communication. There was never another attempt made by  
3 Nathan to see the boy that he claimed to love so much.

4 At that point in time, Ry started what  
5 basically was a year's long battle with her little boy's  
6 health. He stays in Salt Lake City for about a month,  
7 he's got two skull fractures. He's got retinal  
8 hemorrhaging. His eyes had gone crossed. His vision  
9 was substantially effected. He had bleeding inside his  
10 cranium. He had partial paralysis.

11 He could no longer suck on a bottle. He  
12 could no longer chew food. He had to be fed through an  
13 NG tube, which you'll see pictures of.

14 And you're going to hear about the struggle  
15 that Ry had to meet his medical needs. She's a single  
16 mom and she's basically is unable to work for about the  
17 next year. She takes Everett to out-of-state surgeries,  
18 she takes Everett to a year's worth of therapy,  
19 occupational therapy, speech therapy.

20 She's dealing with a boy who once was  
21 absolutely developmentally on par having serious  
22 setbacks cognitively, physically, and she's there.

23 You'll hear about how she does end up working  
24 with the Child Protective Services when she gets to back  
25 home to Billings. And you're going to hear that they

1 was alone with Nathan."

2 Ultimately, you're also going to hear that  
3 since this all happened, there's been a lot of medical  
4 treatment for Everett, but he hasn't been injured, he  
5 hasn't had any broken bones, he hasn't had any strange  
6 accidents. He's trying to recover. And that's largely  
7 because Ry and her family have dedicated themselves  
8 towards his treatment.

9 And you're going to also see just how  
10 different things are for Everett.

11 Will you publish the next photo.

12 You're going to see this happy, healthy boy  
13 had to deal with a variety of adversity in Salt Lake  
14 City. You're going to hear about how much treatment it  
15 has taken to deal with these horrific skull fractures  
16 and the damage they caused.

17 You're going to see the after effect. You're  
18 going to hear that these injuries are permanent.  
19 Nathan's [sic] eyes are not going to be the same.

20 He may have vision issues. He has a seizure  
21 disorder now, which limits his future possibilities as  
22 he grows up. You're going to hear that because of his  
23 age nobody really knows exactly what the final  
24 consequences are going to be for these injuries.

25 Then you're going to hear that he's just not

1 basically close her case very quickly because they can't  
2 identify a harm to Everett.

3 You're going to hear about Dr. Laskey when  
4 she initially was helping diagnose Everett talk to  
5 Ryann. You're going to hear about part of her  
6 diagnostic treatment is that she asks a parent to  
7 identify, "When was the baby last happy?" "When was the  
8 baby last well?" "When did the baby first have  
9 problems?" "When did things get serious?"

10 And very quickly there becomes a theme. When  
11 is the baby first not well? It's when he's alone with  
12 Nathan.

13 When does the baby have -- basically stop  
14 breathing and become nonresponsive? It's when he's  
15 alone with Nathan. You're going to hear Dr. Laskey also  
16 say that the skull fracture on the back of his head  
17 would have immediately debilitated Everett. There would  
18 not have been a delayed response. This is a horrific --  
19 it requires a horrific amount of impact and force to  
20 shatter a skull. And the baby would have been lights  
21 out immediately.

22 And ultimately, when law enforcement  
23 investigate that they look at who was with Nathan [sic]  
24 when this happened. You're going to hear Nathan say,  
25 "He was with me." You're going to hear Ryann say, "He

1 the same boy since he spent some time alone with Nathan  
2 Polakoff in Red Lodge.

3 THE COURT: Thank you, Mr. Nixon.

4 Mr. Snively, does the defense wish to make an  
5 opening statement at this time?

6 MR. SNIVELY: We do, Your Honor.

7 THE COURT: You may proceed.

8 MR. SNIVELY: Thank you, Your Honor.

9 Members of the jury, as the old saying goes,  
10 there's a lot more to the story.

11 The State stands up here and tells you you're  
12 going to hear that Nathan's alone, there's nobody else  
13 around. What you're going to hear is -- first of all,  
14 you're going to hear what this sometimes referred to as  
15 a cabin, an apartment a little house, that Nathan was  
16 renting here, what the distance is in that house and how  
17 close everything is. It isn't like this is a big house  
18 and Nathan is in one far section of the house and Ryann  
19 is in another one.

20 They're almost on top of each other. When  
21 he's in the shower, you're going to hear testimony that  
22 they are probably no further than I am from the front  
23 row of the jurors from where Ryann is while they're in  
24 the shower.

25 And similarly, on the 17th, when they talk

1 about the -- Nathan hearing something and going into the  
2 room, is you're going to see that distance. Ryann at  
3 various times has said, "It was a matter of seconds I  
4 was in that room. There was not a length of time."

5 You're also going to hear concerning the 17th  
6 is the red mark that was on the front of Everett's  
7 forehead. And when they go to see Whitehead at about 5  
8 o'clock on the 18th, Ryann doesn't ask PA Whitehead,  
9 "Hey, I'm concerned about his head. Would you examine  
10 his head?"

11 Whitehead is going to tell you that Nathan is  
12 the one that pointed out, "He has a bruise" -- by that  
13 point it's a bruising -- "on his forehead, would you  
14 take a look at it?"

15 And then Whitehead took a look at it and in  
16 his report says, you know, young children bump  
17 themselves. It doesn't appear out of the ordinary of a  
18 bump.

19 But the importance is it's in the front of  
20 the head. It's a bump on his forehead.

21 The other thing that you're going to hear is  
22 Ryann goes to Salt Lake with Everett on a flight out of  
23 here, out of Red Lodge. They arrive -- it's basically  
24 overnight. They arrive early morning time in Salt Lake  
25 to the hospital.

1 to hear all of this evidence and not just the condensed  
2 version the State would like you to know and to hear.  
3 You need to see the entire picture.

4 And what you're going to see as time has  
5 gone, Ryann's statements have become more and more  
6 contradictory from what she initially said.

7 She was in Salt Lake, Nathan was not in Salt  
8 Lake when she was interviewed. You heard the State show  
9 you an exhibit and heard them say he turned around at  
10 the Wyoming-Utah border and was never in Salt Lake.

11 So he's not there telling her what to do and  
12 not to do. The other red herring that they keep  
13 throwing out to you is he said, "Don't say I'm alone."  
14 He'd already talked to Al Stuber. He'd already talked  
15 to him before she's interviewed in Salt Lake.

16 What you're going to hear is that that  
17 morning of the 20th, which would be a Saturday morning,  
18 Al Stuber requested Nathan to come in so that he could  
19 be interviewed, and Nathan did.

20 And during the interview, Nathan tells Al  
21 Stuber, "I plan to go to Salt Lake to see them and to be  
22 there with them at least for a few days. That's my  
23 plan."

24 They finish that interview, Al then calls him  
25 back, saying, you know, "I thought of a couple of things

1 That evening, Salt Lake Police Department  
2 officers interview her. And what the State didn't  
3 bother to tell you is what she says happened coincides  
4 with what Nathan had told Al Stuber that day had  
5 happened.

6 She doesn't say, "Look, there's all these  
7 other issues, there's all these other things, I had all  
8 of these other worries." She doesn't say any of that.

9 She says that -- it's at the point where the  
10 officers leave and one of them comes back in and, in  
11 essence, says to her, "Either you or Nathan are going to  
12 get arrested."

13 And then she does a 180 and says, "It's  
14 Nathan."

15 She then comes back here to Red Lodge on May  
16 8th or 9th, you'll hear which day it is, and does an  
17 interview with Chief Wells and Al Stuber. She -- Al  
18 Stuber at the end of that interview asks her to clarify  
19 whether she heard noises when she was within a few feet  
20 of that shower and her response is there was not noise.  
21 "I heard the babbling between Everett and Nathan and  
22 Nathan talking to him. I did not hear any other  
23 noises."

24 You're also going to see the distance. She  
25 would have heard it. We have said all along is you need

1 that I'd like to clarify with you."

2 Nathan is like, "I'll be right back down and  
3 talk to you again." He talks to him again, leaves and  
4 then Al Stuber calls him and says, "Could I come over to  
5 your apartment and take pictures?"

6 Nathan's response, "Absolutely. Come on  
7 over." And he allows him in to take pictures and you're  
8 going to see those pictures of what this apartment or  
9 cabin looks like, and the shower and everything.

10 What you're going to quickly realize is it's  
11 a very small place. The shower is a stand-up shower  
12 like a square or stand-up shower. It's not a tub, a  
13 very small area.

14 And when you see the entire picture in which  
15 -- what defense has asked you to do, is not jump to  
16 conclusion because of the pictures and the emotion that  
17 it invokes in the pictures of injuries, but instead wait  
18 until you hear all of the facts, all of the evidence,  
19 and then start seeing the consistency or inconsistency  
20 of what happened.

21 And what you're going to see is the State --  
22 you're also going to see that Ryann on her medical --  
23 you're going to see a videotape of Ryann and Nathan  
24 going to Beartooth Clinic on the 18th for the  
25 appointment with Dr. Whitehead. There's a video and



1 they come into the -- what I'm going to call the waiting  
2 area, where you check in and wait for your appointment.  
3 There's video of that.

4 Ryann checks in with the people. Nathan is  
5 holding Everett and walking around with Everett. Watch  
6 the video. The entire time Nathan has Everett. Ryann  
7 never once comes over and says -- takes her baby from  
8 Nathan. Nathan holds that baby until they go back to  
9 see Whitehead.

10 Nathan is the one who asks Whitehead to look  
11 at the bruise on the forehead. And it's also important  
12 to listen to Whitehead's recollection of what that  
13 bruise was and what it meant to him.

14 And the other medical part that's important  
15 to listen to is Ryann does the intake information for  
16 the Beartooth Clinic. And the intake says that Everett  
17 was throwing up and had diarrhea. You're going to hear  
18 Dr. Laskey say that when she talked to her in Salt Lake  
19 there's no mention of diarrhea. No mention to Dr.  
20 Laskey of diarrhea.

21 Even though at Beartooth, Ryann is the one  
22 who -- that's her comment to the intake person is that's  
23 what we're here for is that. You'll also note on that  
24 day here Dr. Whitehead's notes and his testimony will  
25 confirm that they had reported to him -- "they" being

1 One moment, Judge.

2 THE COURT: Sure.

3 MR. NIXON: Ryann, come right up this way and  
4 be sworn in.

5 **RYANN SELF,**

6 WITNESS HEREIN, BEING FIRST

7 DULY SWORN ON OATH WAS

8 EXAMINED AND TESTIFIED

9 AS FOLLOWS:

10 --oOo--

11 THE COURT: I'm just ask you to take this  
12 chair right here, okay? And I'll ask you to pull the  
13 mike down to a good level.

14 All right.

15 **DIRECT EXAMINATION**

16 **BY MR. NIXON:**

17 Q. Please state and spell your name.

18 A. Ryann Day Self, R-y-a-n-n D-a-y S-e-l-f.

19 Q. Where are you from, Ry?

20 Can I call you Ry?

21 A. Yes.

22 Q. Where are you from?

23 A. Billings, Montana.

24 Q. Do you need a second to catch your breath?

25 A. Just a minute.

1 Ryann and Nathan -- that Everett was doing better and  
2 that they came in to see that.

3 When you see all of this, these facts and the  
4 points -- and a lot of it is going to come out during  
5 cross-examination by me of the State's witnesses, what  
6 was said on which time and where people were and what  
7 happened. You're going to reach the conclusion that the  
8 State can't prove beyond a reasonable doubt that Nathan  
9 Polakoff inflicted any of the injuries on to Everett.

10 And we ask that you keep an open mind until  
11 you've heard everything in this case and not jump to a  
12 conclusion based on the State's version that they've  
13 given you.

14 And I've pointed out just a few of the issues  
15 that the State didn't bother to stand up here and tell  
16 you in their opening. And as the case you unfolds  
17 you're going to hear more and more of those facts.

18 Thank you.

19 THE COURT: Thank you, Mr. Snively.

20 I want to make sure that all witnesses have  
21 been excluded by the parties and that's your  
22 responsibility to make sure.

23 If so, Mr. Nixon, is the State prepared to  
24 call your first witness?

25 MR. NIXON: The State calls Ryann Self.

1 Q. Do you need anything to drink?

2 A. No. Sorry.

3 Q. What do you do, Ry?

4 A. As far as?

5 Q. As work.

6 A. As work?

7 Q. Yes.

8 A. Oh. I'm a licensed cosmetologist. I also  
9 work at the Squire Lounge as a casino attendant and a  
10 cocktail server.

11 Q. Do you also do some nannying?

12 A. I do for my sister and her kids.

13 Q. Are you married?

14 A. I am married.

15 Q. And what's your husband's name?

16 A. Edwin Self.

17 Q. And what was your name previously?

18 A. Ryann Wells.

19 Q. And are you expecting right now?

20 A. I am.

21 Q. Okay. When are you due?

22 A. April 9th.

23 Q. And a boy or girl?

24 A. A little boy.

25 Q. Do you have any other children?

1 A. I do.  
 2 Q. How many?  
 3 A. One.  
 4 Q. And what's your child's name?  
 5 A. Everett.  
 6 Q. And what was Everett's name initially?  
 7 A. Everett Musch.  
 8 Q. Everett Musch. What is his name now?  
 9 A. Everett Self.  
 10 Q. Is that because your husband adopted him?  
 11 A. Yes.  
 12 Q. And when was Everett born?  
 13 A. July 13th of 2018.  
 14 Q. And who was Everett's father?  
 15 A. His name is Richard.  
 16 Q. Richard Musch?  
 17 A. Yes, Richard Musch.  
 18 Q. Can you tell me a little bit about your  
 19 relationship with Richard.  
 20 A. We were high school sweethearts, off and on  
 21 for a long time. And we got pregnant with Everett in  
 22 2019 [sic].  
 23 Q. Okay. And has Richard been an active father  
 24 to Everett?  
 25 A. No.

1 Q. Do you raise Everett on your own?  
 2 A. I did.  
 3 Q. Or you did at the time. Now you have Edwin,  
 4 right?  
 5 A. Yes.  
 6 Q. And can you tell me a little bit about the  
 7 pregnancy that you had with Everett?  
 8 A. It was great. It was normal. He was very  
 9 healthy. He ended up -- I ended up going into labor  
 10 five weeks early. No complications, no NICU, no  
 11 jaundice light. He just wanted to come early and we got  
 12 to take him home after those recommended two days that  
 13 we were in the hospital.  
 14 Q. Did he have any health complications after he  
 15 was born?  
 16 A. No.  
 17 Q. What kind of baby was Everett?  
 18 A. Oh, a happy baby.  
 19 Q. And was anyone else responsible for Everett's  
 20 healthcare?  
 21 A. Just me. And my mom. And I lived with my  
 22 mom.  
 23 Q. Did you take him to regular doctor visits?  
 24 A. Oh, all of them.  
 25 Q. What type of visits were those?

1 A. The well-baby child checkups and his  
 2 vaccinations. And -- yeah.  
 3 Q. Were there visits for anything besides  
 4 routine checkups?  
 5 A. No.  
 6 Q. Were there any concerns about any sort of  
 7 congenital difficulty?  
 8 A. No.  
 9 Q. Had he ever been diagnosed with a serious  
 10 disease?  
 11 A. No.  
 12 Q. Had he ever had any diagnosis involving any  
 13 sort of bone disorders?  
 14 A. No.  
 15 Q. How about bleeding disorders?  
 16 A. No.  
 17 Q. And prior to April of 2019, had he ever been  
 18 sick even?  
 19 A. No.  
 20 Q. Had he had any sort of minor injuries?  
 21 A. No.  
 22 Q. And at this point in time, who were you  
 23 living with?  
 24 A. My mom and my stepdad.  
 25 Q. And can you tell me a little bit about your

1 family.  
 2 A. We're a very, very close family. We're kind  
 3 of -- my sister and I are 15 years apart, so we try and  
 4 get the most out of each other. She's my rock and my  
 5 mom is definitely my rock and my best friend. And we're  
 6 just -- we're as close as it gets.  
 7 Q. Was that how you were with Everett, as well?  
 8 A. Yes.  
 9 Q. Did your whole family spend time with  
 10 Everett?  
 11 A. Absolutely.  
 12 Q. And as he grew up, were you keeping track of  
 13 how he was doing developmentally?  
 14 A. Yes.  
 15 Q. How was he doing?  
 16 A. Good. He was a little bit ahead. I know  
 17 that he was doing some crawling and then he started to  
 18 stand up and he was -- all of his doctor appointments  
 19 were great and he was thriving.  
 20 Q. In April of 2019, what sort of mobility did  
 21 he have?  
 22 A. He was pulling himself up on, like, furniture  
 23 and he was trying to walk, but was just mostly doing the  
 24 pull up and then sit down.  
 25 Q. Could he stand up without pulling something

1 to pull himself up on?  
 2 A. No.  
 3 Q. Was he crawling a lot?  
 4 A. Yeah.  
 5 Q. Why don't you tell me how well he moved  
 6 around.  
 7 A. He rolled. He did his crawling like the slow  
 8 kind of an army crawl. And then he got to his knees and  
 9 he was crawling, but pulling himself up but he wasn't  
 10 walking yet.  
 11 Q. Was he talking at all at this point in time?  
 12 A. No.  
 13 Q. How about eating? What sort of diet did he  
 14 have at that point in time?  
 15 A. He still had formula. And we were  
 16 introducing solids like mashed potatoes and we did the  
 17 rice cereal and trying to do like, little, baby puffs  
 18 that they make and yogurt melts that they made for  
 19 babies.  
 20 Q. Did you have any trouble feeding him?  
 21 A. No.  
 22 Q. Was he starting to chew harder foods at that  
 23 point in time?  
 24 A. No.  
 25 Q. We've talked a little bit about your family.

1 What are your mom's and stepdad's name?  
 2 A. Kathy and Jay.  
 3 Q. What's their last name?  
 4 A. Kolpin, K-o-l-p-i-n. And Lawhon,  
 5 L-a-w-h-o-n.  
 6 Q. How long did you live with Jay and Kathy  
 7 after Everett was born?  
 8 A. Will you repeat that one?  
 9 Q. How long did you live with your mom and  
 10 stepdad?  
 11 A. Probably until Everett was one and a half.  
 12 Q. Had you always lived with them while you had  
 13 Everett?  
 14 A. Yes. Yes.  
 15 Q. And you mentioned a sister. What's your  
 16 sister's name?  
 17 A. Jennifer Cormier.  
 18 Q. Where does she live?  
 19 A. She lives in Billings.  
 20 Q. Does she have a husband and children?  
 21 A. Yes.  
 22 Q. What are their names?  
 23 A. Her husband's name is Jeff Cormier, her  
 24 oldest son is named is Shane Link. Her second oldest  
 25 son is Elgin Link. And then her youngest daughter Poet

1 Cormier.  
 2 Q. How old is Poet?  
 3 A. She will be five this year.  
 4 Q. Do you spend a lot of time with her children?  
 5 A. Yes.  
 6 Q. And which children do you nanny?  
 7 A. Poet. And occasionally, Shane and Everett if  
 8 they were -- excuse me -- Shane and Elgin if they were  
 9 off school.  
 10 Q. Were you left alone with the children when  
 11 you were nannying?  
 12 A. Yes.  
 13 Q. Did you ever have any incidents when the  
 14 children were injured during your watch?  
 15 A. No.  
 16 Q. Were there any times that the children had to  
 17 be taken to the hospital while you were watching them  
 18 alone?  
 19 A. No.  
 20 Q. How did the children get along with Everett?  
 21 A. Great. Poet interacted with Everett as any  
 22 two year old, she loved him, mostly did her own thing.  
 23 She was two, he was eight or nine months then. That's  
 24 it, yeah.  
 25 Q. Did you ever have any reason to discipline

1 the children?  
 2 A. No.  
 3 Q. Did you ever spank any of the children?  
 4 A. No.  
 5 Q. Did you do anything else to -- any other  
 6 means of physically disciplining them if they acted up?  
 7 A. No.  
 8 Q. Did you ever discipline Everett?  
 9 A. No.  
 10 Q. Did you ever spank him?  
 11 A. No.  
 12 Q. Did you ever hurt him?  
 13 A. No.  
 14 Q. And to the best of your knowledge -- you told  
 15 us that Everett was healthy, was your niece, Poet,  
 16 healthy while you were watching her?  
 17 A. Yes.  
 18 Q. Are you aware of any sort of problems or  
 19 injury that she had?  
 20 A. No.  
 21 Q. And did you have any worries about Everett  
 22 being hurt when he spent time with his cousins?  
 23 A. No.  
 24 Q. There was never any instance that you can  
 25 think of where he was hurt by them?

1 A. No.  
 2 Q. How would you describe yourself as a mother?  
 3 A. I would say I'm a good mom. I love Everett  
 4 more than anything and I would do anything for Everett,  
 5 so I'd say I'm a really good mom.  
 6 Q. Are you a worrier?  
 7 A. Yes.  
 8 Q. How would you describe yourself as a worrier  
 9 when it comes to being Everett's mom?  
 10 A. I would just stand up for him. And oh, man,  
 11 just I always made sure that he was okay and that he had  
 12 everything that he needed and that he was loved and he  
 13 was safe and that he was around people that loved him,  
 14 his family. I wanted to make sure that Everett felt all  
 15 the love that he could feel.  
 16 Q. And I know he's pretty young, but what was  
 17 Everett's personality like?  
 18 A. Very happy and energetic. He was just a --  
 19 he was a really happy baby.  
 20 Q. How often did Everett cry?  
 21 A. Typical, like food and his diaper. He wasn't  
 22 much of a crier. He was really brave. Only the  
 23 necessities he would whine or cry about that he would  
 24 need.  
 25 Q. What sort of things did he like to do?

1 A. He liked to play with his baby toys and he  
 2 really loved hanging out with me and my mom. And he  
 3 loved to crawl, pull himself up and just play in his  
 4 bouncer and his walker.  
 5 Q. Did he like the water?  
 6 A. He loved the water.  
 7 Q. What about baths?  
 8 A. Loved baths.  
 9 Q. Have you ever had any difficulty bathing  
 10 Everett?  
 11 A. No.  
 12 Q. And I'm talking as of April of 2019, how was  
 13 he sleeping?  
 14 A. Good.  
 15 Q. How did you put Everett down to sleep in the  
 16 evenings?  
 17 A. I would usually have formula and he would lay  
 18 with me and we would rock or we would sit until he fell  
 19 asleep.  
 20 Q. Okay. And would you use pillows?  
 21 A. Yes.  
 22 Q. How would you use them?  
 23 A. Kind of like a little barricade. I would put  
 24 a pillow at the top, two pillows on the side, one at the  
 25 bottom.

1 Q. Why did you do that?  
 2 A. Just to make sure he wouldn't roll off the  
 3 bed.  
 4 Q. Had he ever rolled off the bed?  
 5 A. No.  
 6 MR. NIXON: Your Honor, if I may approach, I  
 7 have a few exhibits?  
 8 THE COURT: You may.  
 9 Q. (BY MR. NIXON) Ryann, I'm going to hand you  
 10 State's Exhibit 1, 2, and State's Exhibit 3.  
 11 Would you please look at these and see if you  
 12 recognize them.  
 13 A. (Witness peruses document.) I do.  
 14 Q. What are those pictures of?  
 15 A. My son, Everett.  
 16 Q. Let's look at State's Exhibit 1. Is there a  
 17 date on the back of that exhibit?  
 18 A. Yes.  
 19 Q. What does that say?  
 20 A. February of 2019.  
 21 Q. What does that mean? Is that when the  
 22 picture was taken?  
 23 A. Yeah, around then.  
 24 Q. Okay. Those are your initials there by the  
 25 date?

1 A. Yes.  
 2 Q. Okay. And what does it say on the back of  
 3 Exhibit 2?  
 4 A. April 7th, 2019.  
 5 Q. Is that when it was taken?  
 6 A. Yes.  
 7 Q. Are those your initials?  
 8 A. Yes.  
 9 Q. How about State's Exhibit 3?  
 10 A. April of 2019.  
 11 Q. And are all of those exhibits true and  
 12 accurate depictions of your son for those dates?  
 13 A. Yes.  
 14 MR. NIXON: Your Honor, I move for the  
 15 admission of State's Exhibits 1, 2, and 3.  
 16 THE COURT: Mr. Snively?  
 17 MR. SNIVELY: Judge, can I just see --  
 18 THE COURT: Yes.  
 19 MR. SNIVELY: We don't have an objection.  
 20 THE COURT: Without objection, State's  
 21 Exhibit 1, 2, and 3 are admitted.  
 22 (Wherein, State's Exhibit Nos.  
 23 1, 2 and 3 were received.)  
 24 MR. NIXON: Your Honor, may I publish State's  
 25 Exhibit 1?

1 THE COURT: You may.  
 2 Q. (BY MR. NIXON) Ry, what's going on in this  
 3 picture?  
 4 A. I think we were playing at my sister's house.  
 5 Q. That was in February of 2019?  
 6 A. Yes.  
 7 MR. NIXON: Please publish State's Exhibit 2.  
 8 Q. (BY MR. NIXON) This is the photo that you  
 9 identified as having been taken on April 7th, 2019.  
 10 What's going on here?  
 11 A. We were in his playroom at my mom's house.  
 12 Q. And what is he doing?  
 13 A. He had pulled himself up with his hands on my  
 14 lap and I took his picture.  
 15 MR. NIXON: Please publish State's Exhibit 3.  
 16 Q. (BY MR. NIXON) You have this marked as "April  
 17 2019." What's going on in this photo?  
 18 A. Again, we were at my sister's house and he  
 19 was under his bouncer saucer-thing and he thought he was  
 20 pretty cool in that one.  
 21 Q. Did you try to date at all when you -- you  
 22 broke up with Richard?  
 23 A. No, not really.  
 24 Q. Did you eventually make the decision to try  
 25 to start dating again?

1 A. I did.  
 2 Q. Roughly, when did that happen?  
 3 A. Man, we broke up, I think it was October,  
 4 November. And I tried dating in -- must have been  
 5 January or February, 2019.  
 6 Q. How many serious relationships had you had at  
 7 that point in time?  
 8 A. Really just Richard.  
 9 THE COURT: Mr. Nixon -- you speak very  
 10 softly, so I'll have you pull the mike closer.  
 11 THE WITNESS: Sorry.  
 12 THE COURT: That's okay. Thanks.  
 13 Q. (BY MR. NIXON) What concerns did you have  
 14 about starting to date again?  
 15 A. I guess just dating in general with an infant  
 16 and wondering what that would be like.  
 17 Q. What concerns did you have for Everett?  
 18 A. Your typical mom concerns, who is going to be  
 19 around him, how will it affect my life with that person.  
 20 Just worry, I guess, even if it was something that I  
 21 could do.  
 22 Q. How old was Everett at that point in time?  
 23 A. Seven months, seven or eight months.  
 24 Q. Who was the first person that you dated after  
 25 you made the decision to date again?

1 A. Nathan Polakoff.  
 2 Q. And is he in the room here today?  
 3 A. Yes.  
 4 Q. Would you please point him out.  
 5 A. He's right there.  
 6 MR. NIXON: Let the record reflect that she's  
 7 indicated that Nathan Polakoff is in fact seated at the  
 8 defendant's table and is the defendant.  
 9 THE COURT: The record will so reflect.  
 10 Q. (BY MR. NIXON) How did things start out with  
 11 you and Nathan?  
 12 A. It was good. Yeah. It was -- it seemed  
 13 normal. It seemed good.  
 14 Q. What did he tell you about himself?  
 15 A. That he lives in Red Lodge and that he went  
 16 to college. I can't remember if it was a business or  
 17 not. That he was an active member in the community. He  
 18 did Boy Scouts. He donated blood. He was a trained  
 19 EMT.  
 20 Q. What did you think about his EMT?  
 21 A. I thought it was great. I thought, you know,  
 22 if he had medical knowledge that would be the person to  
 23 be around me and my son.  
 24 Q. Do you recall the first time that you met  
 25 Nathan personally?

1 A. I don't recall the date.  
 2 Q. I'm talking about the event?  
 3 A. Oh.  
 4 Q. Do you recall what type of meeting it was?  
 5 A. It was public. We met in the mall, at the  
 6 Rimrock Mall in Billings, Montana.  
 7 Q. Who was with you?  
 8 A. It was me and Nathan and Everett.  
 9 Q. Okay. And how -- were you taking care of  
 10 Everett while you met with Nathan?  
 11 A. Yes.  
 12 Q. Were you carrying him?  
 13 A. No, he was in a stroller.  
 14 Q. And did Everett react to the defendant at  
 15 all?  
 16 A. No.  
 17 Q. Did Everett insist on being picked up?  
 18 A. No.  
 19 Q. Did you let the defendant carry your baby  
 20 that day?  
 21 A. No.  
 22 Q. Why not?  
 23 A. Because I just met him that day. Like,  
 24 Everett always palled around with me when I did  
 25 everything and I chose not to. It just -- he was new in

1 our life and it was the first time we were meeting and I  
2 wanted to meet in a public place. No, I didn't let him  
3 pick up Everett.

4 Q. And how did your relationship progress?

5 A. It was good. It was kind of long distance,  
6 because he's from Red Lodge and I'm from Billings and  
7 so, I mean, we talked and we met up a couple of times  
8 and that was about it.

9 Q. You told us about your tight family. Did  
10 Nathan have to meet your family?

11 A. Yes.

12 Q. Can you tell us about that.

13 A. He met everyone. He met my sister, my  
14 stepdad, my mom. Just -- he was hanging around us so my  
15 family wanted to make sure that everything was okay.

16 Q. How did they seem to get along?

17 A. Good.

18 Q. I'm going to ask you a couple of kind of  
19 embarrassing questions here. I apologize for that.

20 Did your relationship with Nathan become  
21 sexual?

22 A. Yes.

23 Q. And to ask you an even more embarrassing  
24 question, do you have any sort of affinities for violent  
25 sex?

1 week off, but we were going to go up there to spend a  
2 couple of days up there with him.

3 Q. Where did the day start out for you?

4 A. At my sister's.

5 Q. In Billings?

6 A. Yes, in Billings.

7 Q. And what did you end up doing the rest of  
8 that day?

9 A. I nannied. I was on shift until 5:00, until  
10 my sister got home from work.

11 Q. When did you head towards Red Lodge?

12 A. I think it was around 5:30 or 6:00.

13 Q. Prior to leaving, how was Everett doing that  
14 day?

15 A. Great.

16 Q. What sort of mood was he in?

17 A. Happy.

18 Q. And what was his energy like?

19 A. High.

20 Q. What had he been doing that?

21 A. Hanging out with his cousin.

22 Q. How did he like that?

23 A. He loved it.

24 Q. What sort of concerns did you have about  
25 Everett at that point in time?

1 A. No.

2 Q. Do you enjoy being hurt when you have sex?

3 A. No.

4 Q. Do you enjoy hurting other people when having  
5 sex?

6 A. No.

7 Q. Have you ever?

8 A. No.

9 Q. What about Nathan?

10 A. I know he wanted to try it, but that was it.  
11 It was like a light spanking.

12 Q. Is that anything that you had been interested  
13 in?

14 A. No, but I was open. It was...

15 Q. Did you and Nathan decide a safe word?

16 A. No.

17 Q. I apologize for asking such personal  
18 questions here.

19 Now, do you recall the events of April 17th  
20 through April 20th?

21 A. Yes.

22 Q. How did April 17th of 2019 start out?

23 A. It was a typical day. I was nannying for my  
24 sister and we were going to go up to Red Lodge, because  
25 he had -- I can't remember if it was the weekend or the

1 A. None.

2 Q. Did you have any worries about his health at  
3 all?

4 A. No.

5 Q. So what happens after you leave for Red  
6 Lodge?

7 A. We drive. And we got there -- I can't  
8 remember. It had to have been 7:00, 7:30, I think.

9 Q. Where did Nathan live?

10 A. Here in Red Lodge.

11 Q. Do you know the address?

12 A. No, I don't.

13 Q. Can you tell us a little bit about -- I'll  
14 back up a little bit.

15 Do you know what county Red Lodge is in?

16 A. Carbon.

17 Q. Can you describe Nathan's residence.

18 A. It was like a little cabin-house. It was a  
19 one-bedroom.

20 Q. Fairly small?

21 A. Yes.

22 Q. Any rough idea how big it is?

23 A. I don't know.

24 Q. Was there a separate bedroom?

25 A. Yeah, the one bedroom.

1 Q. How big was that bedroom?  
 2 A. Like...  
 3 Q. I'm not asking for dimensions. Even if you  
 4 say small, big, medium.  
 5 A. It's kind of in between small and medium, I  
 6 would think.  
 7 Q. How about the bathroom?  
 8 A. It was pretty small.  
 9 Q. Okay. And what sort of shower did it have in  
 10 it?  
 11 A. It was just a stand-only shower. There was  
 12 no bathtub.  
 13 Q. Okay. And were there doors closing off both  
 14 the bedroom and the bathroom?  
 15 A. To my knowledge, yes.  
 16 Q. What about the living room area?  
 17 A. It was open.  
 18 Q. From what you've said, is it fair to say  
 19 you're always pretty close to any other room in the  
 20 house?  
 21 A. Yeah.  
 22 Q. So what do you do when you and Everett show  
 23 up at Nathan's?  
 24 A. I remember we got out, we greeted and got  
 25 Everett in there, it was his bedtime. So we -- I got

1 MR. NIXON: I'm going to move to admit  
 2 State's Exhibit 4.  
 3 THE COURT: 4?  
 4 MR. NIXON: Yes.  
 5 THE COURT: Any objection?  
 6 MR. SNIVELY: No objection.  
 7 THE COURT: Without objection, State's  
 8 Exhibit 4 is admitted.  
 9 (Wherein, State's Exhibit No. 4  
 10 was received.)  
 11 Q. (BY MR. NIXON) What does State's Exhibit 5  
 12 show?  
 13 A. Half of his futon and the base heater.  
 14 Q. And do you recognize that?  
 15 A. Yes.  
 16 Q. Is that a true and accurate depiction?  
 17 A. Yes.  
 18 MR. NIXON: State's moves to introduce  
 19 State's Exhibit 5.  
 20 THE COURT: Mr. Snively.  
 21 MR. SNIVELY: No objection.  
 22 THE COURT: Without objection, State's  
 23 Exhibit 5 is admitted.  
 24 (Wherein, State's Exhibit No. 5  
 25 was received.)

1 him a bottle and I got him situated on the couch and I  
 2 gave him a bottle until he fell asleep.  
 3 Q. Then what did you do?  
 4 A. And then I laid him down on Nathan's futon.  
 5 MR. NIXON: Your Honor, if I can approach,  
 6 I'm going to show Ms. Self State's Proposed Exhibits 4  
 7 and 5.  
 8 THE COURT: Go ahead.  
 9 Q. (BY MR. NIXON) Do you recognize those  
 10 pictures?  
 11 A. Yes.  
 12 Q. What is State's Exhibit 4?  
 13 A. His futon mattress.  
 14 Q. And is that in his bedroom?  
 15 A. Yes.  
 16 Q. And is that a true and accurate depiction of  
 17 his bedroom as of April of 2019?  
 18 A. No.  
 19 Q. It's not true and accurate? What's different  
 20 about it?  
 21 A. The pillows.  
 22 Q. Okay. We'll address that in a little bit.  
 23 Is that an accurate picture of his bedroom?  
 24 A. Oh, yes.  
 25 Q. Okay.

1 MR. NIXON: Sabrina, will you please publish  
 2 State's Exhibit 4.  
 3 If I may, Judge?  
 4 THE COURT: Yes.  
 5 (Wherein, State's Exhibit No. 4  
 6 was published to the jury.)  
 7 Q. (BY MR. NIXON) So you've told us that this is  
 8 his bedroom and you said it wasn't accurate. What did  
 9 you mean when you said it wasn't an accurate depiction  
 10 of his bedroom?  
 11 A. How the pillows are set up.  
 12 Q. Okay. So this isn't how you put Everett down  
 13 for the evening that night?  
 14 A. No.  
 15 Q. How should it be to be accurate?  
 16 A. There should be a pillow on the side and a  
 17 pillow on the bottom and then a pillow on the other  
 18 side.  
 19 MR. NIXON: If I may approach the photograph,  
 20 Judge?  
 21 THE COURT: Yes.  
 22 Q. (BY MR. NIXON) Are you saying there should be  
 23 a pillow here?  
 24 A. Yes.  
 25 Q. A pillow here, as well?

1 A. Yes.  
 2 Q. Anything else?  
 3 A. No.  
 4 Q. Is that normally how you put Everett down for  
 5 the evening?  
 6 A. Yes.  
 7 Q. I believe you mentioned he had never escaped  
 8 from that pillow corral?  
 9 A. No.  
 10 Q. And I'm going step back a little bit, had you  
 11 ever had Everett sleep at Nathan's place before this?  
 12 A. No.  
 13 Q. Had you spent much time at Nathan's house?  
 14 A. We would go up for a day or so, but other  
 15 than that, no.  
 16 Q. This was Everett's first trip?  
 17 A. Yeah.  
 18 Q. And prior to this, had you let Everett spend  
 19 time alone with Nathan?  
 20 A. No.  
 21 Q. As you set him down, what concerns did you  
 22 have about Everett at that point in time?  
 23 A. None. I had used the pillow method when we  
 24 were at my house and I felt confident that he wasn't  
 25 going to get out of it.

1 Q. And based on what you knew about Everett at  
 2 the time, could he pull himself while he was on that  
 3 bed?  
 4 A. No.  
 5 Q. And why not?  
 6 A. Because there was nothing to pull himself up.  
 7 Q. So what happens after you put Everett to bed?  
 8 A. I remember he went to bed, hard, he was  
 9 snoozing. And I came out to the living room, and at  
 10 that time Nathan didn't have a TV, so we were watching a  
 11 movie on his computer. And I remember him getting up  
 12 and telling me that he had heard noises coming from the  
 13 bedroom and he wanted to go check on Everett.  
 14 Q. Had you been listening for noises, too?  
 15 A. No.  
 16 Q. Did you hear anything?  
 17 A. I didn't.  
 18 Q. What happened then?  
 19 A. I remember him saying he wanted to go check  
 20 on Everett and I said, "That's okay." And then I heard  
 21 a thump.  
 22 Q. What kind of a thump was it?  
 23 A. Like something dropping.  
 24 Q. What did you -- what did you hear next?  
 25 A. Everett crying and I was in -- I was in the

1 room immediately.  
 2 Q. So you were very close?  
 3 A. Yes.  
 4 Q. How long had Nathan been away from you before  
 5 you heard that thump?  
 6 A. It had to have been five minutes, maybe.  
 7 Q. Okay. But you were able to respond very  
 8 quickly once you heard the crying?  
 9 A. Yeah.  
 10 Q. How long do you think it took you to get  
 11 there?  
 12 A. Seconds. It's a pretty small cabin.  
 13 Q. I'm going to go ahead and put up State's  
 14 Exhibit 4 again. Where is Everett when you go into the  
 15 bedroom?  
 16 A. Towards -- so Nathan is actually holding him  
 17 and he's out of the picture towards the right.  
 18 Q. Okay. So he's in Nathan's arms?  
 19 A. Yes.  
 20 Q. And you say "right," are you talking about  
 21 towards the foot of the futon?  
 22 A. Yes.  
 23 Q. Okay. And what is he -- what is happening  
 24 when you go in there?  
 25 A. He's bouncing him like this (indicating).

1 Q. And what is Everett doing?  
 2 A. He's crying.  
 3 Q. What do you do?  
 4 A. I take him. That was my first instinct, I  
 5 took Everett away. And Nathan told me that Everett had  
 6 rolled off the bed and so he had a little bump right  
 7 here. And once I took him, he started to soothe down  
 8 and calm down, and I was, like, okay. So then I gave  
 9 him a bottle and he went back to bed.  
 10 Q. And describe the bump that you saw.  
 11 A. It was like a little -- it was like a goose  
 12 egg right there (indicating).  
 13 Q. Did he have that bump earlier in the day?  
 14 A. No.  
 15 Q. Had you ever seen a bump like that on Everett  
 16 before?  
 17 A. No.  
 18 Q. What concern did that cause?  
 19 A. That he rolled off the bed and I -- yeah.  
 20 Q. What happened after Everett went back to  
 21 sleep?  
 22 A. I got Everett back to sleep and I went to bed  
 23 with him.  
 24 Q. Was that the last thing that you did that  
 25 day?



1 A. Yeah.  
 2 Q. Why don't you tell me what happened the next  
 3 day on the 18th.  
 4 A. He woke up and he just was not acting himself  
 5 at all. He wouldn't eat anything, he wouldn't drink  
 6 anything, he was crying and I was starting to get  
 7 worried.  
 8 Q. How would Everett normally act?  
 9 A. Usually he would wake up, eat, like his rice  
 10 cereal, have a bottle and then start playing.  
 11 Q. What was his activity level like on the 18th?  
 12 A. Really low, really low.  
 13 Q. And what would he normally eat in the  
 14 mornings?  
 15 A. Rice cereal, teething cookies. Just all  
 16 sorts of little food-appropriate snacks.  
 17 Q. What did he eat that day?  
 18 A. It was -- I tried to give him a bottle and he  
 19 threw that up and he didn't want anything to do with his  
 20 rice cereal.  
 21 Q. Was that the second time that he had vomited  
 22 since the previous night?  
 23 A. Yeah.  
 24 Q. What other concerns did you have about his  
 25 health?

1 A. That he might have a concussion.  
 2 Q. Why did you think that?  
 3 A. I thought he had rolled off the bed and  
 4 that's how he got his bump. I kept asking Nathan, "Are  
 5 you sure he doesn't have a concussion?" And he said,  
 6 "No."  
 7 And he just wasn't getting any better. He  
 8 just -- like I said, he was really sleepy and I kept  
 9 getting worrieder and worrieder.  
 10 MR. NIXON: May I publish State's Exhibit 5?  
 11 THE COURT: Yes.  
 12 (Wherein, State's Exhibit No. 5  
 13 was published.)  
 14 Q. (BY MR. NIXON) So tell us what this picture  
 15 is of again, please.  
 16 A. Nathan's bed and the base heater.  
 17 Q. Is this the location that you believed  
 18 Everett rolled off of?  
 19 A. Yes.  
 20 Q. How high off the floor is this bed?  
 21 A. I think it was like up to my ankles.  
 22 Q. What's the surface of the floor?  
 23 A. It's not like concrete, it was carpet.  
 24 Q. At this point in time how big is Everett?  
 25 A. He was 25 pounds, maybe a little bits more

1 than that. He was big.  
 2 Q. And how quickly could he move across a  
 3 surface like a futon?  
 4 A. Not very fast.  
 5 Q. Why is that?  
 6 A. Because he wasn't like speed crawling. He  
 7 was like -- he was moving and he was crawling and stuff,  
 8 but he wasn't like trying to get up and over pillows or  
 9 anything.  
 10 Q. So before I interrupted you you were telling  
 11 me that you were concerned about his headache. What did  
 12 you decide to do with Everett that day?  
 13 A. Take him to the doctor.  
 14 Q. Do you remember what time that was?  
 15 A. I think it was in the evening.  
 16 Q. And what did the bump look like at that point  
 17 in time?  
 18 A. It was still a little red. I think there was  
 19 some bruising. I can't remember for sure.  
 20 Q. And at this point in time why did you think  
 21 that Everett had rolled off the futon?  
 22 A. Because Nathan had told me Everett rolled  
 23 off.  
 24 Q. Did you ever see him roll off the futon?  
 25 A. No.

1 Q. Did you have any other reason to believe  
 2 that?  
 3 A. No.  
 4 Q. So who went to the appointment at the  
 5 Beartooth Billings Clinic?  
 6 A. We both did.  
 7 Q. Is that -- excuse me. That was with who?  
 8 A. With Nathan.  
 9 Q. And who was the appointment with?  
 10 A. Dr. Doug Whitehead.  
 11 Q. And what did you tell Doug Whitehead when you  
 12 went into the appointment?  
 13 A. That Everett had rolled off the futon and he  
 14 has a bump on his head and he was throwing up and he  
 15 wasn't eating.  
 16 Q. Okay. And when you checked into the clinic,  
 17 who was holding Everett?  
 18 A. It was Nathan.  
 19 Q. What were you doing?  
 20 A. I was checking him in, doing all the  
 21 paperwork and stuff.  
 22 Q. Were you able to hold Nathan -- excuse me --  
 23 hold Everett while you were doing that?  
 24 A. I'm sorry?  
 25 Q. Were you physically able to hold Everett and

1 fill out the paperwork at the same time?  
 2 A. Yes.  
 3 Q. You were or did Nathan hold him?  
 4 A. Nathan held him, but I could have held him.  
 5 Q. And what happened during the examination?  
 6 A. We went in there and we told Dr. Doug  
 7 Whitehead what happened and I was worried that he would  
 8 have -- he had a concussion and Dr. Doug Whitehead had  
 9 told me that, "Oh, no. He's fine. Kids fall, get bumps  
 10 and bruises all the time. I want to do an x-ray of his  
 11 stomach." So I was like, "Okay."  
 12 And we went back there and he did an x-ray of  
 13 his stomach. And I said, "Are you sure you don't want  
 14 to do an x-ray of his head?" and he said, no, he didn't  
 15 want that much radiation going through his body. So  
 16 after that, we went back into his examination room.  
 17 Q. Did he look at Everett's head?  
 18 A. Yeah.  
 19 Q. And he examined him all over; is that right?  
 20 A. Yeah.  
 21 Q. And what were you told to do when you left  
 22 the clinic?  
 23 A. I was told to give Everett Pedialyte, if he  
 24 got worse come back on Friday.  
 25 Q. Where did you go from the examination?

1 A. I think we went to Nathan's parents' house.  
 2 Q. Why did you go there?  
 3 A. Because he had -- they had a washer and dryer  
 4 and we needed to wash clothes.  
 5 Q. Why was that?  
 6 A. Because of how much Everett threw up.  
 7 Q. So what happened when you got to Nathan's  
 8 folks' place?  
 9 A. I remember we went in there, I think Nathan  
 10 started laundry and I asked his mom if I could give  
 11 Everett a bath.  
 12 Q. And did she let you give him a bath?  
 13 A. Yeah.  
 14 Q. What happened then?  
 15 A. He didn't want to take his bath. He was  
 16 pretty fussy and every time I would try to wash his hair  
 17 he would flinch and start crying.  
 18 Q. Had you ever seen him do that before?  
 19 A. No.  
 20 Q. And what concern did that give you?  
 21 A. That I -- I was like, "Why doesn't my baby  
 22 want to take a bath?" I didn't know what to think. I  
 23 remember calling in Nathan and asking him, "Why is he  
 24 keep flinching?" And he told me that he probably has a  
 25 headache.

1 Q. Was there any particular part of his head  
 2 that he was more sensitive to?  
 3 A. Me trying to wash the sides of his head.  
 4 Q. And what did you do after that?  
 5 A. I dried him off and then we went back to his  
 6 cabin.  
 7 Q. At this point in time, what concerns did you  
 8 have about how Everett was acting?  
 9 A. None. I was told that he had the flu and  
 10 that if it got worse to go in on Friday.  
 11 Q. Did you have any other concerns?  
 12 A. No.  
 13 Q. Did you have any concerns about his head?  
 14 A. No.  
 15 MR. SNIVELY: Your Honor, I object to the  
 16 leading question. The witness answered his question.  
 17 MR. NIXON: Withdrawn.  
 18 THE COURT: Sustained.  
 19 Q. (BY MR. NIXON) Was there anything else  
 20 significant that happened the rest of that day?  
 21 A. No.  
 22 Q. Was there any more vomiting?  
 23 A. Not that I can remember.  
 24 MR. NIXON: Your Honor, I'd just ask quickly  
 25 -- it's 3 o'clock, I do have a fair bit more to go

1 through, do we want to take a break or would it be wise  
 2 to inquire of the jury, how the jury is doing?  
 3 THE COURT: Counsel, approach. Mr. Snively.  
 4 (Wherein, an off-the-record  
 5 discussion was held at the  
 6 bench outside of the hearing  
 7 of the jury.)  
 8 THE COURT: We'll take an afternoon break  
 9 right now. So we'll be back at 3:15. You can go and  
 10 hang out in your spacious quarters downstairs.  
 11 During this break it is your duty not to talk  
 12 about the substance of this case in any way or to  
 13 discuss it with anyone else or look at or access any  
 14 information about the case in any way, including  
 15 electronic devices or phones or to form or express any  
 16 opinion on the case until the case is submitted to you.  
 17 We're in recess.  
 18 (Wherein, a recess was taken.)  
 19 THE CLERK: All rise.  
 20 THE COURT: Please be seated. Thanks.  
 21 Back on the record, DC 19-17, State versus  
 22 Polakoff.  
 23 Counsel is present for the State.  
 24 Counsel for the defendant and the defendant  
 25 is present.

1 The jury is not present.  
 2 We just completed an afternoon break. Is  
 3 there any reason, Counsel, for the jury not to be  
 4 brought in at this time?  
 5 MR. NIXON: No, Your Honor.  
 6 MR. SNIVELY: No, Your Honor.  
 7 THE COURT: Okay.  
 8 MR. NIXON: Judge, may I approach?  
 9 THE COURT: Yes.  
 10 MR. NIXON: I have a copy of all the State's  
 11 anticipated recordings.  
 12 It's just the same thing that I just gave  
 13 you.  
 14 MR. SNIVELY: Okay.  
 15 THE COURT: Thank you.  
 16 MR. NIXON: Those are anticipated proposed  
 17 exhibits. I just gave the same packet to Mr. Snively.  
 18 THE COURT: Very good. All rise for the  
 19 jury.  
 20 (Wherein, the jury is present.)  
 21 THE COURT: Please be seated. Thanks.  
 22 The jury is now present.  
 23 Mr. Nixon, do you stipulate that the jury and  
 24 alternate are present?  
 25 MR. NIXON: I do, Your Honor.

1 THE COURT: Mr. Snively.  
 2 MR. SNIVELY: Yes, Your Honor.  
 3 THE COURT: Mr. Nixon, you may proceed with  
 4 your direct of Ms. Self.  
 5 Q. (BY MR. NIXON) Before we get back to where we  
 6 were, I want to ask one question of clarification, after  
 7 you heard the thump, what did you see when you walked  
 8 into the room?  
 9 A. I saw Nathan holding Everett and bouncing  
 10 him.  
 11 Q. What had Everett done?  
 12 A. There was vomit on Nathan's shirt.  
 13 Q. Where else did you see vomit?  
 14 A. I think on the bed.  
 15 Q. I just wanted to go back and clarify.  
 16 So when we left off we were starting to talk  
 17 about the 19th. Do you recall how Everett was doing  
 18 when you woke up on the 19th?  
 19 A. He was pretty tired. I remember -- I think  
 20 he vomited, but mostly just sleepy. He was really  
 21 sleepy.  
 22 Q. What concern did that cause you?  
 23 A. That he was getting over the flu.  
 24 Q. How did you spend your day that day?  
 25 A. Mostly inside.

1 Q. What do you remember about what you did that  
 2 day?  
 3 A. I remember that we were inside because he was  
 4 sleepy. And I remember that during -- towards the  
 5 evening I thought we could go out and try and get him  
 6 some air and see if that would help make him feel a  
 7 little bit better.  
 8 Q. Who was with you during the day?  
 9 A. Nathan.  
 10 Q. How much time did he spend with you that day?  
 11 A. All day.  
 12 Q. And what happened when you decided to go to  
 13 dinner?  
 14 A. I remember we went to dinner and Everett had  
 15 thrown up again and we decided to go home.  
 16 Q. So what did you do?  
 17 A. We went back to his cabin.  
 18 Q. And what did you do once you got to the  
 19 cabin?  
 20 A. I remember I was going to give Everett a  
 21 shower, and Nathan told me, "No. You get cleaned up and  
 22 I'll give him a shower."  
 23 Q. What did you think about that?  
 24 A. I didn't think much of it. I thought he just  
 25 wanted to help. And I was like, "Okay, that's fine." I

1 had no reason to believe anything else.  
 2 Q. Okay. So what did Nathan do from that point  
 3 in time?  
 4 A. I remember he took Everett and I was going to  
 5 change into a dress and he took Everett into the shower.  
 6 Q. Okay. And do you remember if the door was  
 7 opened or closed to the shower?  
 8 A. I think it was like ajar, it was like open a  
 9 little bit.  
 10 Q. And what could you see?  
 11 A. Just a crack.  
 12 Q. What could you see inside the bathroom?  
 13 A. Nothing.  
 14 Q. So what did you do after you changed into a  
 15 dress?  
 16 A. I remember I was picking up toys and Nathan  
 17 came out saying that Everett had stopped breathing.  
 18 Q. You said he came out, where was he?  
 19 A. He was in the shower.  
 20 Q. Was he still standing in the shower when he  
 21 said that?  
 22 A. No, he came out. Like, he ran out of the  
 23 door and was holding Everett and said that Everett had  
 24 stopped breathing and he was holding Everett.  
 25 Q. Now you're holding your hands out like this.

1 (Indicating) I'd like the record to reflect that she's  
2 holding her hands out, basically, about body-width apart  
3 and palms in the air.

4 THE COURT: The record will reflect that.

5 Q. (BY MR. NIXON) And what was Everett doing?

6 A. He was just laying like limp, laying in his  
7 arms, his head was here and his feet were over Nathan's  
8 forearm.

9 Q. What did you do?

10 A. I grabbed him. I remember I grabbed Everett  
11 and I laid him down and I performed rescue breaths.

12 Q. Now, you've told us earlier that Nathan was  
13 an EMT, what was he doing in the way of CPR?

14 A. Nothing.

15 Q. What sort of experience do you have with CPR?

16 A. I don't. I just saw it on a TV show and that  
17 was the only thing I could think of doing.

18 Q. The TV show was that?

19 A. Grey's Anatomy.

20 Q. Had you ever had any training?

21 A. No.

22 Q. So would you please tell us what you did.

23 A. I remember grabbing him and putting him on  
24 the floor and covering his nose and breathing into his  
25 mouth to keep the oxygen going.

1 Q. What was Nathan doing?

2 A. I told Nathan to call 911.

3 Q. Did he?

4 A. Yes.

5 Q. Okay. At this point in time, did Nathan  
6 provide any care for Everett?

7 A. No.

8 Q. How did Everett respond to your rescue  
9 breathing?

10 A. I think good. I don't know. I was just  
11 doing what my instincts told me to do.

12 Q. Could you tell if he was breathing?

13 A. Yeah. It was light, shallow.

14 MR. NIXON: Your Honor, if I may, I'm going  
15 to approach with a disk labeled State's Exhibit 6.

16 THE COURT: You may.

17 Q. (BY MR. NIXON) Do you recognize what that is?

18 A. Yes.

19 Q. What is that?

20 A. The 911 call.

21 Q. And did you listen to that 911 call?

22 A. I did.

23 Q. And did you, in fact, mark the disk to show  
24 that is the disk that you listened to?

25 A. Yes.

1 Q. How did you mark it?

2 A. With my signature.

3 Q. And to your recollection is that an accurate  
4 recording of the 911 call?

5 A. Yes.

6 Q. Has it been altered in any way?

7 A. No.

8 MR. NIXON: Your Honor, I would move the  
9 introduction of State's Exhibit 6, the 911 call.

10 THE COURT: Any objection to 6?

11 MR. SNIVELY: No, Your Honor.

12 THE COURT: Without objection, 6 is admitted.  
13 (Wherein, State's Exhibit No. 6  
14 was received.)

15 MR. NIXON: Your Honor, if I may, I would  
16 like to publish State's Exhibit 6 to the jury.

17 THE COURT: You may.

18 MR. NIXON: Just as a point of clarification,  
19 I have the same recording on the trial pad so that I can  
20 play it to the jury a little bit more easily.

21 THE COURT: All right.

22 MR. NIXON: Is there any objection to that?

23 MR. SNIVELY: No.

24 MR. NIXON: Okay.

25 (Pause.)

1 MR. NIXON: I apologize for the delay.

2 While we're waiting, why don't I ask a few  
3 questions. I apologize it had been working very well  
4 yesterday.

5 Q. (BY MR. NIXON) Who are we going to hear on  
6 the 911 call?

7 A. Nathan and me.

8 Q. Okay. And who first talks to the 911  
9 dispatcher?

10 A. Nathan.

11 Q. And at some point in time do you also speak  
12 with the dispatcher?

13 A. Yes.

14 Q. Why don't you tell what's happening at that  
15 point in time.

16 A. I remember Nathan telling me that I needed a  
17 break and he started to do CPR.

18 Q. Do you remember how long you were on the  
19 phone with the 911 dispatcher?

20 A. No.

21 Q. And when -- at what time did you hang up on  
22 the 911 call?

23 A. When I saw the police, police lights outside.

24 Q. And what happened when the police arrived?

25 A. I remember seeing them and I said, "Oh, my

1 God, they're here," and I flung the door open and one of  
2 the officers asked if I had a blanket to cover Everett  
3 up.

4 Q. What was Nathan doing at this point in time?  
5 You told us earlier he was giving some sort  
6 of CPR.

7 A. Yes.

8 Q. What was he doing at the time that the police  
9 arrived?

10 A. I don't remember.

11 Q. And you just told me that there was an  
12 officer that asked for a blanket?

13 A. Yes.

14 Q. Who was the blanket for?

15 A. Everett.

16 Q. Where was Everett?

17 A. He was on the floor in -- not directly in  
18 front of the door, but back to where I could open the  
19 door. So he was in front of -- in front of the front  
20 door laid down.

21 Q. And do you remember anybody else around?

22 A. No.

23 Q. What was your emotional state at this point  
24 in time?

25 A. I was hysterical. I remember just screaming

1 and big window and he was in a room on the other side.

2 Q. And who were you with?

3 A. I was Nathan. And then his mom and dad  
4 showed up.

5 Q. How long did you wait there before you heard  
6 from the doctor?

7 A. I don't know.

8 Q. Do you remember who the doctor was?

9 A. No. I just remember he was tall and he had  
10 short brown hair.

11 Q. And what did you learn?

12 A. I learned that Everett had two skull  
13 fractures.

14 Q. What sort of explanation did you give Dr.  
15 Fouts?

16 A. I don't remember giving him an explanation.  
17 I remember...

18 Q. What about Nathan?

19 A. I don't know what Nathan gave him.

20 Q. Why don't you tell me what happens next.

21 A. I remember the doctor told us that he had two  
22 skull fractures and that he -- they couldn't treat him  
23 there and they couldn't treat him at St. V's in  
24 Billings, so they were going to life flight him to Salt  
25 Lake City.

1 and I remember I felt like I couldn't move. And then I  
2 had to lean on Nathan to get into the cop car when they  
3 got Everett into the ambulance. Like, I couldn't  
4 physically hold myself up.

5 Q. Do you recall seeing anybody else show up to  
6 help Everett?

7 A. The EMTs.

8 Q. What happened when they arrived?

9 A. I remember they put him on a stretcher to go  
10 to the hospital.

11 Q. What else do you remember about that time?

12 A. I remember there was two officers. There was  
13 one who I saw at the front door and the one that took me  
14 and Nathan to the back of his car to follow Everett to  
15 the hospital.

16 Q. And what happens when you get to the  
17 hospital?

18 A. He's rushed into a room to get help.

19 Q. And what did you do?

20 A. I followed behind them. I remember I was  
21 sobbing and I remember a nurse saying that we were just  
22 there.

23 Q. What were you able to do while they were  
24 treating Everett?

25 A. Nothing. I had to sit behind a glass wall

1 Q. And what did you do when you heard that?

2 A. All I could think about was getting on that  
3 plane.

4 Q. Did you know what Everett's status was at  
5 that point in time?

6 A. It was critical.

7 Q. What did that mean to you?

8 A. That it was really serious and that I just  
9 needed to be with Everett.

10 Q. Did anyone else try to get on the plane with  
11 you?

12 A. No.

13 Q. Did you contact anybody while this was going  
14 on?

15 A. My mom and my sister.

16 Q. And did you make any plans about going to  
17 Salt Lake City?

18 A. Yes.

19 Q. How about anybody else?

20 A. Nathan did.

21 Q. How about your family?

22 A. And my family. My mom was on her way to Salt  
23 Lake City.

24 Q. Do you remember much about that point in  
25 time?

1 A. I remember getting on the airplane and there  
 2 was -- I don't know if they were EMTs or doctors, but  
 3 they were monitoring Everett and then we got into Salt  
 4 Lake City.  
 5 Q. How long did Nathan stay with you?  
 6 A. He didn't, not on the plane.  
 7 Q. How long -- did Nathan stay with you during  
 8 the duration of the hospital visit?  
 9 A. Yes.  
 10 Q. Can you tell me if there was ever an occasion  
 11 that some of your property was retrieved in Nathan's  
 12 house?  
 13 A. Yes. I remember him and his mom, when we  
 14 were getting ready to go into the ambulance, that they  
 15 were going to go and pick up some of our stuff.  
 16 Q. And where did you fly out of?  
 17 A. Red Lodge.  
 18 Q. And can you tell me a little bit about the  
 19 type of plane that you got on?  
 20 A. No.  
 21 Q. How many people were on the plane?  
 22 A. There was three -- I don't know if there were  
 23 EMTs or doctors, me, and then I think there was a pilot.  
 24 Q. Could you see Everett?  
 25 A. Yes.

1 Q. And how was he during that flight down?  
 2 A. He was stable, but he was sucking on his hand  
 3 really hard.  
 4 Q. Do you remember anything else that you  
 5 observed about Everett?  
 6 A. No.  
 7 Q. Okay. Do you recall what time it was that  
 8 you flew out of Red Lodge?  
 9 A. No.  
 10 Q. Do you recall when you got in Salt Lake City?  
 11 A. I think it was early in the morning. It was  
 12 still dark out.  
 13 Q. What is your overall emotional state at this  
 14 point in time?  
 15 A. Hysterical. I haven't slept yet, haven't  
 16 eaten and I don't know what's going on.  
 17 Q. What are you concerned about?  
 18 A. If he's going to be okay.  
 19 Q. Do you recall what kind of staff you talked  
 20 to when you got to Salt Lake City?  
 21 A. A lot. I remember we got through there, they  
 22 took Ev. And I remember there was a case worker there  
 23 and she asked me what happened. And then I met with  
 24 another doctor who was on that night.  
 25 Q. And were you able to stay with Everett at

1 that point in time?  
 2 A. No.  
 3 Q. Where was he?  
 4 A. He's with a team of doctors.  
 5 Q. Who did you know when you were down there?  
 6 A. I'm sorry. What?  
 7 Q. Who did you know once you got there?  
 8 A. No one.  
 9 Q. And what sort of support staff did you get  
 10 when you got on to the ground?  
 11 A. There was the EMTs, and then there were the  
 12 doctors and then that one case worker, but other than  
 13 that, I was by myself.  
 14 Q. When you say "case worker," what do you mean?  
 15 A. She was just a case worker that was there. I  
 16 don't know how she ended up there, but she was there.  
 17 MR. NIXON: May I have just a moment, Judge?  
 18 THE COURT: Sure.  
 19 MR. NIXON: If I may backtrack a little bit,  
 20 I'd like to publish the 911 call again.  
 21 THE COURT: All right.  
 22 (Wherein, State's Exhibit No. 6  
 23 was published.)  
 24 MR. NIXON: Please stop it there.  
 25 THE COURT: Start it over and put it on a

1 mike.  
 2 MR. NIXON: Let's get the microphone on it.  
 3 Q. (BY MR. NIXON) Whose voices were we listening  
 4 to on that call?  
 5 A. Mine and Nathan's.  
 6 Q. Before we backtracked, I believe you said you  
 7 were alone in Salt Lake City, but you also told us you  
 8 had made plans in Red Lodge for other people to join  
 9 you. What plans had you made for your family to meet  
 10 you?  
 11 A. That they were -- they were going to -- my  
 12 mom and Jay were coming to Salt Lake City to be there  
 13 with me.  
 14 Q. Can you tell me whether or not you had an  
 15 opportunity to talk to Nathan about coming to Salt Lake  
 16 City?  
 17 A. Yes.  
 18 Q. What did you decide?  
 19 A. He said that he would be on his way as soon  
 20 as he could.  
 21 Q. And what else did you and Nathan talk about  
 22 while you were at the Beartooth Billings Clinic?  
 23 A. That when he was going to come to Salt Lake  
 24 City, because I remember he asked his mom and dad if it  
 25 was okay if he could go.

1 Q. Can you tell me whether or not you had the  
2 opportunity to speak with Nathan alone at Beartooth  
3 Billings Clinic?  
4 A. Yes.  
5 Q. What happened?  
6 A. I remember when I was sitting behind the  
7 glass, he was sitting with his mom and Nathan got up and  
8 wanted to speak with me in private.  
9 Q. Where did you go?  
10 A. It was an empty exam room where I was  
11 sitting.  
12 Q. What happened?  
13 A. I remember him pulling me in there and  
14 telling me, "Whatever you do, you've got to tell them  
15 that I wasn't alone with Everett."  
16 And I was like, "What do you mean? I've been  
17 telling the truth. It was an accident."  
18 Like he's...  
19 Q. What did you think about that?  
20 A. At first, I didn't think anything about it,  
21 because all that I knew was that Everett had two  
22 fractures and he had just been to the doctor's and now  
23 we're going to Salt Lake City.  
24 Q. Okay.  
25 MR. NIXON: So I'm going to go ahead, and if

(Wherein, an off-the-record  
discussion was held at the  
bench outside of the hearing  
of the jury.)  
(Wherein, the witness returns  
to the witness stand.)  
7 Q. (BY MR. NIXON) Do you recognize what those  
8 pictures are?  
9 A. Yes.  
10 Q. And did you also have a chance to look at the  
11 back of the photos, as well?  
12 A. Yes.  
13 Q. Are those photos all labeled "April 2019"?  
14 A. Yes.  
15 Q. Is that your signature next to those dates?  
16 A. Yes.  
17 Q. Does that signify when those photos were  
18 taken?  
19 A. Yes.  
20 Q. What are those photos of?  
21 A. Everett in Salt Lake City.  
22 Q. Are those true and accurate pictures of  
23 Everett when he was in the hospital?  
24 A. Yes.  
25 MR. NIXON: Your Honor, the State moves for

1 I may, Judge, show the witness what is marked State's  
2 Exhibit 7, 8, 9, 10, 11, 12, and 13.  
3 THE COURT: 7 through 13?  
4 MR. NIXON: As well as 14, 15, and 16.  
5 Q. (BY MR. NIXON) Would you please take a  
6 moment to look at these.  
7 THE COURT: And, Mr. Nixon, you have  
8 permission to approach the witness.  
9 MR. NIXON: I apologize. I thought I asked.  
10 THE COURT: No, no, you did. I'm just saying  
11 for the rest of your direct, you can go ahead and  
12 approach to offer your exhibits. That's fine.  
13 MR. NIXON: Okay.  
14 THE WITNESS: (Witness peruses document.)  
15 Can I please have a minute? Can I have a  
16 minute, please?  
17 MR. NIXON: Can she have a second, please?  
18 THE COURT: Just go out and we'll take a  
19 brief minute. We're not going to break, but go ahead,  
20 Mr. Nixon, and take the witness out to the hall for a  
21 minute.  
22 MR. NIXON: Okay.  
23 (Wherein, the witness steps  
24 into hall.)  
25 THE COURT: Counsel, approach.

1 the introduction of State's Exhibit 7, 8, 9, 10, 11, 12,  
2 13, 14, 15 and 16.  
3 THE COURT: Mr. Snively?  
4 MR. SNIVELY: No objection.  
5 THE COURT: Without objection, State's  
6 Exhibit 7 through 16 are admitted.  
7 (Wherein, State's Exhibit Nos.  
8 7 through 16 were received.)  
9 Q. (BY MR. NIXON) At what point in time on the  
10 20th did you actually first get to see Everett?  
11 A. When he was in the ICU.  
12 Q. Do you have any idea what time of day that  
13 was?  
14 A. No.  
15 Q. Any recollection if it was the first part,  
16 last part or is it just kind of kind of a blur?  
17 A. It's a blur.  
18 Q. Okay.  
19 MR. NIXON: And if I may, Judge, I'd like to  
20 publish State's Exhibit 7.  
21 THE COURT: You may.  
22 (Wherein, State's Exhibit No. 7  
23 was published.)  
24 Q. (BY MR. NIXON) What is this photo of?  
25 A. Of Everett in the ICU.

1 Q. Is that how he appeared when you first saw  
2 him at the ICU?  
3 A. Yes.  
4 MR. NIXON: State's Exhibit 8, please.  
5 Q. (BY MR. NIXON) What is this, Ry?  
6 A. Everett.  
7 Q. And was Everett conscious when you saw him in  
8 the ICU?  
9 A. No.  
10 MR. NIXON: And State's Exhibit 10.  
11 Q. (BY MR. NIXON) What is this?  
12 A. Everett in the ICU.  
13 MR. NIXON: State's Exhibit 11, please.  
14 Q. (BY MR. NIXON) What's your understanding of  
15 what his condition was when you observed this photo?  
16 A. Critical.  
17 Q. Had you been made aware of his specific  
18 medical conditions?  
19 A. Only that he had two skull fractures.  
20 Q. Okay.  
21 MR. NIXON: State's Exhibit 12, please.  
22 Q. (BY MR. NIXON) How long did Everett have  
23 these various probes on his head?  
24 A. Days, I think.  
25 MR. NIXON: Judge, if you would please

1 instruct the jury if I am ever blocking, please let me  
2 know. I don't want to impede their vision.  
3 THE COURT: I'll keep my eyes out, too. We  
4 certainly want everybody to be able to see the screen,  
5 that's for sure.  
6 MR. NIXON: State's Exhibit 13.  
7 Q. (BY MR. NIXON) Is that a close up of the last  
8 shot?  
9 A. Yes.  
10 MR. NIXON: State's Exhibit 14. State's  
11 Exhibit 15.  
12 Q. (BY MR. NIXON) When was this picture taken,  
13 Ryann, in comparison to the others?  
14 A. I don't know.  
15 Q. Okay.  
16 MR. NIXON: State's Exhibit 16.  
17 Q. (BY MR. NIXON) Ryann, while  
18 this is going on, what other type -- in addition to  
19 doctors, who else are you talking to during that day?  
20 A. I'm sorry. Will you repeat that?  
21 Q. Who else were you speaking to besides doctors  
22 that day?  
23 A. I don't know.  
24 Q. Were you ever contacted by Child Protective  
25 Services?

1 A. I remember that we had -- I had another case  
2 manager, I was contacted by the police, the Salt Lake  
3 City Police, but I wasn't contacted by CPS for another  
4 week after.  
5 Q. Okay. But you were contacted by the police?  
6 A. Yes.  
7 Q. What did the police want?  
8 A. They wanted to know what happened.  
9 Q. And did you provide an interview?  
10 A. I did.  
11 Q. And when was that?  
12 A. That was -- I think it was April 20th. I  
13 can't remember the day.  
14 Q. And how did that make you feel?  
15 A. Scared.  
16 Q. How many police officers were there?  
17 A. Four.  
18 Q. What did you learn from the interview?  
19 A. That it wasn't -- it possibly wasn't an  
20 accident.  
21 Q. Who was being investigated?  
22 A. Both me and Nathan.  
23 Q. Who sort of thoughts did you have when you  
24 heard that?  
25 A. I -- I didn't know. I didn't know what was

1 going on. I had -- that Everett had a lot of doctors  
2 and he had teams and the only information I was getting  
3 in Salt Lake City was that he still only had two  
4 fractures.  
5 Q. What suspicion did you have at that point in  
6 time?  
7 A. I still had none.  
8 Q. What did you think had caused Everett's skull  
9 fractures that time?  
10 A. Can you repeat that?  
11 Q. What do you think had caused Everett's skull  
12 fractures at that point in time?  
13 A. I don't know.  
14 Q. Did you still trust Nathan at that point in  
15 time?  
16 A. Yeah. I didn't know how anyone could -- the  
17 thought of anyone hurting a baby, I just -- I couldn't  
18 -- I couldn't accept it.  
19 Q. Were you asked if you hurt your baby?  
20 A. Yes.  
21 Q. What did you say?  
22 A. No.  
23 Q. Did you hurt your baby?  
24 A. No.  
25 Q. Did you cause there to be a bump on his head



1 on the 17th of April?  
 2 A. No.  
 3 Q. And did you hurt him and cause him to have  
 4 skull fractures?  
 5 A. No.  
 6 Q. Had you ever -- withdrawn.  
 7 Did you have any contact with Nathan around  
 8 the time of that police interview?  
 9 A. Yes.  
 10 Q. When did you contact him?  
 11 Maybe I'll back up a little bit before I ask  
 12 that one. Do you remember what time of day the police  
 13 interview was?  
 14 A. It had to have -- it was at night. I don't  
 15 know the specific time, but it was dark out. I remember  
 16 it was dark out.  
 17 Q. Okay. And when did you talk to Nathan?  
 18 A. I think before.  
 19 Q. Where was Nathan when you talked to him?  
 20 A. He had told me that he was on his way from  
 21 Red Lodge.  
 22 Q. Did he provide better information about where  
 23 he was?  
 24 A. No.  
 25 Q. Did you have any idea where he was?

1 A. All I knew is that he was in Wyoming. He  
 2 said he was in Wyoming.  
 3 Q. What did you believe he was going to do after  
 4 he talked to you?  
 5 A. I thought he was going to be here to support  
 6 us.  
 7 Q. Who else was with you at that point in time?  
 8 A. My mom.  
 9 Q. What, if anything, did you discuss about the  
 10 police interview with Nathan?  
 11 A. I remember telling him that the police are  
 12 going to interview me. And he, again, had told me to  
 13 make sure that I tell them that he wasn't alone with  
 14 Everett.  
 15 Q. What was your response?  
 16 A. I told him, again, that I'm going to tell the  
 17 truth and I've been telling the truth this entire time  
 18 and that this was an accident. And he said, "Okay."  
 19 Q. When did Nathan get to Salt Lake City?  
 20 A. He didn't.  
 21 Q. What did he tell you about not showing up?  
 22 A. I don't remember him telling me that he  
 23 wasn't coming. I remember when mom told me that he  
 24 wasn't coming.  
 25 Q. And did you talk to Nathan about cooperating

1 with law enforcement again?  
 2 A. About what?  
 3 Q. And did you have any more conversations about  
 4 law enforcement after that?  
 5 A. No.  
 6 Q. What did you and your family decide to do  
 7 regarding law enforcement?  
 8 A. That we would cooperate no matter what and we  
 9 just wanted to get to the bottom of what happened.  
 10 Q. And why was that?  
 11 A. Because we knew at that point that it wasn't  
 12 an accident.  
 13 Q. And did you continue to communicate with  
 14 Nathan for awhile after that?  
 15 A. No.  
 16 Q. Now, after Nathan asked you not to tell  
 17 anybody about being alone with Everett, did he say  
 18 anything else?  
 19 A. No.  
 20 Q. Were there any points in time that he made  
 21 threats against himself?  
 22 A. Yes.  
 23 MR. SNIVELY: Judge, I object. The witness  
 24 has already answered the question that there was no  
 25 other communication.

1 THE COURT: Overruled.  
 2 MR. SNIVELY: It's a leading question.  
 3 THE COURT: Rephrase it. Go ahead.  
 4 Q. (BY MR. NIXON) What additional conversations  
 5 did you have with Nathan?  
 6 A. I remember when -- that I -- I'd asked him --  
 7 or told him that we were going to get to the bottom of  
 8 this and we were going to help law enforcement any way  
 9 that we can and we wanted his cooperation.  
 10 Q. How did he respond?  
 11 A. Not good.  
 12 Q. What does "not good" mean?  
 13 A. I remember him telling me that he was going  
 14 to commit suicide.  
 15 Q. Did he say why?  
 16 A. He said that he was going to be blamed for  
 17 everything.  
 18 Q. What effect did that have on you?  
 19 A. I was in shock. I didn't really know what to  
 20 think. And by that time, I got worried and I told my  
 21 mom to call his parents. And I remember my mom was  
 22 trying to get ahold of Nathan's parents and she kept  
 23 leaving voicemails.  
 24 Q. Did you or your family have much  
 25 communication with Nathan after that?

1 A. No.  
 2 Q. How many times did Nathan try to see Everett  
 3 after the accident?  
 4 A. None.  
 5 Q. You mentioned earlier that you started to  
 6 believe that this wasn't an accident. What had you  
 7 learned about Everett's injuries?  
 8 A. That they were deliberate.  
 9 Q. What were his injuries -- you said initially  
 10 skull fractures. Were there any additional injuries  
 11 that you learned of?  
 12 A. There was hemorrhaging behind his eyes and he  
 13 got -- they think he had a stroke and he was paralyzed  
 14 on, I think it was the left side of his body, he was  
 15 temporarily paralyzed.  
 16 Q. Were there any other disorders that they  
 17 identified?  
 18 A. Not that I can remember.  
 19 Q. You mentioned his eyes. How were his eyes  
 20 affected?  
 21 A. They were crossed.  
 22 Q. Had they ever been crossed previously?  
 23 A. No.  
 24 Q. And how was Everett's vision affected?  
 25 A. Permanent. There was -- he won't -- he lost

1 a lot of his sight in one of his eyes. I think it was  
 2 his right eye.  
 3 Q. And was there any other complications because  
 4 of that skull fracture?  
 5 A. He needed a feeding tube.  
 6 Q. Why did he need a feeding tube?  
 7 A. Because he couldn't eat and he couldn't make  
 8 -- with what happened when he got paralyzed, he couldn't  
 9 form a sucking face to drink out of his bottle.  
 10 Q. And had he ever previously had issues sucking  
 11 out of a bottle?  
 12 A. No.  
 13 Q. Was he able to eat things like the rice  
 14 cereal that you talked about?  
 15 A. Yes.  
 16 Q. He was able to?  
 17 A. Oh, no. I'm sorry. He wasn't able to eat  
 18 because he had an NG tube.  
 19 Q. How long did he have an NG tube?  
 20 A. I think it was three months, maybe three and  
 21 a half months.  
 22 Q. Now, earlier you mentioned that there had  
 23 been -- I should clarify, can you tell me whether or not  
 24 Everett had seizures?  
 25 A. No.

1 Q. He did not have seizures?  
 2 A. Not before his injury.  
 3 Q. Oh, I'm sorry. How about after?  
 4 A. Yes.  
 5 Q. What happened with that?  
 6 A. I remember I was in Salt Lake City and  
 7 Everett started to twitch and it was getting  
 8 uncontrollable and we called the nurse in and she said  
 9 he was having seizures and that we had to get his -- a  
 10 neurologist in there.  
 11 Q. How have those seizures impacted Everett's  
 12 life?  
 13 A. He had to be on Keppra, a seizure medication,  
 14 for five or six months, until we could come back to Salt  
 15 Lake City to his neurologist.  
 16 Q. How long did he stay at Primary Children's  
 17 Hospital in Salt Lake City?  
 18 A. I think it was two weeks.  
 19 Q. Do you remember when he was discharged?  
 20 A. I think it was at the end of May, early June.  
 21 Q. Okay. And what happened after he was  
 22 discharged?  
 23 A. He got to come home with me. I was under CPS  
 24 investigation. And I -- my mom and I and my stepdad, we  
 25 all took care of him around the clock.

1 Q. How long was CPS involved?  
 2 A. Three months.  
 3 Q. And why did that terminate?  
 4 A. It was --  
 5 MR. SNIVELY: Your Honor, I object. It's not  
 6 relevant why CPS got out of the case.  
 7 THE COURT: Relevance is your objection?  
 8 MR. SNIVELY: Yes.  
 9 THE COURT: Overruled.  
 10 Q. (BY MR. NIXON) Would you please answer.  
 11 A. I was doing everything that the CPS was  
 12 asking. I was going to therapy, I was taking Everett to  
 13 all of his appointments, like usual, my checkups with my  
 14 case worker, Bonnie, they were all well. The house was  
 15 well. Everything -- he was thriving.  
 16 Q. How much follow-up was required after he was  
 17 released from Primary Children's?  
 18 A. A lot. I mean, we've --  
 19 Q. Were there surgeries?  
 20 A. There was appointments, no surgery yet.  
 21 Q. Now I'm talking about since he was released  
 22 from Primary.  
 23 A. Oh, okay. Yes, we have -- we have his eye  
 24 doctor in Salt Lake City, so we drive out there three  
 25 times out of the year to go to that. He recently had

1 surgery on his eye in November of 2021. He is scheduled  
2 for another appointment in Seattle for a brain scan.

3 Q. How many surgeries has he had since leaving  
4 the hospital?

5 A. So far one.

6 Q. How many appointments do you think he's had  
7 since he's been discharged?

8 A. Five or more.

9 Q. Where are those located?

10 A. Salt Lake City.

11 Q. Now, what other impacts have you noticed on  
12 Everett since he got out of the hospital?

13 A. When he got out of the hospital, I had to put  
14 a feeding tube up his nose.

15 Q. How did he respond to that?

16 A. Not good.

17 Q. How did you respond to that?

18 A. Horrible.

19 Q. What sort of treatment was required for his  
20 eye?

21 A. He had to do an eye patch and glasses.

22 Q. How did he like that?

23 A. He hated it. He would rip it off, throw his  
24 glasses. We would go again, he would rip it off, throw  
25 his glasses. It was back and forth.

1 A. Before, he could eat and he could see and he  
2 got along fine with other kids.

3 Q. You told us earlier that he was just starting  
4 to walk. How was that affected by his injury?

5 A. He lost a lot of his balance. So he couldn't  
6 -- he would have -- he wouldn't be able to see anything  
7 on one side and he would run into stuff. And he would  
8 -- like he's loopy when he would walk and so we had to  
9 get him like special shoes to help with his ankles and  
10 stuff and help with his balance.

11 MR. NIXON: Your Honor, may I approach to  
12 show the witness State's Exhibit 17, 18, 19, 21, 22, 23  
13 and 20?

14 THE COURT: 20, you said?

15 MR. NIXON: 20, yes.

16 THE COURT: Yes, you may.

17 Q. (BY MR. NIXON) Please take a moment and look  
18 at those.

19 A. Witness complies.

20 Q. Would you please look at the back of the  
21 photos, too.

22 A. Yes.

23 Q. What do you have written on the back of the  
24 photos?

25 A. Dates.

1 Q. How old was he when he had to start wearing  
2 glasses?

3 A. He was 10 or 11 months.

4 Q. What sort of therapy did he require?

5 A. He needed physical and -- at first, physical  
6 and occupational therapy.

7 Q. What was the physical therapy for?

8 A. It was for his movements when he started  
9 walking, his balance. His balance was really off.

10 Q. And the occupational, what was that to  
11 address?

12 A. It was to help his paralysis and help regain  
13 chewing motion and his sucking motions and whatever else  
14 that he needed.

15 Q. How long did he have to keep up those  
16 therapies?

17 A. I think it was about a year and a half for  
18 both physical and occupational.

19 Q. How was he affected socially?

20 A. He had a lot of outbursts. I know that he  
21 had a hard time dealing with his emotions. And we  
22 didn't put him in daycare, because he was just -- he was  
23 with us all the time.

24 Q. How did that change compared to before the  
25 accident?

1 Q. You signed those?

2 A. Yes.

3 Q. What are those pictures of?

4 A. Of Everett.

5 MR. NIXON: Your Honor, I would move the  
6 admission of these exhibits.

7 THE COURT: Mr. Snively, any objection to 17  
8 through 23?

9 MR. SNIVELY: No objection, Judge.

10 THE COURT: Without objection, 17 through 23  
11 is admitted.

12 (Wherein, State's Exhibit Nos.  
13 17 through 23 were received.)

14 MR. NIXON: May I publish these exhibits to  
15 the jury, please?

16 THE COURT: Yes.

17 MR. NIXON: May I approach the witness so I  
18 can get out of the way?

19 THE COURT: Yeah.

20 MR. NIXON: State's Exhibit 17, please.

21 (Wherein, State's Exhibit No.  
22 17 was published.)

23 Q. (BY MR. NIXON) What's the date on this?

24 A. This one is May of 2019.

25 Q. What does this show?

1 A. Everett and his NG tube.  
 2 Q. Okay. How did you use that tube to feed him?  
 3 A. So it went up through his nose and then the  
 4 back of his throat and down to his stomach. And at  
 5 night he would have a little bag that would have his  
 6 formula in it that would be pumped into his stomach.  
 7 Q. What can you tell about his eyes in this  
 8 picture?  
 9 A. They're crossed.  
 10 Q. I'll have you take a look at State's Exhibit  
 11 18.  
 12 MR. NIXON: Please publish that.  
 13 (Wherein, State's Exhibit No.  
 14 18 was published.)  
 15 Q. (BY MR. NIXON) What does this show?  
 16 A. Before and after pictures.  
 17 Q. How close in time are those photos?  
 18 A. The left one was from April of 2019 and the  
 19 right one is from May 2019.  
 20 MR. NIXON: Please publish State's Exhibit  
 21 19.  
 22 (Wherein, State's Exhibit No.  
 23 19 was published.)  
 24 Q. (BY MR. NIXON) When was this photo taken?  
 25 A. July 7th of 2019.

1 MR. NIXON: State's Exhibit 21.  
 2 Q. (BY MR. NIXON) When was this photo?  
 3 A. September 18th of 2019.  
 4 MR. NIXON: State's Exhibit 22.  
 5 Q. (BY MR. NIXON) How about this?  
 6 A. October 31st of 2019.  
 7 MR. NIXON: Please publish State's Exhibit  
 8 23.  
 9 (Wherein, State's Exhibit No.  
 10 23 was published.)  
 11 THE WITNESS: August 21st, 2021.  
 12 Q. (BY MR. NIXON) So this is a more recent  
 13 picture. How has his eyes changed since the previous  
 14 pictures?  
 15 A. A lot better after his glasses. It started  
 16 to correct it a little bit.  
 17 MR. NIXON: Finally, please publish State's  
 18 Exhibit 20.  
 19 THE WITNESS: March of 2022.  
 20 Q. (BY MR. NIXON) So this is the most recent,  
 21 right?  
 22 A. Yes.  
 23 Q. And how have things changed since the  
 24 previous photos?  
 25 A. His eye has gotten better. His eye doctor

1 told us that he most likely didn't need more surgeries  
 2 done on his eye in the future and the one surgery didn't  
 3 fix it. And he probably won't have the eyesight that he  
 4 was born with. And that he'll just have to keep wearing  
 5 his glasses and doing the patching.  
 6 Q. Since he was injured in April of 2019, how  
 7 many other injuries has he had?  
 8 A. None.  
 9 Q. How many emergency room visits as he had?  
 10 A. None.  
 11 Q. How many health scares has he had other than  
 12 related to this incident?  
 13 A. None.  
 14 Q. And how is he Everett doing today?  
 15 A. Great. He's good.  
 16 Q. What's changed in Everett's life?  
 17 That wasn't a very good question. How does  
 18 he get along with his new dad?  
 19 A. Oh, wonderful.  
 20 MR. NIXON: One moment, please.  
 21 No further questions at this point in time,  
 22 Judge.  
 23 THE COURT: Mr. Snively, you may cross.  
 24 MR. SNIVELY: Yes, Your Honor.  
 25 ///

1 **CROSS EXAMINATION**  
 2 **BY MR. SNIVELY:**  
 3 Q. Is it all right if I call you Ryann?  
 4 A. I prefer Ry.  
 5 Q. Ry. Thank you. Ry, I want to take you back  
 6 to April 17th of 2019. You and Everett drove to Red  
 7 Lodge, just the two of you that evening, right?  
 8 A. Yes.  
 9 Q. And that was after you spent Wednesday  
 10 nannying Shane and Poet, correct?  
 11 A. Yes.  
 12 Q. And the day before that, Shane had been  
 13 kicked out of school for fighting, correct?  
 14 A. Yes.  
 15 Q. And he spent that Wednesday with Everett,  
 16 correct?  
 17 A. Yes.  
 18 Q. And there was a period of time when you took  
 19 a bath where the kids were alone, correct?  
 20 A. Yes.  
 21 Q. At Nathan's cabin the distance is very little  
 22 in that setup, correct?  
 23 A. Yes.  
 24 Q. And do you agree that the distance from the  
 25 couch in the living room to the bathroom is about this

1 distance or even a little less?  
 2 A. No.  
 3 Q. It's further?  
 4 A. I feel it was a little bit further.  
 5 Q. How far would you estimate that distance to  
 6 be?  
 7 A. I think it was -- it was from me to maybe  
 8 that wall behind you.  
 9 Q. This half wall here?  
 10 A. Yeah.  
 11 Q. And you said that the door was -- so you're  
 12 estimating it to be 12, 15 feet?  
 13 A. I think so.  
 14 Q. And you were out at the couch when they were  
 15 in the shower, correct, on the 19th?  
 16 A. On the 19th, yes.  
 17 Q. And the door was partially opened?  
 18 A. Yes.  
 19 Q. In fact, in that cabin, that was the only  
 20 door other than the door outside, correct?  
 21 A. That I can remember. I can't remember if  
 22 there was a door to Nathan's bedroom or not.  
 23 Q. But you don't ever remember a door?  
 24 A. To Nathan's bedroom?  
 25 Q. Yes.

1 A. Yeah, I don't remember.  
 2 Q. And now on the 17th, you said afterwards that  
 3 Everett seemed okay?  
 4 A. Yes.  
 5 Q. He slept through the night?  
 6 A. Yes.  
 7 Q. You gave him a bottle, he settled back down?  
 8 A. Yes.  
 9 Q. Slept all night?  
 10 A. Yes.  
 11 Q. And he slept on the futon between you and  
 12 Nathan, correct?  
 13 A. Yes.  
 14 Q. Your testimony is you didn't hear any noise  
 15 prior -- on the 17th, prior to Nathan going in?  
 16 A. Yes.  
 17 Q. But he told you he heard something and he was  
 18 going to go in?  
 19 A. Yes.  
 20 Q. And you could have followed him in  
 21 immediately or gone and looked yourself, right?  
 22 A. Yes.  
 23 Q. And you were only a few steps from that  
 24 bedroom where you were at, correct?  
 25 A. Yes.

1 Q. And I think you've said it took a second or  
 2 two for you to get from where you were into the bedroom?  
 3 A. Yes.  
 4 Q. And the only thing you saw, other than the  
 5 vomit was a red mark on his forehead, correct?  
 6 A. Yes.  
 7 Q. And you had talked about the red mark to Salt  
 8 Lake Police on the 20th of April, you talked about a red  
 9 mark with Red Lodge Police on May -- was it May 9th that  
 10 they interviewed you?  
 11 A. I think so.  
 12 Q. And of '19?  
 13 A. Of '19.  
 14 Q. It was shortly after you got back to  
 15 Billings, correct?  
 16 A. Yeah.  
 17 Q. You came up here and were interviewed and  
 18 Chief Wells' office here in Red Lodge?  
 19 A. Yes.  
 20 Q. During that interview, you only talked about  
 21 a red mark on the night of the 17th on Everett, correct?  
 22 A. Yes.  
 23 Q. And when you see PA Whitehead the next day,  
 24 the 18th, that red mark had started to bruise, correct?  
 25 A. I think so.

1 Q. And you -- prior to the -- to include the  
 2 interview here in Red Lodge, you never described the  
 3 injury as a goose egg, did you?  
 4 A. No.  
 5 Q. In fact, it's June of '21 is the first time  
 6 that you ever used that terminology?  
 7 A. I don't remember.  
 8 Q. But you do remember that those interviews I  
 9 just asked you about, it was always referred to as only  
 10 a red mark?  
 11 A. Yes.  
 12 Q. Never a goose egg?  
 13 A. Yes.  
 14 Q. And you've seen PA Whitehead's records,  
 15 correct?  
 16 A. Yes.  
 17 Q. And those records reflect that Nathan asked  
 18 PA Whitehead to look at Everett's mark on his forehead.  
 19 Do you remember seeing that?  
 20 A. Yes.  
 21 Q. It never says in there that you were worried  
 22 about a concussion in those records, does it?  
 23 A. Sorry. Will you repeat that?  
 24 Q. In the records from April 18th of 2019 when  
 25 you saw PA Whitehead at the Beartooth Clinic, there's no

1 reference in those records of you stating that you  
 2 thought Everett had a concussion?  
 3 A. No. I know that I asked Doug Whitehead if he  
 4 had a concussion.  
 5 Q. I'm sorry?  
 6 A. I said I know I asked Doug Whitehead if he  
 7 had a concussion.  
 8 Q. And that's nowhere in the records, is it?  
 9 A. It should be in the record.  
 10 Q. You've looked at the records, right?  
 11 A. Yes.  
 12 Q. And you're the one on the 18th that checked  
 13 Everett in for his appointment, correct?  
 14 A. Yes.  
 15 Q. So the intake form was the information that  
 16 you provided to them, correct?  
 17 A. Correct.  
 18 Q. And on the intake form you never told the  
 19 person who did the intake that you were concerned about  
 20 a concussion, did you?  
 21 A. No.  
 22 Q. In fact, what you said you were there for was  
 23 throwing up and diarrhea, correct?  
 24 A. I don't remember.  
 25 Q. So if PA Whitehead says that was the entry

1 that was made at intake, you don't have any basis to  
 2 dispute that that information came from you?  
 3 MR. NIXON: Your Honor, I'm going to object.  
 4 I believe that's speculation at this point in time.  
 5 THE COURT: Overruled. Go ahead.  
 6 Q. (BY MR. SNIVELY) I mean, you were the only  
 7 one providing intake information to the lady that  
 8 checked you in, correct?  
 9 A. Yes.  
 10 Q. Nathan never provided any intake information?  
 11 A. Not that I can remember.  
 12 Q. Okay. And is it your testimony that PA  
 13 Whitehead was in the x-ray room when Everett's stomach  
 14 was x-rayed or scanned?  
 15 A. Yes.  
 16 Q. And did you go back to the exam room and talk  
 17 to him then?  
 18 A. Yes.  
 19 Q. And now on the 17th, you previously had  
 20 identified it as a red mark and you had told Salt Lake  
 21 Police and Red Lodge Police that the noise you heard,  
 22 the thud, was consistent with that mark, correct?  
 23 A. I don't remember.  
 24 Q. You never told either of those police  
 25 departments that you thought your son had received a

1 concussion on the 17th, did you?  
 2 A. No.  
 3 Q. You told PA Whitehead that Everett was doing  
 4 better by the time that you saw him at around 5 o'clock  
 5 on the 18th, correct?  
 6 A. I don't know.  
 7 Q. So again, if that's in PA Whitehead's notes,  
 8 you have no reason to dispute that?  
 9 A. I mean, there was -- I honestly don't  
 10 remember all of the conversation that I had with Doug  
 11 Whitehead. It's been...  
 12 Q. You don't remember it?  
 13 A. Not all of the conversation with Doug and  
 14 it's been almost three years.  
 15 Q. So the only part that you remember is telling  
 16 him to x-ray his head because there's a concussion?  
 17 A. I remember asking him if Everett had a  
 18 concussion and he said no, that it's just a goose egg  
 19 and that kids fall and they bump and that he wants to do  
 20 an x-ray on his stomach to make sure that his stomach  
 21 wasn't turn tied.  
 22 Q. We just agreed that goose egg was never used  
 23 until after you'd seen Whitehead, after you'd been  
 24 interviewed by the Salt Lake Police on the 20th of April  
 25 and after you were interviewed by Red Lodge Police on

1 May 9th. Do you remember agreeing with me that that  
 2 term came up after that?  
 3 A. Yes.  
 4 Q. So your memory about what you told Whitehead  
 5 is wrong, correct? Because goose egg was not used by  
 6 you until some point after May 9th of '19.  
 7 A. Yes.  
 8 Q. And the entire time that you and Nathan are  
 9 waiting to see Whitehead on the 18th, Nathan holds  
 10 Everett the entire time, correct?  
 11 A. Yes.  
 12 Q. You don't -- when you finish -- there's a  
 13 period of time where you finish checking in and then  
 14 there's a period of time, then, before you go back and  
 15 see Whitehead, correct?  
 16 A. Yes.  
 17 Q. And during that time period, you never took  
 18 Everett and held him?  
 19 A. I know I held Everett when we came in,  
 20 because I remember he was sleeping. And then he woke up  
 21 and, yeah, Nathan was holding him.  
 22 Q. I'm sorry?  
 23 A. I said, yeah, Nathan was holding him.  
 24 Q. That entire time period, even after you  
 25 checked in?

1 A. Not when we first got in there.  
 2 Q. But from the point that you finished checking  
 3 him in until you went in the exam room to see Whitehead,  
 4 Nathan held him?  
 5 A. Yes.  
 6 Q. You never asked to take Everett at any point  
 7 during that window of time?  
 8 A. No.  
 9 Q. And you -- there had never been any violence  
 10 between you and Nathan, correct?  
 11 A. Correct.  
 12 Q. You never had any indication of any violence  
 13 from Nathan, correct?  
 14 A. Yes.  
 15 Q. And you have previously testified that Nathan  
 16 was always appropriate with Everett, correct?  
 17 A. Yes.  
 18 Q. You never asked to talk to PA Whitehead alone  
 19 without Nathan in the room, correct?  
 20 A. Correct.  
 21 Q. And you never clarified to PA Whitehead that  
 22 Nathan was not the dad, he was the boyfriend?  
 23 A. Yes.  
 24 Q. And you testified that you had gone after  
 25 that appointment to Nathan's parents' house?

1 A. Yes.  
 2 Q. Do you remember that?  
 3 A. Yes.  
 4 Q. On the 18th?  
 5 A. Yes.  
 6 Q. And you said that Nathan started laundry when  
 7 you got to his parents' house; is that correct?  
 8 A. That's what I remember.  
 9 Q. Do you remember that you had taken the  
 10 laundry over and his mother had agreed to do it for you  
 11 guys that afternoon and you went there to pick up the  
 12 laundry that was already done?  
 13 A. No, I don't remember that.  
 14 Q. Do you remember Everett threw up in the  
 15 garage at their house that evening?  
 16 A. Yes.  
 17 Q. And that was as you and Nathan were leaving  
 18 his parents' house that evening, correct?  
 19 A. I think so.  
 20 Q. And the two of you decided to go ahead and go  
 21 back to Nathan's house after that happened in the garage  
 22 the night of the 18th, correct?  
 23 A. Yes.  
 24 Q. On the night of the 18th the three of you  
 25 being you, Everett and Nathan, again slept in the futon,

1 all three of you?  
 2 A. Yes.  
 3 Q. With Everett between the two of you?  
 4 A. Yes.  
 5 Q. And you've previously said that Nathan took a  
 6 shower with Everett on the 18th, as well, correct?  
 7 A. Yes.  
 8 Q. And again, it was the same setup as it would  
 9 have been on the 19th, you were at the couch, right  
 10 there to hear them?  
 11 A. Yes.  
 12 Q. And you heard on the 18th the same thing you  
 13 heard on the 19th, didn't you?  
 14 A. No.  
 15 Q. You didn't hear the two of them talking and  
 16 what you described as babbling between the two of them  
 17 when they were in the shower?  
 18 A. I remember Nathan taking a shower with  
 19 Everett on the 18th, but the door was open and I  
 20 remember going in and out and doing stuff.  
 21 Q. Okay. And you heard them talking -- "them  
 22 talking" being Nathan talking and Everett sort of  
 23 babbling?  
 24 A. Yes.  
 25 Q. And you heard the same thing on the 19th,

1 didn't you?  
 2 A. No.  
 3 Q. And you have previously said on the 19th you  
 4 didn't hear any noise, that it was quiet. Correct?  
 5 A. Yes.  
 6 Q. In any of the times when Nathan would have  
 7 held Everett you'd never noticed any marks on him or  
 8 bruising on him prior to the red mark that we've just  
 9 talked about on the 17th, correct?  
 10 A. Yes.  
 11 Q. And on the 18th, you don't -- that's the only  
 12 mark that you see until the emergency room on the 19th,  
 13 correct?  
 14 A. Yes.  
 15 Q. You don't see any other marks that are of  
 16 concern?  
 17 A. No.  
 18 Q. You talked to the cops in Salt Lake City for  
 19 about an hour, do you remember that?  
 20 A. I remember talking to them, but I couldn't  
 21 tell how long I talked to them for.  
 22 Q. It seemed like a long time?  
 23 A. Yes.  
 24 Q. And there were -- I think you said there were  
 25 four officers. Were there four or three?

1 A. I think there were four.  
 2 Q. So they talked to you for a long time and  
 3 then they leave you in the room alone, correct?  
 4 A. Yes.  
 5 Q. And at that point when they leave your room,  
 6 they have told you that they think there's more  
 7 information, correct?  
 8 A. Yes.  
 9 Q. And you never provide them any other  
 10 information other than to say Nathan did it, right?  
 11 A. I remember telling them that -- I remember  
 12 them telling me that it was either you or Nathan and I  
 13 said that -- I said, "How, if this has been an accident?  
 14 I don't know what's going on. No one is telling me  
 15 anything."  
 16 Q. But after they told you it's either you or  
 17 Nathan, you then tell that one officer -- at that point  
 18 there's only one officer in there, isn't there?  
 19 A. Yes.  
 20 Q. At that at that point, you tell that one  
 21 officer it's Nathan, correct?  
 22 A. Yes, that I think it was Nathan.  
 23 Q. Right. Prior to that, when all the officers  
 24 were in there, you denied that and when you told the one  
 25 officer it was Nathan you didn't provide any other

1 information, did you, than you had not already provided  
 2 to all four of the cops?  
 3 A. I don't remember. I was -- I remember I  
 4 hadn't slept for a long time during that interview.  
 5 Q. You've never looked at that interview since?  
 6 A. No.  
 7 Q. So prior to the one officer saying, "It's  
 8 either you or Nathan," you had denied you had any  
 9 information as to what would have caused Everett's  
 10 injuries other than the futon incident, correct?  
 11 A. Yes.  
 12 Q. And even after that interview, you've never  
 13 provided more information about anything happening other  
 14 than what you'd originally said, correct?  
 15 A. I'm not sure I understand your question.  
 16 Q. After that interview you then interview with  
 17 the Red Lodge Police and your statement to them is  
 18 consistent with the early part of Salt Lake City. That  
 19 there was a red mark on his forehead, he'd bumped his  
 20 head, then Nathan had gone in first to see what was  
 21 wrong, you were right there behind him on the 17th.  
 22 You go to the doctor on the 18th, that  
 23 information -- you checked him in because he was  
 24 throwing up and vomiting. Or I'm sorry. Throwing up  
 25 and had diarrhea, is what you had checked him in for,

1 correct?  
 2 A. Yes.  
 3 Q. You don't tell Red Lodge Police that Nathan  
 4 had showered him on the 18th, did you?  
 5 A. Not that I can remember.  
 6 Q. That information finally came out after all  
 7 those interviews, right?  
 8 A. I think so.  
 9 Q. Okay. And your testimony is on the 18th  
 10 there was no suspicions from you that anything happened  
 11 on the 18th, correct?  
 12 A. Yes.  
 13 Q. In fact, you had heard them in the shower and  
 14 listened to what was going on while they were in the  
 15 shower?  
 16 A. Yeah.  
 17 Q. And you were in a similar position on the  
 18 18th that you were in on the 19th?  
 19 A. Yes.  
 20 Q. And on the 19th, you tell Salt Lake and Red  
 21 Lodge that you don't hear anything happen in the shower?  
 22 A. Yes.  
 23 Q. In fact, what you tell them is it was quiet  
 24 while they were in the shower, don't you?  
 25 A. On? On what day?

1 Q. On the 19th.  
 2 A. On the 19th, yes.  
 3 Q. You describe their shower as being quiet?  
 4 A. Yeah, I didn't hear anything.  
 5 Q. And again, you were within, by your  
 6 estimation, 12 feet of the shower?  
 7 A. Yes.  
 8 Q. And the shower is a stand-up shower, correct?  
 9 A. Yes.  
 10 Q. How big is it?  
 11 A. I'm not sure. Your standard stand-up shower.  
 12 Q. Pretty small?  
 13 A. Yeah.  
 14 Q. I mean, I would have trouble in that shower  
 15 turning around or moving my arms up without hitting the  
 16 sides, right?  
 17 A. I think so.  
 18 Q. I mean, it is small?  
 19 A. Yeah. It was a small shower.  
 20 Q. All right. And in the interview with Salt  
 21 Lake City do you recall telling them that you heard  
 22 them, referencing Nate and Everett in the shower on the  
 23 19th, they were just talking and Everett was a little  
 24 whiny because he didn't feel good?  
 25 Do you remember making that statement to the



1 Salt Lake City Police?  
 2 A. I don't.  
 3 Q. If I show you the --  
 4 MR. SNIVELY: With the Court's permission,  
 5 I'm going to show the witness that page of the  
 6 transcript and ask her to look at it and I'll follow up.  
 7 THE COURT: For what purpose?  
 8 MR. SNIVELY: To refresh her memory.  
 9 THE COURT: Okay.  
 10 Q. (BY MR. SNIVELY) It's the middle of the  
 11 page. If you take a minute and look at that.  
 12 A. (Witness complies.)  
 13 Q. Does that refresh your memory as to what you  
 14 told --  
 15 MR. SNIVELY: If I may, Judge, I'm going to  
 16 retrieve the page.  
 17 THE COURT: Yes.  
 18 Q. (BY MR. SNIVELY) Does that refresh your  
 19 memory as to what you told Salt Lake City Police?  
 20 A. Honestly, no. A lot of what I told the Salt  
 21 Lake City Police I don't remember because I was up so  
 22 long.  
 23 Q. Okay. But reading that transcript doesn't  
 24 refresh your memory?  
 25 A. No.

1 Q. Do you have any reason to believe that that  
 2 isn't an accurate statement of what you said to them?  
 3 A. No. Just that I hadn't slept in, I don't  
 4 know, like 24 hours, 30 hours. I can't even remember.  
 5 Q. But you were being truthful with them, were  
 6 you not?  
 7 A. Yes.  
 8 Q. All right. And I'm going to hand you, to  
 9 again refresh your memory, if you would take a minute  
 10 and look at the top of page 24.  
 11 MR. SNIVELY: Judge, if I may approach?  
 12 THE COURT: You may.  
 13 Q. (BY MR. SNIVELY) If you'd just take a moment  
 14 and read that to yourself.  
 15 A. (Witness complies.)  
 16 Q. Do you see, having looked at that transcript,  
 17 you used the terms that they were talking and babbling  
 18 in reference to the 19th?  
 19 A. Yes.  
 20 Q. And do you have any reason to doubt that that  
 21 would have been your statement to Salt Lake City Police  
 22 on that date?  
 23 A. No.  
 24 Q. Now, when you checked Everett into the  
 25 Beartooth Clinic on the 18th, you had indicated he'd had

1 diarrhea, correct?  
 2 A. I don't remember him having diarrhea. I...  
 3 Yes.  
 4 Q. I'm sorry?  
 5 A. Yes.  
 6 Q. So you said that he had diarrhea when you  
 7 checked him in on the 18th?  
 8 A. I think so.  
 9 Q. When you saw PA Whitehead?  
 10 A. Yes, I think so.  
 11 Q. And you tell others that there had been  
 12 diarrhea during that time period, correct?  
 13 A. Which others?  
 14 Q. Other medical people.  
 15 A. I think so.  
 16 Q. All right. When you get to Salt Lake, do you  
 17 remember Dr. Laskey?  
 18 A. Not -- not really.  
 19 Q. Do you remember one of the doctors in Salt  
 20 Lake asking you about diarrhea?  
 21 A. No.  
 22 Q. Do you remember them asking you what the  
 23 symptoms were that Everett had when you sought medical  
 24 help here in Red Lodge?  
 25 A. Yes.

1 Q. And you didn't tell them that there had been  
 2 diarrhea, did you?  
 3 A. I remember telling -- I'm confused. I'm  
 4 sorry.  
 5 Q. You didn't tell the doctors in Salt Lake City  
 6 that Everett had diarrhea, did you?  
 7 A. I don't remember.  
 8 Q. And when Nate and Everett came out of the  
 9 shower on the 19th, they were wet, correct?  
 10 A. I don't remember if they were wet or not. I  
 11 was focused on Everett.  
 12 Q. Okay. And they were both naked?  
 13 A. I remember -- yeah, yeah. Everett was naked  
 14 and I -- yes, Nathan was naked, too.  
 15 THE COURT: You have to turn it off. Thanks,  
 16 go ahead.  
 17 MR. SNIVELY: All right.  
 18 Q. (BY MR. SNIVELY) So both of them were naked  
 19 when they came -- when Nathan came out of the shower  
 20 with Everett on the 19th, correct?  
 21 A. Yes.  
 22 Q. And then at some point, Nathan put on a pair  
 23 of shorts, underwear?  
 24 A. I think so.  
 25 Q. And then at some other point later on, he

1 puts his t-shirt on and then when you and he go to the  
2 hospital or the emergency room, he has like pajama  
3 bottoms on and a blue-checked plaid shirt at that point,  
4 correct?

5 A. I don't remember what he was wearing.

6 Q. Okay. And, I mean, you've previously said  
7 that you heard the water running in the shower on the  
8 19th, right?

9 A. Yes.

10 Q. So you believe both of them would have been  
11 wet coming out of the shower?

12 A. Yes.

13 Q. And again, on the 19th of April while they  
14 were in the shower, other than hearing the talking and  
15 the babbling that we've already talked about, you said  
16 it was quiet, correct?

17 A. Yes.

18 Q. Now, in your testimony about talking to  
19 Nathan on Saturday afternoon on the 20th, I think your  
20 testimony is you thought you talked to him about 4  
21 o'clock before you had talked to Salt Lake Police,  
22 correct?

23 A. I think.

24 Q. And he'd already told you that he had talked  
25 to Red Lodge Police earlier that day, correct?

1 A. No. I don't remember him telling me that he  
2 had talked to them.

3 Q. Okay. But if you found out that he had  
4 already talked to Al Stuber --

5 MR. NIXON: Objection, speculation.

6 THE COURT: Sustained.

7 Counsel, approach.

8 (Wherein, an off-the-record  
9 discussion was held at the  
10 bench outside of the hearing  
11 of the jury.)

12 THE COURT: All right. Okay. It is after  
13 5:00, and as I told you, I try to work with the scheme  
14 of the witnesses but sometimes it's just pushing it.  
15 It's been a long day already with the jury selection and  
16 everything else. I don't think we can get this witness  
17 done in a timely way unless we go quite a bit into  
18 supertime. So we're not going to. We're going to  
19 break for the evening now.

20 So what I'll ask you to do is, as I've said,  
21 maybe just remind you to leave your notebooks on your  
22 chair and we'll collect them and put them in the vault  
23 and keep them safe for you and when you come back  
24 tomorrow they will be right there for you to work with.

25 We'll start at 8:30, so do your best -- I

1 hope the weather cooperates -- but do your best to get  
2 here so we can get started right off and get rolling  
3 again and get a lot of work done.

4 In the meantime, I know you probably have  
5 this memorized by heart, but it's more important now  
6 than ever, because you're going to be out and about  
7 talking to people.

8 It is your duty not to talk to about the  
9 substance of the case in any way, among yourselves or  
10 with anyone else, look at or access any information  
11 about this case in any way, including electronic devices  
12 or phones or form or express any opinion on the case  
13 until the case is submitted to you.

14 We'll be in recess until tomorrow at 8:30.

15 All rise.

16 (Wherein, the jury is not  
17 present.)

18 THE COURT: The jury is now out of the room.  
19 I simply wanted to make sure and admonish Ms. Self that  
20 during this break you're not to discuss your testimony  
21 with any other witness, don't discuss the questions that  
22 were asked, answers provided or anything with any other  
23 witnesses.

24 Okay. I understand that you'll be out and  
25 about.

1 Does counsel need to put anything on the  
2 record before we break for the evening?

3 MR. SNIVELY: No, Your Honor.

4 THE COURT: Mr. Nixon.

5 MR. NIXON: No, thank you, Judge.

6 THE COURT: We'll be in recess until -- for  
7 you guys, 8:15, unless something pops up. I want you  
8 guys in chambers at 8:15.

9 If something pops up, let me know. We can  
10 meet earlier than 8:00.

11 See in the morning. We're in recess.

12 (Wherein, court was in recess  
13 for the evening.)

14 \* \* \*

15 **CARBON COUNTY COURTHOUSE**

16 **RED LODGE, MONTANA**

17 **MARCH 9, 2022**

18 **DAY TWO OF TRIAL**

19 \* \* \*

20 (Wherein, the following took  
21 place in chambers.)

22 THE COURT: DC 19-17, State v. Polakoff.

23 This is day two, morning of the jury trial. We haven't  
24 resumed yet. We're in chambers.

25 Counsel for the State, Alex Nixon is present.

1 Counsel for the defendant, Robert Snively is  
2 present. The defendant is present.

3 I asked the parties to appear at this time  
4 before we start the jury trial process again to make  
5 sure there's no issues that I need to address before so  
6 we don't waste the jury's time.

7 Mr. Nixon, is there any issues that need to  
8 be brought to my attention?

9 MR. NIXON: There is, Your Honor. I'm not  
10 sure if you received the email I sent to both you and  
11 Mr. Snively.

12 THE COURT: I did, but you can summarize for  
13 the record.

14 MR. NIXON: Yes. Well, my concern was that  
15 during the course of Ms. Self's testimony yesterday, I'd  
16 heard some noises behind me as I was asking questions  
17 and I honestly assumed that they were probably coming  
18 from the jury.

19 And as we took one of our breaks it was  
20 brought to my attention that there was a blond woman and  
21 a slight brunette woman that had positioned themselves  
22 in the line of sight of Ms. Self, and had been making  
23 just kind of intimidating stares, acting somewhat  
24 inappropriately.

25 I was told that by three or four people.

1 After being told about it, I turned around and was able  
2 to observe the blond woman going out of her way to try  
3 to make contact with Ms. Self.

4 I did ask Ms. Self directly later on if she  
5 had seen that, she had. Her husband had also observed  
6 it.

7 When I first observed it, I did mention the  
8 issue to Mr. Snively, because I didn't want any  
9 distractions as it's a very small courthouse. They  
10 could easily be seen by the jury where they were  
11 sitting.

12 Mr. Snively showed the same concern that I  
13 did and immediately had a talk with them.

14 My assistant could hear her say prior to the  
15 jury coming in, this person turning around and saying  
16 things like, to quote, "This is fucking ridiculous."  
17 And shortly thereafter, I observed her once again trying  
18 to stare at Ms. Self after she again took the witness  
19 stand and before the jury came in. I did bring this to  
20 Mr. Snively's attention.

21 I was hoping that that would be the end of  
22 it. The undersheriff did indicate that there had been  
23 incidents with the same person outside the courthouse on  
24 previous court appearances and that he had seen her  
25 screaming at the witness's stepfather. So he did

1 indicate that this was not new behavior.

2 Making the matters worse, last night I was  
3 contacted by Mr. Moyers, who represents Beartooth  
4 Billings Clinic, he had indicated that the -- that these  
5 same two women had confronted him and asked if he had  
6 been photographing them, which he denied. And was then  
7 asked why he was there and asked if he was associated  
8 with the prosecution. He indicated that he was not and  
9 was, once again, accused of working with the  
10 prosecution.

11 My concern is that this sort of behavior is  
12 volatile, I don't want to start some sort of altercation  
13 between members of the victim's family.

14 Mr. Snively had asked me before this started  
15 if the stepfather or mother would be willing to be in  
16 the courtroom. Ms. Kolpin, Ms. Self's mother is under  
17 subpoena she's been excluded. The stepfather is there  
18 in the courtroom.

19 I did ask -- I did have a talk with him  
20 yesterday before court proceeded and I told him there  
21 would be no tolerance whatsoever for any sort of  
22 behavior that would lead to problems that might be  
23 noticed by the jury.

24 I'm assured he also -- I also told Ms. Kolpin  
25 that if I see that kind of behavior it wouldn't Mr.

1 Snively that asked to get them kicked out, it would be  
2 me.

3 So I'm disturbed by what I saw yesterday and  
4 I don't think there's any benefit at this point in time,  
5 if there's going to be this continued behavior even  
6 after Mr. Snively warned them. It's just too small of a  
7 courtroom. It's not worth compromising this trial to  
8 tolerate that sort of behavior.

9 THE COURT: What are you asking?

10 MR. NIXON: I'd just ask that they be ejected  
11 from the courtroom.

12 THE COURT: Do you know who they are? We'll  
13 figure that out soon. You want them to be --

14 MR. SPOJA: One is sitting out in the hallway  
15 right now.

16 MR. NIXON: I saw one right outside the door.  
17 She's a younger, heavy-set blonde woman.

18 THE COURT: -- removed from the courtroom for  
19 the trial?

20 MR. NIXON: I believe so. If Mr. Moyers --  
21 like he said, he might be available, I think he's going  
22 to be watching today, indicated that he was approached  
23 by the metal detector, so it was not even just the  
24 courtroom. It was -- he was in the hallway. That was  
25 observed by Deputy Pratt. I don't know if -- there's

1 going to be an attempt to pull videotape, I haven't  
 2 gotten it yet. It may show.  
 3 But what my assistant indicated was that when  
 4 Ms. Self came in to testify these two women immediately  
 5 positioned themselves in the line of sight and she could  
 6 hear basically noises of disapproval coming from behind  
 7 her from these two women. And that's such close  
 8 proximity to the jury, basically it would be behind me.  
 9 THE COURT: All right. Mr. Snively, your  
 10 position.  
 11 MR. SNIVELY: Judge, my only comment is I did  
 12 talk to the one lady when it was brought to my attention  
 13 during the afternoon break and I told her she had to  
 14 stop doing anything or she'd be kicked out of the  
 15 courtroom. I mean, I don't represent them. I don't --  
 16 they don't -- I don't have a position.  
 17 THE COURT: I assume they're supporters of  
 18 Mr. Polakoff.  
 19 MR. SNIVELY: The one lady is. I'm not sure  
 20 who the second lady is.  
 21 MR. NIXON: She was a slight woman with short  
 22 brown hair who was sitting next to the blonde woman.  
 23 THE COURT: Was she engaged in the same  
 24 behavior?  
 25 MR. NIXON: That is what I was told. I was

1 told by Mr. Moyers that two women approached him.  
 2 THE COURT: How about in court?  
 3 MR. NIXON: In court they were sitting next  
 4 to each other and I was told they were engaged in the  
 5 same behavior.  
 6 I'm at a bit of a disadvantage having my back  
 7 turned to them.  
 8 THE COURT: Well, I think they were directly  
 9 behind Mr. Snively and Mr. Polakoff.  
 10 MR. SNIVELY: I didn't see them do anything.  
 11 Based on what I was told, I addressed her and told her.  
 12 THE COURT: All right. Well, the Court  
 13 doesn't take it lightly to exclude individuals from  
 14 public -- clearly a public setting, which is this trial,  
 15 or a public building, which is the this courthouse,  
 16 however, especially during conduct of a trial of this  
 17 nature, I do have a duty to make sure that the matter is  
 18 presented without prejudice to either party.  
 19 I appreciate counsel trying to deal with the  
 20 matter appropriately, trying to explain the  
 21 inappropriate behavior. If that hadn't happened, I'd be  
 22 inclined to admonish the individuals and give them the  
 23 opportunity to behave themselves in accordance to what  
 24 we demand of observers.  
 25 But given the fact that they had been warned

1 by counsel, their inappropriate behavior explained, I do  
 2 believe it is important, it's appropriate to grant the  
 3 motion.  
 4 And, obviously, any behavior that is  
 5 considered assaultive or anything such as with Mr.  
 6 Moyers, there's laws in effect that could deal with  
 7 that, whether they be prosecuted or whether it rose to  
 8 that level, I don't know. But whether it be witnesses  
 9 or observers or anyone facing that behavior by other  
 10 observers, I simply can't have it.  
 11 As the State noted, this courthouse is very  
 12 small. It's very unfortunate, because it's not any  
 13 desire of the Court to try to limit anyone who might be  
 14 here just simply interested or that has an interest in  
 15 the case or is in support of either the State or the  
 16 defendant.  
 17 But under the circumstances, the motion in  
 18 this case I think that is the remedy. I'll ask the  
 19 bailiff to exclude -- make sure we identify these people  
 20 appropriately, exclude them from the courthouse  
 21 premises.  
 22 MR. NIXON: May I have one other, Judge?  
 23 THE COURT: Yes.  
 24 MR. NIXON: If, in fact, there's any sort of  
 25 allegations regarding the stepfather or anybody else

1 acting inappropriately that may be there supporting the  
 2 defendant, I would -- I will address them before we get  
 3 to trial today. And if there's allegations of that, I  
 4 would not oppose a motion from Mr. Snively to make the  
 5 same request of any supporters of the victim's family.  
 6 THE COURT: Well, I haven't heard anything  
 7 like that. But clearly, I'm not going to accept  
 8 anything. And in addition, before we start, before the  
 9 jury comes in, I'm going to talk to the gallery.  
 10 MR. NIXON: And I haven't, either.  
 11 Judge, my concern is partisanship, it's  
 12 preserving this jury, keeping them in a situation where  
 13 they can fairly and impartially judge things. I don't  
 14 think anybody needs distractions.  
 15 I don't think Mr. Snively or the defendant  
 16 want distractions, either.  
 17 THE COURT: Well, in further addition to the  
 18 record, I'm going to note that in this courtroom where  
 19 these individuals were placed is about 20 feet from the  
 20 witness box and about less than 15 feet from the jury  
 21 box, in clear sight of the jury, which absolutely can't  
 22 have any tainting of this jury, not to mention the make  
 23 up of this courtroom is such that the jury isn't able to  
 24 leave to go to the jury room without going through the  
 25 gallery. There's no way.

1 And I simply can't take the risk of having  
2 anyone in the gallery in any way interfering with the  
3 jury or trying to in any way influence the jury and that  
4 is my concern here.

5 I'll talk to the bailiff.

6 MR. NIXON: Do you want me to -- would you  
7 prefer to have the bailiff or would you like me to get  
8 somebody from the sheriff's department downstairs?

9 THE COURT: That might be appropriate. I am  
10 going to instruct the bailiff to watch for any more  
11 inappropriate behavior.

12 MR. NIXON: And if the Court does wish to  
13 inquire, Mr. Snively -- these Bobs confuse me.

14 Mr. Spoja did talk to Ralph Dawson about this  
15 and I don't know if he ended up seeing this. I believe  
16 there was some concern on be his behalf.

17 THE COURT: I believe that there was. That  
18 Mr. Dawson -- Bailiff Dawson actually did observe the  
19 same information that you've supplied to me.

20 Unfortunately, I wasn't able to observe it  
21 directly, due to the, as I said, line of sight was  
22 impeded. It was clearly in court during session in my  
23 presence.

24 MR. NIXON: If I may, I have one more thing.  
25 That discussion Mr. Spoja and Mr. Dawson was after Mr.

1 in there, as well. It sounds like -- maybe I won't.  
2 Since we're now -- between now and when I step into the  
3 courtroom, something comes up one of you let me know.  
4 Otherwise, I'll just tell the bailiff to bring up the  
5 jury.

6 MR. SNIVELY: Judge, could we have a few  
7 minutes before we go in?

8 THE COURT: I'll give you -- yeah, but not  
9 very many, because I told that jury 8:30 and we got a  
10 little behind yesterday. But, yeah, I'll definitely  
11 give you a couple of minutes, Mr. Snively.

(Off the record.)

(Wherein, the following took  
place in open court.)

15 THE BAILIFF: All rise.

16 THE COURT: Please be seated. Thank you.

17 We're in open court. DC 19-17, State versus  
18 Polakoff.

19 Counsel is present for the State.

20 Counsel for the defense is present. The  
21 defendant is present.

22 The jury is not present.

23 I want to address the gallery quickly before  
24 I bring the jury in.

25 I recognize the emotional nature of this

1 Snively had advised.

2 THE COURT: All right. The reason I extended  
3 it to the courthouse premises is because of the nature,  
4 again, of what occurred, some of the additional  
5 inappropriate behavior downstairs and the jury room is  
6 downstairs.

7 And therefore, it's appropriate to not just  
8 exclude from the courtroom but the premises, as well.  
9 After this trial, of course, those individuals will be  
10 free to come and go in this public building, of course,  
11 as usual.

12 I'll ask the State to contact a  
13 representative of the sheriff's office and politely  
14 explain it to those two individuals.

15 Mr. Snively.

16 MR. SNIVELY: I don't have anything for the  
17 record. It's a comment afterwards.

18 THE COURT: Okay. Anything else for the  
19 record before we go in and is there anything else that  
20 prevents us from starting right off with Ms. Self?

21 MR. NIXON: No, sir. Not as far as the State  
22 is concerned.

23 MR. SNIVELY: No, Your Honor.

24 THE COURT: We should pretty much be able to  
25 go in and bring the jury up. I'll ask the same question

1 trial. I recognize that the emotions can run high. And  
2 I recognize human nature is such that if you have strong  
3 opinions on a case of this nature, it's hard to conceal  
4 those.

5 But I will tell you, anyone here, I have a  
6 jury sitting right here, the gallery is feet from that  
7 jury. If I find anyone who is doing anything or  
8 behaving in any fashion that I believe could impact this  
9 jury or influence this jury or attempt to influence this  
10 jury or act inappropriately towards any witnesses or any  
11 parties, they will be excluded from the courthouse for  
12 the remainder of the trial.

13 If it continues or if there's action that is  
14 escalated from that, you'll be held in contempt. Keep  
15 that in mind, please. Accord yourself the way you need  
16 to, with courtesy appropriately in this room.

17 Thanks.

18 Bring the jury in, please.

19 (Wherein, the jury is present.)

20 THE COURT: Be seated. Thank you.

21 The jury is now present.

22 Mr. Nixon, do you stipulate that the jury and  
23 the alternate are here?

24 MR. NIXON: I do, Your Honor.

25 THE COURT: Mr. Snively.

1 MR. SNIVELY: I do, Your Honor.  
 2 THE COURT: All right. Good morning to you.  
 3 We had a matter that we had to deal with, so  
 4 a couple of minutes later than I thought, but I  
 5 appreciate it. Let's get right to work.  
 6 Mr. Nixon, I believe you were continuing with  
 7 Ms. Self, correct?  
 8 MR. NIXON: Yes, Your Honor. It was Mr.  
 9 Snively's cross. I can make sure that she's brought in.  
 10 THE COURT: Please. All right. Come on  
 11 forward. You remain sworn. You can take the witness  
 12 stand. Okay?  
 13 THE WITNESS: Okay.  
 14 THE COURT: Mr. Snively, I do believe you  
 15 were continuing your cross.  
 16 MR. SNIVELY: Thank you, Your Honor.  
 17 **CROSS EXAMINATION (CONTINUED)**  
 18 **BY MR. SNIVELY.**  
 19 Q. Good morning.  
 20 A. Hi.  
 21 Q. I want to start with you testified on direct  
 22 that there was no TV in Nathan's cabin on April 17th; is  
 23 that correct?  
 24 A. Yes.  
 25 Q. And you are aware there was a TV on the table

1 near the couch in his cabin, correct?  
 2 A. I thought that was a computer screen.  
 3 Q. That's what you watched the movie on was that  
 4 screen that was on the table?  
 5 A. Yes.  
 6 Q. The other question, you said Nathan had  
 7 turned around, you didn't have any idea why he turned  
 8 around. Do you remember that, saying that yesterday?  
 9 A. Yes.  
 10 Q. We're talking about when he's on his way to  
 11 Salt Lake and then he turns around, correct?  
 12 A. Yes.  
 13 Q. And you talked to Chief Wells about that, do  
 14 you remember that?  
 15 A. Barely.  
 16 Q. Sorry?  
 17 A. I said barely.  
 18 Q. Do you remember telling Chief Wells that he  
 19 turned around because they were saying he had done it?  
 20 A. Yes.  
 21 Q. So you knew why he turned around?  
 22 A. Yes.  
 23 Q. So the idea that he never came to Salt Lake,  
 24 you knew because you were in communication with him that  
 25 he was going to turn around because he was being accused

1 of it and returned to Red Lodge. You knew that at the  
 2 time that it happened, didn't you?  
 3 A. Yes.  
 4 Q. It would be incorrect when you state you  
 5 don't know why he turned around?  
 6 A. Yes.  
 7 Q. You knew that he was in -- well, let me  
 8 withdraw that question and phrase it this way.  
 9 He had communicated with you and you had  
 10 communicated with him as he was driving through Wyoming,  
 11 correct?  
 12 A. Yes.  
 13 Q. And you also told Chief Wells that Salt Lake  
 14 Police kept pushing and pushing you for information and  
 15 you didn't have any information for them?  
 16 MR. NIXON: Your Honor, I'm going to object  
 17 to this. I don't think that's the appropriate way to  
 18 impeach a witness. I think there needs to be an inquiry  
 19 as to whether she remembers and allow her an opportunity  
 20 to review the transcript if, in fact, he means to  
 21 impeach her with it.  
 22 THE COURT: Overruled. I believe he just  
 23 asked if whether that's what she said. If she  
 24 remembers, that's acceptable. Go ahead.  
 25 Q. (BY MR. SNIVELY) Just -- your answer to that

1 question was that that is what you told Chief Wells,  
 2 correct?  
 3 A. Will you repeat the question, please?  
 4 Q. You'd told Chief Wells that the Salt Lake  
 5 Police kept pushing and pushing you for information that  
 6 you didn't have?  
 7 A. Yes.  
 8 Q. And that then they left you alone as soon as  
 9 you said it had to be Nathan?  
 10 A. They gave me an ultimatum. They told me, "It  
 11 was either you or Nathan."  
 12 Q. And once you said it was Nathan, they left  
 13 you alone?  
 14 A. Yes.  
 15 Q. Yesterday, you testified about Nathan's  
 16 comment about suicide?  
 17 A. Yes.  
 18 Q. Do you recall talking to Chief Wells about  
 19 that, as well?  
 20 A. I don't remember.  
 21 MR. SNIVELY: With the Court's permission,  
 22 may I approach the witness?  
 23 THE COURT: Are you attempting to refresh her  
 24 memory?  
 25 MR. SNIVELY: Yes.

1 THE COURT: Okay. Did you ask her about  
2 remembering whether she told that to Wells?  
3 MR. SNIVELY: I thought I did, Judge.  
4 THE COURT: Go ahead.  
5 Q. (BY MR. SNIVELY) I'm going to hand you page  
6 7, and if you'd just take a moment and look at that part  
7 again. Like yesterday, just look at it to yourself and  
8 then I'll ask you a question.  
9 A. (Witness peruses document.) Okay.  
10 Q. Having looked at that transcript, does that  
11 refresh your memory as to what you told Chief Wells?  
12 A. Yes.  
13 Q. And you told him that Nathan was considering  
14 checking himself into a psych ward because he was afraid  
15 of committing suicide because of a fight he'd had with  
16 his parents?  
17 A. Yes.  
18 Q. All right. There's no -- you never told  
19 Chief Wells that it had anything to do with this case,  
20 did you?  
21 A. Not that I can remember.  
22 Q. All right. And that he didn't say he was  
23 going to commit suicide, he said he was going to go get  
24 help by checking himself in, correct?  
25 A. About the suicide?

1 Q. Yes.  
2 A. Yes.  
3 Q. I want to make sure on the 17th of April that  
4 I understand your testimony is that Nathan went in the  
5 room and within seconds you're in the room, as well?  
6 A. Yes.  
7 Q. And did Nathan holler for you or did you just  
8 go in the room on your own?  
9 A. I went when I heard the thump and Everett  
10 crying.  
11 Q. All right. So you were there immediately?  
12 A. Yes.  
13 Q. And you never saw Nathan do anything  
14 inappropriate on the 17th?  
15 A. No. I just saw him holding Ev and comforting  
16 him.  
17 Q. He was holding him appropriately and trying  
18 to console him appropriately, correct?  
19 A. Yes.  
20 Q. We've already talked about that there was a  
21 red mark on his forehead?  
22 A. Yes.  
23 Q. And now your testimony is that that night  
24 Everett sleeps all night, no issues?  
25 A. Yes.

1 Q. When you went in the bedroom on the evening  
2 of the 17th, when Nathan is holding him, there's some  
3 vomit on Nathan, correct?  
4 A. Yes.  
5 Q. On the 18th, you testify that Nathan and  
6 Everett took a shower together?  
7 A. Yes.  
8 Q. And that you again heard them, there was  
9 talking babbling, they shower, no concerns?  
10 A. Yes.  
11 Q. And on -- and that's before you go see  
12 Whitehead, correct?  
13 A. Yes.  
14 Q. So he had, in essence, cleaned Everett up to  
15 go to the doctor?  
16 A. Yeah.  
17 Q. And then you go see Dr. -- or PA Whitehead.  
18 And am I correct that you were the only one that  
19 provided intake information at that appointment?  
20 A. Yes.  
21 Q. And your testimony is that -- or PA Whitehead  
22 was in the x-ray room when x-rays were being taken of  
23 Everett, correct?  
24 A. That I remember, yes.  
25 Q. And do you agree that Nathan asked Dr.

1 Whitehead to look at the bruise on Everett's forehead at  
2 the end of your appointment with Dr. Whitehead?  
3 A. I don't remember.  
4 Q. You don't have any reason to dispute that if  
5 that's what is said by the other witnesses?  
6 A. No.  
7 Q. And you agree that you did not during the  
8 intake make any reference to concerns about the bump on  
9 his head or concussion, correct?  
10 A. I know I made it in the office with Doug and  
11 Nathan.  
12 Q. Right. But I'm asking you in the intake  
13 part, you did not state anything about that to the  
14 intake person?  
15 A. I don't remember. I would have to look at  
16 the intake form.  
17 MR. SNIVELY: Judge, if I may approach?  
18 THE COURT: You may.  
19 Q. (BY MR. SNIVELY) I'm going to hand you the  
20 document again. If you would just review it, please.  
21 A. (Witness complies.)  
22 Q. Does that appear to be the intake form?  
23 A. Yes.  
24 Q. And is there any reference on there about a  
25 concussion or a bump on the forehead?

1 A. No.  
 2 Q. And what does that say the reason for the  
 3 visit is?  
 4 A. Throwing up and diarrhea.  
 5 Q. You agree that that information, throwing up  
 6 and diarrhea, came from you?  
 7 A. Yes.  
 8 MR. SNIVELY: If I may retrieve that  
 9 document?  
 10 THE COURT: Yes.  
 11 Q. (BY MR. SNIVELY) And you agree after the  
 12 appointment with Whitehead, you and Nathan went to his  
 13 parents' house; is that correct?  
 14 A. Yes.  
 15 Q. And that Everett threw up in the garage as  
 16 you and Nathan were leaving their residence, correct?  
 17 A. No. I think we were going into the  
 18 residence, that I can remember.  
 19 Q. And you went there, you say, to pick up  
 20 laundry; is that correct?  
 21 A. Yeah, or do laundry.  
 22 Q. And you agree that Nathan's mother held  
 23 Everett during that visit?  
 24 A. Yes.  
 25 Q. And then you and Nathan on the evening of the

1 A. I think it was on Main Street and then we  
 2 went to the Boxcar for dinner.  
 3 Q. I'm sorry. I missed your reference to what  
 4 street.  
 5 A. I don't know if it's called Main Street.  
 6 Q. Okay. You walked on Main Street?  
 7 A. For a little bit, I think.  
 8 Q. From his house?  
 9 A. I don't know -- I don't remember if it was  
 10 from his house or not, or if we drove in part.  
 11 Q. So there are two times you left his house  
 12 that day?  
 13 A. Yes.  
 14 Q. So the statement that you stayed at his house  
 15 until you went to dinner is not an accurate statement,  
 16 correct?  
 17 A. We did go to dinner.  
 18 Q. I'm sorry?  
 19 A. We did go to dinner.  
 20 Q. No. The statement that you stayed at his  
 21 house until you had gone to dinner is not accurate?  
 22 A. Yes. Because we went and we got Everett some  
 23 air and then we went to dinner.  
 24 Q. So was it the same trip that you were out  
 25 getting air and then you end up at the Boxcar?

1 18th go back to his cabin, correct?  
 2 A. Yes.  
 3 Q. And the three of you spend the night together  
 4 in the futon?  
 5 A. Yes.  
 6 Q. And then the next day, your testimony is you  
 7 basically hung out at his place for that entire day,  
 8 until dinnertime, correct?  
 9 A. Yes.  
 10 Q. And at dinnertime you went -- is it the  
 11 Boxcar?  
 12 A. Yeah. It's whatever that diner is that looks  
 13 like a train.  
 14 Q. I think you've referred to it at various  
 15 times as the Boxcar?  
 16 A. Yeah.  
 17 Q. And just the three of you went to the Boxcar?  
 18 A. Yes.  
 19 Q. And you didn't do anything else that day,  
 20 other than stay at Nathan's house?  
 21 A. For most of the day, yes.  
 22 Q. Did you leave his house other than when you  
 23 went to the Boxcar?  
 24 A. I remember we went for a small walk.  
 25 Q. Just in the neighborhood?

1 A. Yes.  
 2 Q. Okay. So you didn't go out, go back home and  
 3 come out a second time?  
 4 A. No.  
 5 Q. All right. So your testimony is that  
 6 sometime just prior to dinner the three of you went out  
 7 and may have walked a little bit on the street and then  
 8 went to dinner?  
 9 A. Yes.  
 10 Q. Without returning to Nathan's cabin?  
 11 A. Yes.  
 12 Q. You previously have talked about going out to  
 13 lunch, as well, correct?  
 14 A. Yes.  
 15 Q. So that didn't happen, lunch was not out, you  
 16 were at his cabin that entire time, correct?  
 17 A. I know that there was a point where we went  
 18 out for lunch, because he was getting refried beans and  
 19 he couldn't eat the refried beans.  
 20 Q. Okay. But you just told me you didn't go out  
 21 for lunch.  
 22 A. I don't remember. I'm doing my best.  
 23 Q. So your testimony is you don't know what you  
 24 did on the 19th --  
 25 A. I don't know what we did all on the 19th.



1 Q. I'm sorry?  
 2 A. I don't know what we all did on the 19th.  
 3 Q. Okay.  
 4 A. Because I know during the morning he was  
 5 sleepy and I wanted him to get some air and I don't  
 6 remember any of those times.  
 7 Q. All right. You never saw Nathan do anything  
 8 inappropriate with Everett, did you?  
 9 A. No.  
 10 Q. You never saw Nathan angry at any time that  
 11 you were around him, did you?  
 12 A. No.  
 13 Q. And you never witnessed Nathan be violent in  
 14 any manner while you were around him, did you?  
 15 A. No.  
 16 MR. SNIVELY: I don't have any other  
 17 questions, Judge.  
 18 THE COURT: All right. Any redirect?  
 19 MR. NIXON: Please, Your Honor.  
 20 Do you need a moment, Ry?  
 21 THE WITNESS: Yes.  
 22 **REDIRECT EXAMINATION**  
 23 **BY MR. NIXON:**  
 24 Q. So yesterday, Mr. Snively started out his  
 25 cross-examination asking you about Shane Link?

1 A. Yes.  
 2 Q. How old was Shane Link in April of 2019?  
 3 A. He was 12.  
 4 Q. And can you please describe what Shane looked  
 5 like at that point in time?  
 6 A. He was a little bit shorter than me, real  
 7 skinny, kind of -- we refer to him as kind of like a  
 8 bean pole.  
 9 Q. And before April 17th, 2019, how much time  
 10 did he spend around Shane?  
 11 A. A lot.  
 12 Q. And how many times did you observe Shane  
 13 intentionally hurting Everett before April 17th, 2019?  
 14 A. None.  
 15 Q. How many times did you observe him  
 16 accidentally hurting Everett before April 17th, 2019?  
 17 A. None.  
 18 Q. After Everett got back from the hospital in  
 19 May of 2019, how much time did Everett spend around  
 20 Shane?  
 21 A. A lot.  
 22 Q. How many times have you seen him  
 23 intentionally hurt Everett since that time?  
 24 A. None.  
 25 Q. How many times have you observed Shane

1 accidentally hurting Everett during that time?  
 2 A. None.  
 3 Q. What concerns do you have about Everett and  
 4 Shane spending time together?  
 5 A. None. Shane loves his cousin.  
 6 Q. How does Everett feel about Shane?  
 7 A. He talks about Shane all the time, and Elgin,  
 8 and wanting to go to his auntie's house to see Shane,  
 9 Elgin and Poet.  
 10 Q. And Elgin is Shane's younger brother?  
 11 A. Yes.  
 12 Q. You've been asked quite a few questions about  
 13 how quickly you were able to get to see Everett after he  
 14 was hurt. How quickly did you get to see Everett and  
 15 Nathan after you heard the thump and crying?  
 16 A. I'm sorry. Will you repeat that?  
 17 Q. How fast were you able to respond after you  
 18 heard Everett being hurt?  
 19 A. It felt like seconds to me.  
 20 Q. Now, how long were you away from Nathan and  
 21 Everett before he got hurt on the 17th?  
 22 A. I think it was five minutes.  
 23 Q. Okay.  
 24 A. I'm not entirely sure on the time.  
 25 Q. So --

1 A. It didn't feel that long.  
 2 Q. Okay. And you were asked similar questions  
 3 about what happened in the shower on in 2019. You were  
 4 -- you testified regarding how quickly you were able to  
 5 get there after Everett stopped breathing. How long do  
 6 you think it took from the time that you heard that  
 7 Everett stopped breathing until you were able to get  
 8 right to him?  
 9 A. It felt like seconds. I could see him and I  
 10 grabbed him.  
 11 Q. How long were you apart from Nathan and  
 12 Everett before he stopped breathing?  
 13 A. Maybe 10 to 15 minutes. I'm not sure.  
 14 Q. Okay. And yesterday, we also heard a lot of  
 15 talk about the term "goose egg." Regardless of what you  
 16 want to call it, what did you observe?  
 17 A. That there was either -- there was a mark on  
 18 his forehead.  
 19 Q. And when did that injury occur?  
 20 A. On April 17th.  
 21 Q. What were the circumstances?  
 22 A. Nathan had told me that Everett rolled off  
 23 the bed.  
 24 Q. And whose story was the futon story?  
 25 A. Nathan.

1 Q. You were asked yesterday and a little bit  
2 today if you'd ever observed Nathan ever be violent.  
3 Had you?  
4 A. No.  
5 Q. From the time that you first met Nathan until  
6 April 17th, how many times had Everett been injured?  
7 A. None.  
8 Q. How many times had he been alone with Nathan  
9 from that point in time?  
10 A. None that I can remember.  
11 Q. Between April 17th and April 19th, how many  
12 times was Everett injured?  
13 A. Twice.  
14 Q. How many times was he alone with Nathan?  
15 Excuse me. Alone with Everett? I'm sorry.  
16 MR. SNIVELY: I'm sorry. What's the  
17 question?  
18 Q. (BY MR. NIXON) During that period of between  
19 April 17th and 19th, how many times was Everett alone  
20 with Nathan?  
21 A. Three times.  
22 Q. You were also asked a little bit about the  
23 Salt Lake City interview on the night of the 20th. At  
24 that point in time, when was -- the night of the 20th,  
25 when was the last time that you had slept?

1 A. I think it was the 18th. Because it happened  
2 on the 19th, so the last night that me, Nathan and  
3 Everett slept in the futon, which was the 18th. And I  
4 didn't sleep the 19th or 20th.  
5 Q. You testified about being emotional and not  
6 sleeping. How well do you recall those events?  
7 A. Barely. It kind of all was a blur.  
8 Q. How did that interview with the Salt Lake  
9 City Police make you feel?  
10 A. Emotionally stressed. It was really  
11 traumatic and I couldn't understand what was going on.  
12 They had taken me away from Everett and I said -- I  
13 hadn't slept or ate and I -- I didn't know -- I didn't  
14 know why they were pulling me into a room to be  
15 questioned.  
16 Q. And how much did you know about Everett's  
17 condition at that point in time?  
18 A. Not very much.  
19 Q. What suspicions, if any, did you have prior  
20 to the interview that Everett has been intentionally  
21 hurt?  
22 A. None.  
23 Q. What suspicions, if any, did you have that  
24 Everett had been intentionally hurt after your  
25 interview?

1 A. Still none.  
2 Q. How did you feel about Nathan at that point  
3 in time?  
4 A. He was my boyfriend. I loved him. And I  
5 felt like who would do this to a baby. It had to have  
6 been an accident. The doctors weren't telling me or my  
7 mom anything until his whole team of neurologists and  
8 doctors came and I can't even remember when they came  
9 in.  
10 Q. Okay. And what choice were you given by the  
11 Salt Lake City Police?  
12 A. That it was either me or Nathan.  
13 Q. Why did you say Nathan?  
14 A. Because it wasn't me.  
15 Q. Even though you said that, what did you think  
16 had happened to cause Everett's injuries?  
17 A. I was still thinking that it had to have been  
18 an accident.  
19 Q. Okay. There was also a little bit of  
20 questioning about where Mr. Polakoff was in his trip to  
21 Salt Lake City. Where did you -- how much did you know  
22 about where he actually was during his trip?  
23 A. Not very much. I knew he was in Wyoming and  
24 that he was keeping in contact with my mom and my  
25 sister.

1 Q. At the end of the interview of the Salt Lake  
2 City Police, what was your expectation about Nathan  
3 coming to visit you?  
4 A. None.  
5 Q. I'm going to ask you to clarify that. What  
6 was your expectation as to whether or not he would show  
7 up to see you after the interview?  
8 A. I still thought that he would. He still  
9 might come.  
10 Q. And you were also asked a little bit about  
11 Nathan's suicidal statements. Regardless of what you  
12 told Chief Wells, what did Nathan tell you about being  
13 suicidal?  
14 A. On that day?  
15 Q. Yes.  
16 A. He told me that he was going to check himself  
17 into a mental hospital, because he was going to commit  
18 suicide because everyone was going to blame him.  
19 Q. You talked a little bit about the shower on  
20 the 18th and 19th and you were asked to describe what  
21 the shower looked like. Now, do you know how Everett  
22 was hurt on the 19th?  
23 A. Barely still, but kind of.  
24 Q. Did you observe anything?  
25 A. I didn't observe anything. I just know what

1 the Salt Lake City doctors had told me.  
 2 Q. Can you tell me whether or not anybody has  
 3 ever been able to tell you this is exactly what happened  
 4 to Everett?  
 5 A. No.  
 6 Q. Do you know exactly what happened to Everett?  
 7 A. I -- what the doctors had told me was that --  
 8 MR. SNIVELY: Your Honor, I object to the  
 9 hearsay.  
 10 MR. NIXON: That is appropriate.  
 11 THE COURT: Sustained.  
 12 Q. (BY MR. NIXON) Who was alone with Everett  
 13 when he stopped breathing?  
 14 A. Nathan.  
 15 Q. Who was alone with Everett when he got the  
 16 injury on his forehead?  
 17 A. Nathan.  
 18 Q. You've been asked a lot about diarrhea, too.  
 19 You did say that there was some diarrhea. Do you recall  
 20 how many times Everett had diarrhea prior to you taking  
 21 him to see Whitehead?  
 22 A. I think once. I can't remember how many  
 23 times.  
 24 Q. And after things got more serious, you  
 25 describe that Everett had seizures and stopped

1 breathing, and then you subsequently learned that he had  
 2 a skull fracture. How important was it to you while you  
 3 were sitting in Salt Lake that Everett had previously  
 4 had diarrhea?  
 5 A. None.  
 6 Q. Why is that?  
 7 A. Because I was just thinking about how this  
 8 could have happened, who -- how, I guess, he could have  
 9 done it and just a lot of stuff. Everett was in  
 10 critical condition. I didn't know if I was going to  
 11 take my baby home. A lot of things I didn't even think  
 12 about. A lot of things I was mostly just focused making  
 13 sure I was there for Everett and --  
 14 MR. SNIVELY: Your Honor, I object. This  
 15 isn't responsive to the question.  
 16 THE COURT: It's narrative.  
 17 MR. NIXON: One moment, please, Judge.  
 18 THE COURT: Sustained.  
 19 MR. NIXON: No further redirect, Your Honor.  
 20 THE COURT: Thank you, Mr. Nixon.  
 21 Any recross?  
 22 MR. SNIVELY: Just a couple quick questions,  
 23 please.  
 24 THE COURT: All right.  
 25 ///

# RECROSS EXAMINATION

BY MR. SNIVELY:

1 Q. Ma'am, when you talked to the Red Lodge  
 2 Police you'd had plenty of sleep, correct?  
 3 A. Yeah.  
 4 Q. And you came to Red Lodge for the purpose of  
 5 talking with Red Lodge Police?  
 6 A. Yes.  
 7 Q. So there was not an issue of any sleep  
 8 deprivation or anything when you talked to them in May  
 9 of '19, correct?  
 10 A. Correct.  
 11 Q. And you, in essence, told them the same thing  
 12 that you told Salt Lake Police, didn't you?  
 13 A. Yes.  
 14 Q. And at no time during those interviews, and  
 15 specifically with Chief Wells, did you make the comment  
 16 about Nathan saying that they were blaming him and that  
 17 was the reason for the suicide, did you?  
 18 A. Not that I can remember.  
 19 Q. I mean, that's -- yesterday and today, is the  
 20 first time that has come up, correct?  
 21 A. I think I've done so -- I've done a lot of  
 22 testimonies and stuff.  
 23 Q. But you don't remember ever saying that

1 before you said it yesterday, do you?  
 2 A. Not that I can remember.  
 3 Q. All right. And I showed you the transcript  
 4 of that question and that's not in there, is it?  
 5 A. Yes.  
 6 Q. And that would have been with Chief Wells in  
 7 May of '19, correct?  
 8 A. Yes.  
 9 Q. And so if I understood your answer to Mr.  
 10 Nixon is your opinion is it wasn't important to tell  
 11 Salt Lake doctors the entire history of your son's  
 12 medical condition?  
 13 MR. NIXON: Your Honor, I believe that  
 14 misstate the evidence.  
 15 THE COURT: Sustained.  
 16 Q. (BY MR. SNIVELY) Your testimony is that you  
 17 didn't think it was important to tell the Salt Lake  
 18 doctors or specifically Dr. Laskey about the diarrhea?  
 19 MR. NIXON: Your Honor, I'm going to object  
 20 to that. I think that misstate, as well.  
 21 THE COURT: Hold on. He's just asking her if  
 22 that's -- if that's what it is. Go ahead. Overruled.  
 23 THE WITNESS: I don't remember talking that  
 24 much with Dr. Laskey. There were so many doctors there.  
 25 And I have -- and I have talked to so many doctors.

1 Q. (BY MR. SNIVELY) So your testimony is you  
2 don't recall her asking you for the history and going  
3 through a whole series of questions with you?  
4 A. I don't remember a lot of the questions that  
5 she asked me. I don't even remember what state I was in  
6 when she came and talked to me or when the other doctor  
7 came and talked to me.  
8 Q. I'm sorry. You don't know where you were --  
9 which state?  
10 A. State of mind I was in. I barely even  
11 remember being with Dr. Laskey or how long after Everett  
12 was out of the NICU when I saw Dr. Laskey. I barely  
13 remember her.  
14 Q. How many times do you think you talked to  
15 her?  
16 A. I think once.  
17 Q. Just one time?  
18 A. I think so.  
19 MR. SNIVELY: I don't have any further  
20 questions.  
21 THE COURT: All right. May this witness be  
22 excused, Mr. Nixon?  
23 MR. NIXON: The State would ask that she is  
24 excused.  
25 THE COURT: Mr. Snively.

1 MR. SNIVELY: Judge, I would ask that she be  
2 subject to re-call.  
3 THE COURT: So you are still subject to your  
4 subpoena. But for now, you're admonished not to discuss  
5 your testimony with any other witnesses. Don't talk  
6 about the questions that you were asked or the answers  
7 that you provided with any other witness. Okay?  
8 THE WITNESS: Okay.  
9 THE COURT: For now, you can step down and go  
10 on out. Thank you.  
11 Next witness, Mr. Nixon.  
12 MR. NIXON: The State calls Doug Whitehead.  
13 **DOUGLAS WHITEHEAD,**  
14 **WITNESS HEREIN, BEING FIRST**  
15 **DULY SWORN ON OATH WAS**  
16 **EXAMINED AND TESTIFIED**  
17 **AS FOLLOWS:**  
18 --oOo--  
19 THE COURT: Sit yourself right there, please,  
20 and make sure you speak into the microphone.  
21 THE WITNESS: Okay.  
22 **DIRECT EXAMINATION**  
23 **BY MR. NIXON:**  
24 Q. Mr. Whitehead, will you please start by  
25 stating and spelling your name.

1 A. Douglas Allen Whitehead. D-o-u-g-l-a-s,  
2 Allen A-l-l-e-n, Whitehead W-h-i-t-e-h-e-a-d.  
3 Q. And what is your occupation?  
4 A. I'm a physician assistant.  
5 Q. And could you please tell us what being a  
6 physician assistant entails.  
7 A. It's a provider that's not a physician  
8 trained. However, usually bring years of some other  
9 experience. Mine was a paramedic for several years and  
10 then attending an accredited physician assistant  
11 training program.  
12 I attended Rocky Mountain College. And after  
13 being accredited and completion of the training, one  
14 practices as a provider that is with a relationship,  
15 duties and delegations agreement with a supervising  
16 physician.  
17 Q. Okay. You started going into it a little  
18 bit, but are there any -- do you have any other  
19 educational background getting your PA education?  
20 A. Yes. I started my medical training and  
21 career in Sidney, Montana. I volunteered as an EMT  
22 after taking a training course there in Sidney. And  
23 then went to North Carolina and took a program for -- it  
24 was the highest accredited emergency medical care  
25 program for paramedic training.

1 And so I attended training there from --  
2 until 1992 and graduated with a bachelor of science in  
3 emergency medical care and healthcare administration  
4 supervision.  
5 I left there, North Carolina University -- or  
6 excuse me -- Western Carolina University and went to  
7 Spokane, Washington, where I worked as a paramedic for  
8 nine years as a paramedic, paramedic supervisor, and an  
9 operations manager for American Medical Response in  
10 Spokane.  
11 I left there to attend additional training at  
12 Rocky Mountain College to become a physician assistant.  
13 I continued to work now for 30 years -- I'm recertifying  
14 my paramedic for 30 years and continue to volunteer in  
15 the community of Joliet with Joliet Ambulance.  
16 When I finished my PA training for Rocky  
17 Mountain College, I went to -- my first role was in  
18 Forsyth, Montana, at Rosebud Healthcare Center, where I  
19 was a PA practicing family practice, following a family  
20 practice, as well as about 50 percent of the emergency  
21 room call time, urgent care, walk-in care, hospital --  
22 in-hospital patients.  
23 When Billings Clinic severed from Rosebud  
24 Healthcare Center, their critical access hospital there,  
25 I traveled with Billings Clinic for some time working in

1 some vacated family practice roles or for some emergency  
2 room coverage over the weekends.

3 I was fortunate enough to join Beartooth  
4 Billings Clinic when they built their new hospital and  
5 worked there as a physician assistant following a family  
6 practice, urgent care, walk-in care, four to six on-call  
7 shifts per month in the emergency department and then  
8 following in-hospital patient and long-term care  
9 patients, as well.

10 Q. When did that new clinic open?

11 A. 2012. I think October of 2012.

12 Q. How long did you stay with Beartooth Billings  
13 Clinic?

14 A. I was there from 2012 to June of '20.

15 Q. Do you still practice as a physician  
16 assistant?

17 A. Yes.

18 Q. Where do you currently work?

19 A. I currently work at SCL Health medical group  
20 as a PA at the walk-in clinic, walk-in clinics  
21 throughout Billings.

22 Q. You mentioned you do some family practice as  
23 well as some emergency room. What other sort of roles  
24 do you play as a physician assistant?

25 A. Many physician assistants practice

1 differently. Some do surgery and such things like that,  
2 but my practice has been family practice, urgent care,  
3 walk-in care, emergency room coverage, that included  
4 often in-hospital work at critical access hospitals,  
5 including Rosebud Healthcare Center in Forsyth, and also  
6 in Columbus, Stillwater Billings Clinic and at  
7 Beartooth.

8 Currently, I'm just doing the walk-in work.

9 Q. Okay. You mentioned that you did family  
10 practice at Beartooth Billings Clinic. What does that  
11 family practice entail?

12 A. We would follow patients according to our  
13 duties and delegation agreement. I would see infants,  
14 children, adults, acute care, chronic care, long-term  
15 care at Cedarwood Villa here at the nursing home.

16 Q. So you mentioned you saw infants. Did you  
17 see a lot of pediatric patients in the family care?

18 A. I believe so. I would do some well-child  
19 follow-up or well-child cases, as well. And as part of  
20 walk-in and/or emergency care, it was all-comers. You  
21 know, anybody that would come in, I would see.

22 Q. Assuming that a child is too young to talk to  
23 you for care, how do you approach a pediatric case?

24 A. Usually parents, of course, carry or  
25 accompany their children and so the history of their

1 illness or their complaint is usually reviewed as the  
2 problem-specific exam is provided to their provider  
3 based on the information that they provide and the  
4 questions that I ask for clarification.

5 Q. And do you consider where a child should be  
6 developmentally?

7 A. Yes.

8 Q. If you're seeing a nine-month-old --

9 THE COURT: Stop. Anyone with a phone, turn  
10 it off, please, or they will be collected. Thanks.  
11 Go ahead.

12 Q. (BY MR. NIXON) You've had the opportunity to  
13 serve nine-month-old patients before?

14 A. Yes.

15 Q. What do you expect developmentally from a  
16 nine-month-old?

17 A. Usually they are not speaking. They may have  
18 a history of crawling and some, perhaps, cruising, which  
19 is kind of, you know, which is bringing themselves up on  
20 chairs or something like that. Some, you know --  
21 usually I'll ask the parent what they're doing, whether  
22 they're crawling or cruising or such. They're usually  
23 not verbal to provide history.

24 Q. Why is it important to collect that  
25 information?

1 A. Because they're the only advocate for the  
2 child.

3 Q. And what other sort of medical information do  
4 you see?

5 A. Past medical history and then the history of  
6 present illness, you know, why they're in the clinic on  
7 that date.

8 Q. And just to go back and clarify, I believe  
9 you said that you were working at Beartooth Billings  
10 Clinic in April of 2019?

11 A. Yes. I was the walk-in or the urgent care  
12 provider that day.

13 Q. And do you recall the events of April 18th,  
14 2019?

15 A. Yes.

16 Q. And as part of your -- you seeing -- first  
17 let me withdraw that.

18 Do you remember the name of the patient that  
19 you saw that day?

20 A. Yes.

21 Q. What was that?

22 A. Everett Musch.

23 Q. And did you generate a report on your visit  
24 with Everett Musch?

25 A. Yes.

1 Q. And do you have that today?  
 2 A. I do.  
 3 Q. Now, is it going to help your recollection to  
 4 be able to refer to that report while you testify?  
 5 A. Yes.  
 6 MR. NIXON: Your Honor, I'd ask that he be  
 7 allowed to refer to his report to refresh his  
 8 recollection.  
 9 THE COURT: Mr. Snively.  
 10 MR. SNIVELY: I don't have any objection.  
 11 THE COURT: It is allowed.  
 12 Q. (BY MR. NIXON) Had you ever seen Everett in  
 13 the clinic before?  
 14 A. I don't believe so.  
 15 Q. And do you recall who was with Everett that  
 16 day?  
 17 A. Yes. Two guardians, that I assumed was  
 18 mother and father.  
 19 Q. Is that how they're referred to in the  
 20 report?  
 21 A. Yes.  
 22 Q. Did you recognize either of those adult  
 23 individuals?  
 24 A. I did recognize Nathan. But I am admittedly  
 25 very poor with names, so I didn't recall his name.

1 Q. How well did you know him?  
 2 A. Not well. I had just seen him in the  
 3 community.  
 4 Q. And just to verify, how old was Everett when  
 5 you saw him?  
 6 A. Nine months old.  
 7 Q. Did you take any notes of what size he was,  
 8 height or weight?  
 9 A. That, I think is in the intake of the record.  
 10 Q. Do you have access to that?  
 11 A. I do. His weight was 9.1 kilograms, and his  
 12 height was calculated at 26.5 inches by the nurse.  
 13 Q. And just in case we have some folks that  
 14 aren't good with the metric scale, roughly, how much in  
 15 pounds is 9.1 kilograms?  
 16 A. About 20 pounds.  
 17 Q. Okay. And so what sort of expectations --  
 18 I'll withdraw that.  
 19 What are your initial observations of Everett  
 20 physically?  
 21 A. He was aware, he was alert. I believe he was  
 22 sitting on his mother's lap, and appropriate to me.  
 23 Q. And what concerns were articulated to you  
 24 about his health?  
 25 A. The intake concerns were vomiting and

1 diarrhea. Throwing up and diarrhea is written on here.  
 2 Q. So are your observations documented in the  
 3 history of present illness of your report?  
 4 A. Yes.  
 5 Q. How do you describe Everett when you saw him  
 6 in your history of present illness?  
 7 A. He's a nine-month-old brought to the clinic  
 8 accompanied by his mother and father, sitting on his  
 9 mother's lap and appears well. Slightly fussy and  
 10 dependent.  
 11 Q. Do you also document what they told you about  
 12 vomiting and diarrhea?  
 13 A. Yes.  
 14 Q. What do you say about that?  
 15 A. The mother -- excuse me. "The mother and  
 16 father report he had episodes of vomiting and diarrhea.  
 17 He vomited one time last evening and has been seemingly  
 18 thirsty, taking Pedialyte well."  
 19 And they state he seems to enjoy the  
 20 Pedialyte. They're having no trouble with rehydration.  
 21 His appetite seemed normal to them. He had two to three  
 22 episodes of vomiting on the day of service, but had not  
 23 had an episode in the last several hours.  
 24 Q. Do you also note anything about the diarrhea?  
 25 A. Yeah. I'm sorry. The vomiting seemingly was

1 getting better, less vomiting, better liquid intake and  
 2 one episode of normal-colored, diarrhea-like consistency  
 3 in his diaper. No bleeding. No evidence of blood in  
 4 his stool and normal heavy wet diaper in the morning.  
 5 Oftentimes they are heavier in the morning  
 6 with urine.  
 7 Q. What did you document regarding physical  
 8 trauma that the child had experienced in your history of  
 9 present illness?  
 10 A. The father states the patient was on a bed  
 11 mattress on the floor and that he fell from the bed onto  
 12 the floor, about six inches from the surface, landing on  
 13 his frontal forehead. He had a very small area of a  
 14 mark on his forehead. And the father reported that he  
 15 responded appropriately after the fall.  
 16 Q. Did you examine that bump?  
 17 A. Yes.  
 18 Q. How would you describe it?  
 19 A. As a mark on his forehead. As I reapproached  
 20 the infant and put my hands on him, I could touch the  
 21 area. There was no underlying instability or fluid  
 22 collection. It was stable. It wasn't really an injury.  
 23 Q. Okay. What did you tell Nathan and the  
 24 mother about how babies bruise?  
 25 A. I told them that -- we talked a little bit

1 about that particular mark. And then I thought that it  
2 could be from crawling or cruising and we tried to  
3 re-address what things he was doing in his development  
4 that may have caused something like that.

5 Q. As a new patient, what do you know about how  
6 Everett bruised like?

7 What do you know about his tendency to bruise  
8 at that point in time?

9 A. I wouldn't know anything about his tendency  
10 to bruise.

11 Q. How concerned were you about that bump?

12 A. After reevaluating that and initially  
13 evaluating it, there was no evidence of an injury there.  
14 No injury. Just a mark on his forehead.

15 Q. Nevertheless, what did you think about the  
16 explanation for the mechanism of that injury?

17 A. It seemed plausible.

18 Q. Would you expect to see an injury from a roll  
19 off a futon to carpet?

20 A. Like this little mark?

21 Q. Yes.

22 A. I might expect to see a little mark like  
23 that.

24 Q. And based on your initial, I guess,  
25 observation, what were your concerns for?

1 medical history.

2 Q. What concerns did you have about his vital  
3 signs?

4 A. His heart rate was 145, which is an expected  
5 value on a nine-month-old, respirations 30, body  
6 temperature 99.5. His oxygen saturation was 98 percent.

7 Q. You talked about his respirations, what  
8 concern did you have about his breathing?

9 A. I asked parents if he had any respiratory  
10 symptoms and no reported increase work of breathing,  
11 he's not been -- okay. Yeah. No report of increased  
12 work of breathing.

13 Q. What did you observe, if anything, regarding  
14 the ease of his respiration?

15 A. No significant upper respiratory problems  
16 historically. He had no cough. And by my assessment,  
17 his lungs were clear.

18 Q. Did you have any concerns about his ability  
19 to breathe?

20 A. I did not.

21 Q. Did you have the opportunity to look at his  
22 eyes?

23 A. I did.

24 Q. What did you observe?

25 A. He was tearing slightly, because he was

1 A. I reevaluated that because a good 20 to 30  
2 minutes of our time was spent on the primary complaint  
3 about nausea and vomiting. So when I was asked to  
4 evaluate the mark, I'd already evaluated him  
5 comprehensively. And I reevaluated that area and there  
6 was no injury, so I reassured the parents.

7 Q. What did you think was the cause of his  
8 distress?

9 A. Of his distress?

10 Q. Of Everett's distress. Nausea?

11 A. Oh, yeah. Vomiting and diarrhea. I felt  
12 that it was a viral syndrome, gastrointestinal viral  
13 syndrome.

14 Q. Was his temperature significant?

15 A. He had a temperature of 99.5, which is  
16 arguable whether that's a fever or not. The literature  
17 disputes whether that's a fever or not. Everybody has  
18 their level of concern about a fever. That would be  
19 very low fever.

20 Q. Did he have any sort of significant past  
21 medical history?

22 A. No past medical history that I was aware of.

23 Q. Did he have any sort of a surgical history?

24 A. The surgical history, it was reviewed on the  
25 intake by the nurse and myself, and he had no known

1 approached by a stranger, as myself. Tearing slightly,  
2 that's documented. And then he had equal pupils  
3 bilaterally.

4 Q. What concern did you have about Everett being  
5 cross-eyed at that point in time?

6 A. I didn't see that he was cross-eyed at that  
7 time.

8 Q. What is petechiae?

9 A. Petechiae are little blood collections under  
10 the skin.

11 Q. Can you tell me whether or not you observed  
12 any petechiae?

13 A. There was no petechiae that I noticed.

14 Q. What signs of retinal hemorrhaging did you  
15 observe?

16 A. There was no evidence of retinal  
17 hemorrhaging.

18 Q. Did you have a chance to examine his  
19 extremities?

20 A. I did.

21 Q. What did you notice about that?

22 A. For the most part, just that he was moving  
23 all extremities well while he was on the lap of either  
24 his mother or presumed father. He was moving all  
25 extremities well. I didn't do any resistance testing or

1 anything like that.

2 Q. What comments did you make about his  
3 strength?

4 A. He moved all extremities well. He is quite  
5 strong. In fact, resisting observations of TMs and  
6 oropharynx. Pretty appropriate for a nine-month-old  
7 where somebody is approaching them and they're just  
8 trying to be comforted by mom.

9 Q. What signs of paralysis on his right side did  
10 you observe?

11 A. There was no paralysis on his right side. I  
12 put down, "He moves all extremities well."

13 Q. What, if any, signs of seizure activity did  
14 you learn about or observe that day?

15 A. There was no report of any seizure-like  
16 activity and there was nothing like that witnessed on  
17 the physical exam.

18 Q. Did you make note of his skin coloring?

19 A. I did state, "He is slightly warm to touch,  
20 perhaps."

21 Q. But the actual color of his skin, did you  
22 make any comments about how he appeared?

23 A. I just stated that he appeared well. I don't  
24 think I...

25 Q. Okay.

1 whether it be urgent care or emergency department,  
2 usually part of that anticipatory guidance is to make  
3 sure that they are hydrating well and to return to the  
4 clinic, whether it be a clinic or emergency department,  
5 if anything changes.

6 I've got notes here that said patients are  
7 reassured about the abdomen film, it looks unremarkable  
8 and that I anticipated the symptoms were viral etiology.  
9 I said to continue to treat the fever and hydrate with  
10 Pedialyte.

11 Q. Now, did you make any notes that -- what, if  
12 any, notes did you make about thinking he might have  
13 multiple skull fractures?

14 A. He didn't have any skull fractures when I saw  
15 him.

16 Q. Can you tell me whether or not you could  
17 definitely say that without having an x-ray?

18 A. I examined him in the room for the mark that  
19 I was asked to evaluate and his skull was stable, his  
20 pupils were normal. There was no injury.

21 Q. Nevertheless, can you say that definitely  
22 without an x-ray?

23 A. Yes.

24 Q. Now, do you recall speaking to me prior to  
25 your testimony?

1 A. Unless you see it on my note. I don't see it  
2 here.

3 Q. That's all right. And based on your  
4 concerns, what sort of tests did you have done?

5 A. Based on the history of vomiting and  
6 diarrhea, I examined his abdomen and his bowel sounds  
7 were perhaps slightly hypoactive from what I would  
8 expect, and so since there was some concerns of problems  
9 that are unique to infants under one or two years old, I  
10 mentioned to the parents, "I'd like to do an x-ray", and  
11 so sent him over for an x-ray of his abdomen.

12 Q. What, if anything, remarkable did you observe  
13 about the x-ray?

14 A. It looked normal for him.

15 Q. What other tests did you test for?

16 A. A rapid strep test.

17 Q. And did you authorize a head x-ray?

18 A. I did not.

19 Q. Based on that, can you tell me anything about  
20 what an x-ray may have -- withdrawn.

21 Did you ever see Everett after this?

22 A. I've not seen him since, no.

23 Q. Did you make any plan about checking him with  
24 you again?

25 A. As always when patients leave a visit,

1 A. I'm sorry?

2 Q. Do you recall speaking with me prior to your  
3 testimony?

4 A. Yes.

5 Q. Can you tell me whether or not you recall  
6 talking about the bump on the head?

7 A. Yes.

8 Q. Okay. Can you tell me whether or not you  
9 recall saying that although unremarkable, you wouldn't  
10 expect there to be a bump from a six-inch fall?

11 A. I wouldn't expect there to be a cranial  
12 fracture from a six-inch fall.

13 Q. And do you recall talking about a bump that  
14 you observed? Do you recall saying that you would not  
15 expect that?

16 A. Yes.

17 Q. Okay.

18 MR. NIXON: No further questions.

19 THE COURT: Cross, Mr. Snively?

20 MR. SNIVELY: Thank you, Your Honor.

#### 21 CROSS EXAMINATION

22 BY MR. SNIVELY:

23 Q. Sir, Nathan is the one who asked you to look  
24 at the bruise on the forehead, correct?

25 A. At the mark on his forehead, yes, he did.



1 Q. And when you saw it, had it had started to  
2 bruise, is that a fair -- or discolor, I should say?

3 A. In my opinion the discoloration -- it's  
4 called ecchymosis, a little skin discoloration is what  
5 it was.

6 Q. All right. Did you see any elevated bump on  
7 that?

8 A. No. On my assessment there was no fluid  
9 collection or bump or instability of the skull.

10 Q. All right. And you placed your hands on  
11 Everett's skull during that exam, correct?

12 A. Yes.

13 Q. And you would have used your thumbs or a  
14 finger or two?

15 A. (Indicating) This here, and then my hands  
16 would have been wrapped around his skull.

17 Q. All right. And your thumbs would have been  
18 on his forehead?

19 A. Yeah.

20 Q. The way you're describing?

21 A. Yeah. That's how I'm doing it.

22 MR. SNIVELY: The witness just put his hands  
23 straightforward about three inches apart with his  
24 fingers spread to describe what he's testifying to.

25 THE COURT: The record will reflect that

1 A. No.

2 Q. Escorting them or escorting them either  
3 direction, correct?

4 A. No.

5 Q. And am I correct in you're doing other work  
6 while the x-rays are being performed?

7 A. Correct. I'm uncertain if I'm seeing any  
8 other patients at any time, but my office is right  
9 around that area.

10 Q. I mean, you potentially could have seen  
11 somebody else, you could have been doing paperwork,  
12 reviewing something?

13 A. Right. I don't recall what I was doing.

14 Q. Right.

15 A. But, yes.

16 Q. But you wouldn't have been with the parents  
17 and Everett?

18 A. I would not have.

19 Q. How did you find out the -- or how did you  
20 receive the results?

21 A. I read the x-ray myself as a preliminary  
22 read. And then the rest of the results are formally  
23 dictated by a radiologist at Billings Clinic in Billings  
24 and then they're entered into the electronic medical  
25 record.

1 testimony.

2 MR. SNIVELY: Thank you.

3 Q. (BY MR. SNIVELY) And the mother, did she ever  
4 tell you that there was a goose egg on his head?

5 A. I don't recall her saying that.

6 Q. And that's something you would have noted in  
7 your records, had you been told that, right?

8 A. If there was any fluid collection on the  
9 scalp, I would have mentioned that.

10 Q. Also, when you sent Everett and, what you  
11 believed, his parents for x-rays, did you go perform  
12 those x-rays?

13 A. No, sir.

14 Q. Can you tell the jury how that happens at  
15 your clinic?

16 A. After we consult with the parents, caregivers  
17 and say, "Hey, I'd like to do an x-ray," they consent to  
18 that and then we go to our computer terminal and type in  
19 the type of x-ray we request and then notify by intercom  
20 system to the rad tech in the building that we'd like to  
21 get an x-ray. And they usually come to the room and  
22 escort the patient or family members and patient to the  
23 x-ray suite, perform the x-ray and then escort them back  
24 to the room.

25 Q. But you don't accompany them in any of that?

1 Q. And that's how you read it?

2 A. Correct. And then I confirm that.

3 Q. I'm sorry?

4 A. And then I confirm my initial impression with  
5 their official read.

6 Q. And there's usually a lag between those?

7 A. 20 to 30 minutes, perhaps.

8 Q. So it would have been probably while they  
9 were still in your office?

10 A. Likely, uh-huh.

11 Q. In this case, they confirmed what you had  
12 initially assessed it as?

13 A. Yes.

14 Q. Did the mother ever tell you that she was  
15 worried about a concussion?

16 A. No.

17 Q. And in the intake notes is there any  
18 reference to Everett having a concussion?

19 A. No. Just says "throwing up and diarrhea."

20 Q. And that entry of throwing up and diarrhea,  
21 how was that entry made in the system?

22 A. This particular entry is made, I believe, by  
23 Mary Jo, who was the service representative that  
24 admitted him into the clinic visit. And she put the  
25 chief complaint of the patient or patient's caregivers.

1 And then the next process is a nurse evaluates them for  
2 appropriateness of where to place the patient for their  
3 visit. And Jillian Aukema was the nurse on duty, and  
4 she put down "vomiting and diarrhea."

5 Q. All right. And again, the original entry of  
6 throwing up and diarrhea, that's what that lady would  
7 have been told by whoever checked him in and gave his  
8 history?

9 A. Correct.

10 Q. And that's where that information comes from?

11 A. Yes.

12 Q. And then the nurse -- if the nurse thought it  
13 was something different, would that have been corrected  
14 on that --

15 A. Yes.

16 Q. -- nurse entry?

17 A. Uh-huh.

18 Q. And in this case, they're consistent?

19 A. Yes.

20 Q. And in the nurse's notes there's no  
21 annotation of a goose egg or concerns of a concussion?

22 A. Yes. She did mention that, "Father states  
23 patient did fall off of bed, about six inches from bed  
24 last night. Has bump on forehead."

25 Q. All right. Which was consistent with what

1 or not there was report of some sort of a head injury or  
2 some sort of a mark. It didn't make the notes, didn't  
3 it?

4 A. Yes.

5 Q. And based on that, what sort of an  
6 examination did you do?

7 A. I reapproached the infant when I was asked to  
8 evaluate the mark on his head and that's where I, again,  
9 looked at his pupils, evaluated the skull, the cranium  
10 like this, pushed on the bump to be assured that it was  
11 stable. There was no instability, no fluid collection,  
12 no injury. And I would have relooked at his pupils and  
13 touched the anterior fontanelle, which was open and  
14 soft.

15 Q. Okay. And what does that mean?

16 A. That means that there's no significant  
17 swelling.

18 Q. Okay. And you mentioned he was how tall?

19 A. The intake as taken by the nurse had his  
20 height at 67.31 centimeters. And I'm sorry, 26.5  
21 inches.

22 Q. Okay. Thank you. Can you tell me whether or  
23 not based on that, would a six-inch fall be more or less  
24 distance from him just tipping over from a sitting  
25 position?

1 you examined?

2 A. Yes.

3 Q. Did the mother ever ask you to do a scan or  
4 an x-ray of Everett's head?

5 A. No.

6 Q. And in your medical opinion, there was not a  
7 need for that at that point?

8 A. There was no indication for x-ray.

9 Q. Did the mother also report to you during that  
10 appointment that Everett seemed to be getting better?

11 A. She did.

12 Q. And the significance of that that he's  
13 recovering from the flu?

14 A. It was reassuring that he's recovering from  
15 gastrienitis.

16 Q. So it was consisted with your diagnosis that  
17 he would have been getting better from the onset?

18 A. Yes.

19 MR. SNIVELY: I have no further questions,  
20 Judge.

21 THE COURT: Any redirect?

22 MR. NIXON: Please, Your Honor.

# REDIRECT EXAMINATION

24 BY MR. NIXON:

25 Q. There's been a fair bit of talk about whether

1 A. It would less distance than tipping over from  
2 a sitting position.

3 Q. What would you expect in the way of an injury  
4 if a child simply tipped over on carpet?

5 A. At most, maybe a mark on the skin.

6 Q. Would you generally expect anything?

7 A. I would expect no injury whatsoever or maybe  
8 some mark on the skin or a slight abrasion, perhaps.

9 Q. Okay. Although -- it is your opinion, then,  
10 that although you weren't terribly concerned by the  
11 mark, that you wouldn't generally expect to see anything  
12 from a six-inch drop onto carpet?

13 MR. SNIVELY: I object. It's been asked and  
14 answered.

15 THE COURT: Sustained.

16 Q. (BY MR. NIXON) Have you had the opportunity  
17 to review these notes much recently?

18 A. Yes, for the last few days.

19 Q. Have you had the opportunity to review these  
20 notes quite a lot in the recent past?

21 A. In the last few days, yes.

22 Q. And before that?

23 A. At least one time previously.

24 Q. And have there been any consequences --

25 MR. SNIVELY: Your Honor, I object. I don't

1 think this is relevant.  
 2 THE COURT: Approach.  
 3 (Wherein, an off-the-record  
 4 discussion was held at the  
 5 bench outside of the hearing  
 6 of the jury.)  
 7 THE COURT: That objection is sustained.  
 8 Mr. Nixon, any other questions?  
 9 MR. NIXON: No. Mr. Whitehead, thank you for  
 10 your time. I don't have any further questions.  
 11 THE COURT: Mr. Snively?  
 12 MR. SNIVELY: No, Your Honor.  
 13 THE COURT: May this witness be excused?  
 14 MR. NIXON: Please, Your Honor.  
 15 MR. SNIVELY: Yes, Your Honor.  
 16 THE COURT: All right. Mr. Whitehead, you  
 17 are excused from your subpoena. But please do not  
 18 discuss your testimony with any other witness or the  
 19 questions that you were asked or the answers that you  
 20 provided. You are free to leave now. Free to stay, if  
 21 you wish.  
 22 Mr. Nixon, your next testimony, do you  
 23 anticipate a lengthy witness or not?  
 24 MR. NIXON: Your Honor, I believe there's  
 25 going to be a couple of videos played, so there's going

1 that that you wish to put on the record? Mr. Snively?  
 2 Let me just say for the record, there was a  
 3 relevancy objection and the sidebar was due to the  
 4 nature of that objection, the Court ultimately sustained  
 5 the objection.  
 6 MR. SNIVELY: Judge, I guess I would just  
 7 like to on the record that the Court's not going to  
 8 allow any conversation about any other pending  
 9 litigation related to this case.  
 10 THE COURT: I think my ruling was pretty  
 11 clear.  
 12 MR. SNIVELY: Well, I guess I'm sort of  
 13 surprised that that issue came up and I had to object.  
 14 THE COURT: All right.  
 15 MR. SNIVELY: I think it's out of bounds.  
 16 THE COURT: Okay.  
 17 MR. NIXON: I guess I'm not sure, what ruling  
 18 are we referring to?  
 19 THE COURT: Well, right before the sidebar  
 20 there was a relevancy objection and I believe the  
 21 discussion at that sidebar was about possible inquiry  
 22 into whether PA Whitehead was subject to civil  
 23 litigation.  
 24 MR. NIXON: Okay. But had there been a  
 25 previous ruling about that?

1 to be some time. It's going to be the reporting  
 2 officer. So I do think it might be time to inquire  
 3 whether a break is in order.  
 4 THE COURT: Let's try to do that. Let's take  
 5 a morning break.  
 6 Folks, 15 minutes. During this break it's  
 7 your duty not to talk about the substance of this case  
 8 in any way, among yourselves or with anyone else, or  
 9 look at or access any information about this case in any  
 10 way, including electronic devices or phones or form or  
 11 express any opinion on the case until the case is  
 12 submitted to you.  
 13 Go on down to the jury room. We'll be in  
 14 recess.  
 15 (Wherein, a recess was taken.)  
 16 THE BAILIFF: All rise.  
 17 THE COURT: Please be seated. Thanks.  
 18 We're back on the record. DC 19-17, State  
 19 versus Polakoff, after a break.  
 20 Counsel for the State is present.  
 21 Counsel for the defendant is present. The  
 22 defendant is present.  
 23 The jury is not present.  
 24 Counsel, before the jury comes in, we had a  
 25 brief sidebar off the record, is there anything about

1 THE COURT: No.  
 2 MR. NIXON: Okay. I misunderstood.  
 3 THE COURT: No. No. I found that to be not  
 4 relevant. Unless you -- go ahead and put it on the  
 5 record if you think it is.  
 6 MR. NIXON: Your Honor, I guess I'll go ahead  
 7 and do that, if you don't mind.  
 8 I guess I believe that the State does have a  
 9 problem with the objection that was sustained prior. I  
 10 believe there was some inconsistency in PA Whitehead's  
 11 testimony regarding what he said on the stand and what  
 12 he had agreed to discussing with me previously in  
 13 meetings.  
 14 And subsequently, I think that did leave the  
 15 State to wonder if it was necessary to inquire into  
 16 possible bias. It is a concern, certainly, that, you  
 17 know, it was to his personal benefit to change that  
 18 testimony at the time, because of possible consequences  
 19 in an upcoming civil problem.  
 20 So I was happy to move on, but I do think  
 21 that there was a relevance to that line of questioning  
 22 because the ability to examine regarding the  
 23 inconsistencies in his previous testimony was  
 24 foreclosed.  
 25 THE COURT: Anything?

1 MR. SNIVELY: Judge, I made my point. I  
2 don't believe that --  
3 THE COURT: Okay. Well -- oh, I'm sorry. I  
4 cut you off.  
5 MR. SNIVELY: That's fine. I'd already made  
6 my point. I said I don't believe -- it has nothing to  
7 do with what Mr. Nixon just said. It was that I don't  
8 believe the civil litigation should be mentioned by any  
9 witness.  
10 MR. NIXON: Just to make it clear, I'm happy  
11 to not mention it again. Certainly that is your ruling  
12 and the State doesn't intend to make inquiry again. I  
13 simply rely on that statement.  
14 THE COURT: All right. And as far as  
15 relevance with regard to your point about bias, first,  
16 it's somewhat problematic, as you know, Mr. Nixon, to  
17 attempt to impeach based on conversations with you who  
18 cannot be called and so we were getting into dangerous  
19 territory, in any event.  
20 Obviously, you can't testify to anything  
21 you've been told and I assume you didn't have another  
22 officer or something there during that time. But in any  
23 event, based on your offer of proof or, essentially,  
24 your argument, I still find under 403 that any relevance  
25 is outweighed by prejudice.

1 So the ruling will stand and I'll ask the  
2 State to refrain from any further mention of that.  
3 Obviously, if you believe something happened in this  
4 trial that makes it relevant, approach the bench before  
5 you go there. Okay?  
6 MR. NIXON: Your Honor, I can tell you there  
7 simply won't be.  
8 THE COURT: Okay, thanks. Any reason the  
9 jury can't be brought back in?  
10 MR. NIXON: No, Your Honor.  
11 MR. SNIVELY: No, Your Honor.  
12 THE COURT: Thank you. I'll ask the bailiff  
13 to bring them in.  
14 (Wherein, the jury is present.)  
15 THE COURT: All right. Be seated. Thanks.  
16 The jury is now returned to the courtroom.  
17 Mr. Nixon, do you stipulate that the jury and  
18 the alternate are present?  
19 MR. NIXON: I do, Your Honor.  
20 THE COURT: Mr. Snively?  
21 MR. SNIVELY: Yes, Your Honor.  
22 THE COURT: Let's proceed. The next witness.  
23 MR. SPOJA: The State calls Officer Matt  
24 Grieshop.  
25 **MATTHEW GRIESHOP,**

1 WITNESS HEREIN, BEING FIRST  
2 DULY SWORN ON OATH WAS  
3 EXAMINED AND TESTIFIED  
4 AS FOLLOWS:  
5 --o0o--  
6 THE COURT: Officer, please take the witness  
7 chair.  
8 All right. You may proceed, Mr. Spoja.  
9 **DIRECT EXAMINATION**  
10 **BY MR. SPOJA:**  
11 Q. Good morning.  
12 A. Good morning.  
13 Q. Can you state your name and spell it for the  
14 record.  
15 A. Matthew Steven Grieshop, G-r-i-e-s-h-o-p.  
16 Q. You're obviously in uniform. What is your  
17 current position?  
18 A. I'm a police officer for the City of  
19 Columbus.  
20 Q. And how long have you been with Columbus?  
21 A. It will be two years in May.  
22 Q. Prior to that, what did you do?  
23 A. Before that, I was an officer here in Red  
24 Lodge.  
25 Q. Okay. And I assume that you had to go

1 through some training and education to get into that  
2 current position.  
3 A. Yes, I did.  
4 Q. Can you tell us a little bit about that.  
5 A. In 2009, I went to the Montana Law  
6 Enforcement Academy.  
7 Q. Okay. And after that you go through -- did  
8 you go to work, then, directly for Red Lodge at that  
9 point?  
10 A. No, I was actually employed with Big Horn  
11 County. I was a deputy in the city of Hardin.  
12 Q. Okay. And after that -- well, how long were  
13 you with Big Horn County?  
14 A. Approximately 18 months.  
15 Q. Okay. And then where did you go?  
16 A. From there, I came here to Red Lodge.  
17 Q. Okay. And how long were you with the City of  
18 Red Lodge?  
19 A. A little over nine years.  
20 Q. Okay. And in April of 2019, were you still  
21 working for the City of Red Lodge?  
22 A. Yes, I was.  
23 Q. And at that point in time how long had you  
24 been with the city?  
25 A. At that time, just about nine years.

1 Q. All right. Do you have to update your  
2 education and training through your career?  
3 A. Yes.  
4 Q. Is that part of maintaining your POST  
5 certification?  
6 A. Yes. We're supposed to get about 40 hours  
7 every two years of POST accreditation.  
8 Q. What sorts of education and training is that?  
9 A. There's different kinds. I mean, there's  
10 drug investigation, there's firearms training, there's  
11 different assortment of training that anybody could go  
12 to.  
13 Q. Okay. So back in April of 2019, what were  
14 some of your duties?  
15 A. At that time I was the sergeant for the  
16 police department. I took care of scheduling and I did  
17 evaluations. I helped the current chief out with cases  
18 that needed to be done, equipment, whatever needed to be  
19 done. And I was also kind of liaison with the other  
20 younger officers, with concerns they may have had to  
21 bring those to the chief at the time.  
22 Q. Were you tasked with acting as a field  
23 training officer for younger -- or newer officers?  
24 A. There was a time that I had a few officers  
25 where I did do some field training time with them, yes.

1 Q. Okay. So I'd like to draw you back to April  
2 19th, 2019. Were you on shift that day?  
3 A. Yes, I was.  
4 Q. Do you recall what shift?  
5 A. I believe I was working the 6:00 p.m. to 6:00  
6 a.m. shift.  
7 Q. Okay. And did you have a trainee at that  
8 time?  
9 A. Yes, I did.  
10 Q. Do you recall who that was?  
11 A. Yes, that was Officer Dawson.  
12 Q. Okay. So as -- while you're riding along  
13 with him, what are some of the things that -- I guess  
14 what is the objective of field training officers?  
15 A. You know, just more to evaluate some of the  
16 decisions that they do, you know, how they drive in  
17 their vehicle, their safety on traffic stops, just their  
18 overall composure of how they handle themselves at what  
19 they're doing when they're patrolling or with the  
20 public.  
21 Q. Okay. So back again, April '19, just after  
22 9:00 p.m., did you receive a dispatch?  
23 A. There was a dispatch, yes.  
24 Q. And where were you at when you received that,  
25 heard it?

1 A. We were -- Dawson and I were in one of our  
2 Red Lodge patrol vehicles and we were at the Town Pump  
3 at that time.  
4 Q. Okay. Do you recall the nature of the  
5 dispatch?  
6 A. Yes.  
7 Q. Okay. What information were you provided?  
8 A. Information that came over the EMS dispatch  
9 was that there was a child that was not breathing at  
10 that time.  
11 Q. Okay. In your career, how often have you  
12 heard a dispatch like that?  
13 A. I believe that was my first.  
14 Q. And what -- what does that do you to -- well,  
15 strike that.  
16 As an officer, what are you thinking when you  
17 get that dispatch?  
18 A. I just want to get there as soon as I  
19 possibly can.  
20 Q. Is that one of the worst?  
21 MR. SNIVELY: Your Honor, I object. It's not  
22 relevant, whether he thinks it's the worst or not.  
23 THE COURT: Sustained.  
24 Q. (BY MR. SPOJA) What level of importance does  
25 a call of this nature receive?

1 A. That call was severe.  
2 Q. And does that determine how you respond?  
3 A. Absolutely.  
4 Q. Okay. Do you have kids?  
5 A. I do.  
6 Q. And did this call resonate with you?  
7 MR. SNIVELY: Your Honor, I object. His  
8 personal experience is not relevant.  
9 THE COURT: Sustained.  
10 Q. (BY MR. SPOJA) Can you tell me what -- I  
11 guess, what were you thinking as you were responding?  
12 MR. SNIVELY: Your Honor, I object. Same  
13 basis.  
14 THE COURT: Let's just get to what he did.  
15 Sustained.  
16 MR. SPOJA: Very well.  
17 Q. (BY MR. SPOJA) You responded?  
18 A. Yes.  
19 Q. Okay. And were you driving at that point?  
20 A. No, I was not.  
21 Q. Who was driving?  
22 A. Officer Dawson.  
23 Q. And was the patrol car that you were  
24 operating was it outfitted with an in-car camera system?  
25 A. Yes, it was.

1 Q. Was it functioning properly that evening?  
 2 A. Yes.  
 3 MR. SPOJA: Your Honor, may I approach?  
 4 THE COURT: Yes.  
 5 Q. (BY MR. SPOJA) Officer Grieshop, I'm handing  
 6 you what's been premarked State's Exhibit 24. Do you  
 7 recognize that?  
 8 A. Yes, I do.  
 9 Q. How is it that you recognize it?  
 10 A. I viewed that video yesterday.  
 11 Q. Does it bear your mark?  
 12 A. It does.  
 13 Q. And is it a true and accurate depiction of  
 14 the events of April 19th, 2019, relating to the response  
 15 to this call?  
 16 A. It does.  
 17 MR. SPOJA: Your Honor, the State moves for  
 18 admission of State's Exhibit 24.  
 19 THE COURT: Mr. Snively.  
 20 MR. SNIVELY: No objection.  
 21 THE COURT: Without objection, State's  
 22 Exhibit 24 is admitted.  
 23 (Wherein, State's Exhibit No.  
 24 24 was received.)  
 25 MR. SPOJA: The State would like to publish

1 at this time, Your Honor.  
 2 THE COURT: Yes, you may. Do we need to turn  
 3 the lights down, Mr. Spojja?  
 4 MR. SPOJA: Yes, that would probably be  
 5 appropriate, Your Honor.  
 6 (Wherein, the video was  
 7 played.)  
 8 Q. (BY MR. SPOJA) Officer Grieshop, are you a  
 9 trained EMT?  
 10 A. No, I'm not.  
 11 Q. Trained as a First Responder?  
 12 A. Not in the medical sense, no.  
 13 Q. Okay. Do you recall how the defendant was  
 14 holding Everett as he was handing him to you?  
 15 A. I just remember that the child's head was  
 16 flopped over one side of his arm. The child did not  
 17 look to be supported very well.  
 18 Q. What were you thinking when the defendant  
 19 handed Everett to you?  
 20 MR. SNIVELY: Your Honor, I am going to  
 21 object to what he was thinking. He can testify what he  
 22 -- his facts.  
 23 THE COURT: Overruled. Go ahead.  
 24 Q. (BY MR. SPOJA) You may answer.  
 25 A. Okay. When I received the child from Nathan,

1 the child was limp. It wasn't crying, it wasn't  
 2 struggling, the color was off. And, I mean, at the time  
 3 I thought the child was dead.  
 4 Q. Do you recall what the defendant did after he  
 5 handed Everett to you?  
 6 A. I do not.  
 7 Q. Okay. In watching the video, did you notice  
 8 anything that seemed odd about what the defendant was  
 9 doing after giving you Everett?  
 10 A. After I watched the video, I did notice that  
 11 he had stepped away from -- after I took the baby down  
 12 to the ground to look for a pulse, he had stepped away,  
 13 went to a different part of the house and then came back  
 14 a few moments later. And then I believe he had a vape  
 15 pen or something in his mouth that he may have been  
 16 smoking at that time.  
 17 Q. And this struck you as odd?  
 18 A. It did.  
 19 Q. Why is that?  
 20 A. First of all, I never noticed that before.  
 21 And then, you know, the mother, while I'm down on the  
 22 ground with this child, it's having labored breathing  
 23 and in distress, the mom is right there. And after  
 24 viewing the video, I didn't realize from my recollection  
 25 that he wasn't there until after I reviewed the video.

1 But a situation like that, I would have expected both  
 2 people or parents to be right there concerned about the  
 3 child.  
 4 Q. Do you recall any particular observations of  
 5 the defendant that you made?  
 6 A. I believe he was wearing maybe some  
 7 boxer shorts or just some kind of shorts, at that time.  
 8 Other than, that he didn't have a shirt. I don't  
 9 believe he had socks on at that time.  
 10 Q. Did he appear wet?  
 11 A. He didn't appear to be wet at that time.  
 12 Q. Did Everett appear to be wet?  
 13 A. He did not.  
 14 Q. Do you recall your arms getting wet from  
 15 taking Everett?  
 16 A. No, I don't.  
 17 Q. Can you describe the defendant's behavior  
 18 while you were there?  
 19 A. I don't recall much of his actual behavior,  
 20 because when I was down on the floor in the doorway.  
 21 The only thing I remember is the mother being there,  
 22 kind of in my face. That was the only thing I remember  
 23 at that time.  
 24 Q. Okay. Do you recall whether he was  
 25 attempting to continue CPR, rescue breaths or anything

1 like that?

2 A. There was nothing like that being done at

3 all.

4 Q. Okay.

5 MR. SPOJA: Your Honor, may I approach?

6 THE COURT: Yes.

7 Q. (BY MR. SPOJA) I'm handing you what's been

8 marked as State's Exhibit 25. Do you recognize that?

9 A. Yes, I do.

10 Q. And how is it that you recognize it?

11 A. I viewed that video yesterday.

12 Q. Does it bear your mark?

13 A. It does.

14 Q. And is it a true and accurate -- first off,

15 what is on that disk?

16 A. It's a video from the body cam that I was

17 wearing on that evening.

18 Q. Is that a true and accurate depiction of the

19 events as captured by your body cam on April 19th, 2019?

20 A. It is.

21 MR. SPOJA: Your Honor, the State moves for

22 admission of State's Exhibit No. 25.

23 THE COURT: Mr. Snively?

24 MR. SNIVELY: No objection.

25 THE COURT: Without objection, State's

1 Exhibit 25 is admitted.

2 (Wherein, State's Exhibit No.

3 25 was received.)

4 MR. SPOJA: May we publish, Your Honor?

5 THE COURT: You may.

6 MR. SPOJA: Can we dim the lights again?

7 THE COURT: Yes. Do you want us to wait

8 until you get it ready or are you ready to roll?

9 MR. SPOJA: It should be.

10 (Wherein, the video was

11 played.)

12 Q. (BY MR. SPOJA) Officer Grieshop, you were the

13 officer that essentially received the call the first

14 call out, correct?

15 A. It was a medical page that came out and it

16 wasn't designated either to myself or Dawson.

17 Q. Okay. Was there a period of time -- let me

18 rephrase.

19 During your shift that evening, did there

20 come a time where you learned that it was something

21 other than just a medical call?

22 A. Yes.

23 Q. And do you recall when that was?

24 A. I believe it was the second time I went to

25 the hospital that evening, I spoke with Dr. Fouts.

1 Q. Okay. And so you were at the hospital twice?

2 A. Yes.

3 Q. And the first time is when we saw just a few

4 moments ago, when the ambulance arrived?

5 A. Yes.

6 Q. And then you left, presumably?

7 A. Yes.

8 Q. Okay. And about how long later did you come

9 back?

10 A. About an hour and a half later.

11 Q. Okay. And after you learned that it was

12 something other than just a medical call, what was your

13 next step?

14 A. At that time I radioed my dispatch to start a

15 new call, just so that -- it wasn't a medical call at

16 the time, if we needed to change the direction of the

17 investigation at that time then we could have a

18 different call for service number.

19 Q. And what was the basic nature of the incident

20 at that point in time?

21 A. Information was given to me by Dr. Fouts that

22 there was a fracture in the skull of the child and so

23 that was the information that was given to me.

24 Q. And were you informed of whether it was

25 considered to be accidental in nature or something

1 other?

2 MR. SNIVELY: Your Honor, I'm going to object

3 to the hearsay.

4 THE COURT: Sustained.

5 MR. SPOJA: I'll rephrase.

6 Q. (BY MR. SPOJA) I guess, what action did you

7 take based on the information that you received at that

8 point?

9 A. At that time the information that was given

10 to me by Dr. Fouts, like I said, I just started a new

11 call for service. After I left the -- I believe I kind

12 of checked on the parties that were there at the time

13 and then I left the hospital. At some point, I went

14 back to dispatch and pulled our dispatch records for the

15 calls and then the involved parties. And I later made a

16 call to CPS to report the incident.

17 Q. Okay. And did you act as the investigating

18 officer for the rest of this case?

19 A. I did not.

20 Q. And who did?

21 A. Officer Stuber.

22 Q. Why was that?

23 A. Partly because of the information that was

24 given to me at the time, I knew that there was more that

25 was involved. Number one, I didn't know the seriousness

1 at that time. The parties were leaving and the time  
2 frame Officer Stuber was coming on in the morning, and  
3 it would have been easier for him to handle that case in  
4 the daytime. And Officer Stuber does many of those  
5 daytime investigations.

6 Q. Okay. And so he came on shift for the  
7 morning shift or day shift?

8 A. Yes.

9 Q. What did you -- what did you do when Officer  
10 Stuber came on?

11 A. I met him at the police department. I just  
12 tried to bring him up to speed on the events that  
13 transpired in the night, the parties involved, and kind  
14 of what was going on at that time.

15 Q. Do you have any further involvement in the  
16 case?

17 A. Not direct involvement.

18 Q. Okay.

19 MR. SPOJA: If I may have a moment, Your  
20 Honor?

21 THE COURT: Sure.

22 Q. (BY MR. SPOJA) Did you -- were you aware of  
23 what the circumstances were when the -- when Everett had  
24 stopped breathing?

25 A. At the time of the dispatch call or after?

1 Q. At any point during the call.

2 A. I mean, yeah, just the information that I  
3 received from dispatch and then our brief contact when I  
4 did take the child, from communication there, the  
5 information was given to me that Everett was in the  
6 shower with Mr. Polakoff and that the child had stopped  
7 breathing and that Mr. Polakoff started CPR at that time  
8 in the shower.

9 Q. Then who did you receive that information  
10 from?

11 A. From Mr. Polakoff.

12 Q. Okay. And so they were in the shower when  
13 the baby stopped breathing?

14 A. That's what was told to me.

15 Q. What would you expect to see if the defendant  
16 and baby were in the shower when this started?

17 MR. SNIVELY: Your Honor, I object, it's  
18 speculation.

19 THE COURT: Overruled.

20 THE WITNESS: On my arrival I would have  
21 expected to see both parties naked, fully drenched and  
22 CPR actively being done on the child.

23 Q. (BY MR. SPOJA) Okay. They weren't wet?

24 A. No.

25 Q. What did that tell you?

1 MR. SNIVELY: Your Honor, I object. It's --

2 THE COURT: Sustained.

3 MR. SPOJA: I have nothing further, Your  
4 Honor.

5 THE COURT: Cross?

6 MR. SNIVELY: Thank you.

7 **CROSS EXAMINATION**

8 **BY MR. SNIVELY:**

9 Q. Sir, Nathan told you that he had started CPR  
10 on Everett?

11 A. Yes.

12 Q. He also told you that he placed the call to  
13 911, correct?

14 A. That, I'm not for sure.

15 Q. But after he started CPR, you were told the  
16 911 call was placed, correct?

17 A. There was -- I was told that there was a 911  
18 call, but I'm not for sure if it was Nathan or the  
19 mother that made the call.

20 Q. And you've never listened to that 911 call?

21 A. I don't believe that I have, no.

22 Q. All right. So the information that you knew  
23 was that Nathan had performed CPR or had been performing  
24 CPR on Everett prior to your arrival, correct?

25 A. Yes.

1 Q. And at your arrival, Nathan was wearing what  
2 you describe as boxer shorts. I mean, would you agree  
3 with me they were basically long underwear?

4 A. Yes.

5 Q. Is what they appear to be?

6 A. Yes.

7 Q. And you can see them in the video, with the  
8 black tight, kind of boxer shorts on, correct?

9 A. Yes.

10 Q. And what was Nathan's hair like when you  
11 arrived at the scene?

12 A. I don't recall his hair.

13 Q. Did -- by the video, did it appear to be wet?

14 A. I would have to go back and look at the video  
15 to see if it appeared to be wet.

16 Q. Did the video show a vape pen?

17 A. The in-car camera, from looking at the time  
18 frame that Nathan left to come back, it appeared to be a  
19 vape pen or a smoking instrument at that time, yes.

20 Q. And you never documented that in your written  
21 report that you did right after that incident, did you?

22 A. Correct.

23 Q. And Nathan came back and was down right with  
24 the baby and you in that video, correct?

25 A. He did come back, yes.



1 Q. And was -- I mean, at that point you're in  
2 charge, correct?  
3 A. Yes.  
4 Q. I mean, you had taken the baby and started  
5 monitoring the baby, you're telling dispatch that the  
6 baby is breathing, you have taken control of the scene  
7 at that point, correct?  
8 A. Yes.  
9 Q. And Nathan is down on the floor, right beside  
10 you and Everett, correct?  
11 A. He is, yes.  
12 Q. Acting appropriately?  
13 A. Yes.  
14 Q. Trying to help?  
15 A. I don't recall.  
16 Q. And there was a period of time before you got  
17 there that the baby and Nathan could have been dried  
18 off, correct?  
19 A. Absolutely.  
20 Q. So the fact that they were not wet doesn't  
21 mean that there wasn't CPR performed and the 911 call  
22 was made during that time and that they could have been  
23 dried during that time period?  
24 A. Yes.  
25 Q. Because there's at least a few minutes when

1 you hear the medical page, before you're at the scene,  
2 correct?  
3 A. Yes.  
4 Q. And did you actually time how long it took  
5 you guys to respond?  
6 A. I did not.  
7 Q. A few minutes, correct?  
8 A. Yes.  
9 Q. Nathan acted appropriate during your  
10 interaction with him?  
11 A. Yes.  
12 MR. SNIVELY: I don't have any other  
13 questions, Judge.  
14 THE COURT: All right. Any redirect?  
15 MR. SPOJA: Yes, Your Honor, thank you.  
16 **REDIRECT EXAMINATION**  
17 **BY MR. SPOJA:**  
18 Q. Mr. Snively asked you about the defendant's  
19 hair. What was your present sense impression of whether  
20 the defendant was wet?  
21 A. At the time I didn't think that he or the  
22 child were wet.  
23 Q. And why -- you were also asked after you took  
24 Everett, that you were in charge. Well, why did you  
25 take the baby?

1 A. Well, it was more handed, taken, I think --  
2 you know, I wanted to do whatever I could for that  
3 child. But then also Mr. Polakoff, obviously, didn't  
4 want that child in his hands. So I took that and wanted  
5 to just establish what was going on with that child  
6 right away.  
7 MR. SPOJA: Thank you. I have nothing  
8 further, Your Honor.  
9 THE COURT: Mr. Snively.  
10 **REXCROSS EXAMINATION**  
11 **BY MR. SNIVELY:**  
12 Q. When he handed you the child, he didn't know  
13 whether you were a policeman or EMT, correct?  
14 MR. SPOJA: Objection, calls for speculation.  
15 THE COURT: Sustained.  
16 Q. (BY MR. SNIVELY) I mean, you didn't identify  
17 yourself when that door came open, did you?  
18 A. No.  
19 MR. SNIVELY: Thank you.  
20 THE COURT: May this witness be excused?  
21 MR. SPOJA: Yes, Your Honor.  
22 MR. SNIVELY: Yes.  
23 THE COURT: All right. Officer, you are  
24 excused. Don't discuss your testimony with any other  
25 witnesses or any questions asked or any of your answers.

1 All right?  
2 THE WITNESS: Absolutely.  
3 THE COURT: You're free to go.  
4 Next witness, State.  
5 MR. SPOJA: The State calls Amy Hyfield.  
6 **AMY HYFIELD,**  
7 **WITNESS HEREIN, BEING FIRST**  
8 **DULY SWORN ON OATH WAS**  
9 **EXAMINED AND TESTIFIED**  
10 **AS FOLLOWS:**  
11 **--oOo--**  
12 THE COURT: Please take the witness chair.  
13 Please make sure you speak in the microphone.  
14 Okay?  
15 THE WITNESS: Okay.  
16 **DIRECT EXAMINATION**  
17 **BY MR. SPOJA:**  
18 Q. Good morning.  
19 A. Good morning.  
20 Q. Can you state your name and spell it for the  
21 record.  
22 A. My name is Amy Hyfield, A-m-y H-y-f-i-e-l-d.  
23 Q. And what is your current position?  
24 A. I work for Red Lodge Fire and Rescue. My  
25 current position is the volunteer coordinator. I'm also

1 a firefighter, an EMT, and I'm on the Search and Rescue.  
2 Q. How long have you been with Red Lodge Fire  
3 and Rescue?

4 A. As an employee I've been there since December  
5 of 2021. But as a volunteer prior to that, I was with  
6 Search and Rescue for about ten years. I've been with  
7 fire for about eight and I've been with EMS for about  
8 four.

9 Q. Okay. What sort of training and education do  
10 you have that brought you in your position?

11 A. Into the volunteer coordinator position or  
12 for EMS?

13 Q. For EMS.

14 A. Okay. So as an EMT, I have to take an EMT  
15 class, which I did about four years ago, so that would  
16 have been in 2017 and ending in 2018. And I had to  
17 obtain my EMT licensure through the national registry  
18 and I also have to get state licensed.

19 Q. You went through education before that?

20 A. My educational background, yes. Not related  
21 to EMS, but I have a BS, an MS and Ph.D. in chemistry.

22 Q. And so at the time in April of 2019, about  
23 how long have you been an EMT?

24 A. I would have been licensed for just a little  
25 over a year at that time.

1 paramedic with the Red Lodge EMS. And then the  
2 ambulance arrived with Mark Rubella, who is an EMT,  
3 JoAnn Stark, who I believe at the time was an EMR, and  
4 then -- although, she may have been EMT at the time.  
5 And then Maggie Blevins, who was an EMT also with Red  
6 Lodge EMS.

7 Q. Do you recall watching the body cam from  
8 Officer Grieshop?

9 A. I do, yes.

10 Q. Okay. And does that show what you and Mr.  
11 Anthes were doing with Everett?

12 A. It does for the -- so Joel and I responded on  
13 scene and Officer Grieshop was already there, so you can  
14 see us responding to the scene. And then it does show  
15 some footage of the work that we were doing in the  
16 doorway up until the time that we got onto the  
17 ambulance.

18 Q. Okay.

19 MR. SPOJA: Your Honor, I would like to play  
20 the video and have the witness describe her actions as  
21 we provide further context to the video as we're  
22 watching it.

23 THE COURT: If it will assist her testimony,  
24 go ahead.

25 MR. SPOJA: Can we dim the lights, please?

1 Q. And were you on call on April 19th, 2019?

2 A. I was not on call on that day, no.

3 Q. Did you respond to a medical call on April  
4 19th?

5 A. I did in the evening, yes.

6 Q. Okay. And do you recall where you responded  
7 from?

8 A. I responded from my home.

9 Q. Okay. And about how far -- was that very far  
10 from where the call was?

11 A. It was not. It was -- I think I'm three,  
12 maybe four blocks away, my house is.

13 Q. Okay.

14 A. Yeah.

15 Q. Do you recall the nature of the dispatch?

16 A. As I recall, it was a dispatch for a  
17 unresponsive and not breathing infant.

18 Q. Do you recall when you responded who else was  
19 there?

20 A. Certainly. Officer Grieshop was already on  
21 scene. Very shortly after I arrived, Joel Anthes, who  
22 is a paramedic with Red Lodge EMS, arrived on scene, and  
23 then there was some additional responders that responded  
24 after that.

25 Including Chad Malcot, who was at the time a

1 (Wherein, the video was  
2 played.)

3 THE WITNESS: So that's Joel Anthes that just  
4 entered there and that's me in the blue.

5 Q. (BY MR. SPOJA) What were you doing right  
6 there?

7 A. I believe what I have are blue bags that our  
8 oxygen and it's for airway and respiration, so I'm  
9 trying to get that ready. We also have a blue bag  
10 that's a pediatric bag that we'll take with us and that  
11 will have what we need for infants and pediatric cases,  
12 including things for airway breathing and circulation.

13 I think at that time I was trying to grab the  
14 BVM, which was a Bag Valve Mask for an infant and that  
15 is something that we would use to assist with breathing  
16 if they're not breathing adequately.

17 Q. Okay. By "not breathing adequately," what --  
18 can you unpack that a little bit?

19 A. Certainly. So we would be looking at  
20 respiration rate. And for an infant that's going to be  
21 a lot faster than an adult, like every two seconds, two  
22 to three seconds or so. So if they're not breathing  
23 adequately and at a slower rate then we feel like we  
24 need to assist them with breathing, that's what we'll  
25 do.

1 Q. Okay.  
 2 MR. SPOJA: Continue, please.  
 3 (Wherein, the video was  
 4 played.)  
 5 THE WITNESS: So Joel is taking a brachial  
 6 pulse right there. And he's trying to work on the  
 7 airway at that time and I'm trying to get oxygen.  
 8 Q. (BY MR. SPOJA) What do you have in your hand?  
 9 A. That's the BVM, the Bag Valve Mask. And Joel  
 10 has just asked for it. And I'm asking Officer Grieshop  
 11 to please hook that up to the oxygen while I'll go and  
 12 work on airway and breathing with Joel.  
 13 You can hear Joel asking for some history.  
 14 And Chad Maltot has just arrived on scene in  
 15 the red. So he's trying to work on the oxygen while I  
 16 am working with the infant and Joel to make sure that  
 17 we've got adequate breathing, that his airway had  
 18 continuous assessment.  
 19 Q. What's happening here?  
 20 A. So the ambulance has arrived and Joel has  
 21 made the call that we just need to transport, so he's  
 22 picked up the infant and we are bringing it to the  
 23 ambulance right now. And I'm going inside the ambulance  
 24 to get things ready.  
 25 You can hear Joel say that the infant is

1 apparently having a seizure. So I'm trying to get the  
 2 cot ready, so that we can put the child on it right now  
 3 and Joel has the infant in his arms and hands it to me.  
 4 MR. SPOJA: Let's stop it.  
 5 Q. (BY MR. SPOJA) So about how long does it take  
 6 before you guys are rolling?  
 7 A. When I looked at the patient call report, I  
 8 think we were not on scene for very long. I think the  
 9 whole call from the doorway to the hospital was about 11  
 10 minutes.  
 11 Q. Okay.  
 12 A. And we were -- I think we were en route maybe  
 13 four to five minutes after we got to the doorway itself  
 14 or when Joel arrived on scene, so it wasn't very long.  
 15 Q. And what are you doing -- I mean, we can't  
 16 see inside the ambulance. What are you doing while --  
 17 after you'd received Everett?  
 18 A. So in this case and in all of our EMS calls,  
 19 our primary concerns is our ABCs, which is airway,  
 20 breathing and circulation and any life threats that we  
 21 may encounter.  
 22 And so we are still at this point concerned  
 23 about making sure we've got a good airway so that the  
 24 infant in this case could breathe without any  
 25 restrictions. We're trying to make sure that they are

1 breathing adequately or, if they're not breathing  
 2 adequately, that we assist them with that. And also I'm  
 3 trying to get set up for -- to do other things, like  
 4 provide more oxygen, continue assessment, make sure that  
 5 the pulse is adequate and that we can start to do some  
 6 interventions if they're necessary.  
 7 Q. Okay. What type of -- I guess what after  
 8 you're prepped, what went on with Everett? What were  
 9 you doing specifically?  
 10 A. I know that Joel attempted an IO, which is a  
 11 way to get fluid actually into the bone. And that was  
 12 unsuccessful and then he did an IV, so that we could try  
 13 to get fluids into the child.  
 14 And then we were continuing to assess, try to  
 15 give oxygen and monitor breathing, assist with breathing  
 16 if needed. Although at that time I think he was  
 17 breathing adequately enough on his own that we were just  
 18 providing oxygen and monitoring that, making sure that  
 19 the airway stayed open.  
 20 And because children have a very large head,  
 21 we want to make sure they're positioned correctly to  
 22 make sure that the airway stays open. All that work was  
 23 being done by a variety of people trying to get IV  
 24 fluids prepped and ready for the paramedics to be able  
 25 to administer as we were en route. Then we, obviously,

1 got to the hospital and transferred care there.  
 2 Q. After you got to the hospital, I guess what  
 3 does that look like?  
 4 A. Certainly. The rule, typically, with the  
 5 person or in this case an infant on the stretcher, we'll  
 6 roll them into the ambulance. We've already made a call  
 7 to the hospital ahead of time, giving them information  
 8 that we have. And in this case I think they were all  
 9 ready. They undoubtedly heard the page go out, they do  
 10 have a radio in the hospital.  
 11 So that we can bring them into the emergency  
 12 room and give a report to the doctors and nurses that  
 13 are on scene and then transfer care to them. In some  
 14 cases we'll stay around if the hospital requests to  
 15 assist with other things.  
 16 I was not one of the people that stayed in  
 17 the emergency room, but sometimes our paramedics  
 18 definitely stay in there.  
 19 And as I recall, the child did start crying  
 20 right before we got to the hospital, which was a very  
 21 positive thing for all of us, because when children cry,  
 22 it means they're breathing well and they're airway is  
 23 open.  
 24 Q. Okay. You mentioned that Everett was having  
 25 a seizure --

1 A. Uh-huh.  
 2 Q. -- as Joel was transferring him to you?  
 3 A. Uh-huh.  
 4 Q. Did he have any others on the way to the  
 5 hospital?  
 6 A. I do recall that that was in the PCR report  
 7 that it looked like he had a second seizure en route,  
 8 so, yeah.  
 9 Q. Was there anything else of note that occurred  
 10 on the transport to the hospital?  
 11 A. Once we had a little bit more time, we were  
 12 able to do more of a head-to-toe assessment. And I know  
 13 that when reading the PCR report and my own  
 14 recollection, the child had a bruise on his forehead,  
 15 and one of our staff did note that there was some  
 16 one-sided weakness or stiffness, that one side was not  
 17 moving in the same way that the other was. And so that  
 18 was noted in the patient care report as a concern.  
 19 Q. And, I guess, why is that a concern?  
 20 A. Well, when we do a head-to-toe, we're trying  
 21 to make note of things that physicians and the care that  
 22 we're being transferred would need to know. A bruise  
 23 can indicate some sort of a head trauma or trauma to the  
 24 to another part of the body if there was bruising in  
 25 other places, but that was the only place that we did

1 see bruising.  
 2 And the body typically will react, you know,  
 3 equally on both sides, so having a deficit on one side  
 4 that's not present on the other can be something to note  
 5 to pass onto the physicians that we're delivering and  
 6 transferring care to so that they can assess that  
 7 further and do more tests.  
 8 Q. Okay.  
 9 MR. SPOJA: Can I have a moment, Your Honor?  
 10 THE COURT: Sure.  
 11 Q. (BY MR. SPOJA) Now, we saw a little bit of  
 12 Everett while Joel is carrying him and he notes a  
 13 seizure there. Is that something you looking at it?  
 14 Are you seeing the same thing?  
 15 A. For the seizure?  
 16 Q. Yes.  
 17 A. As I recall, yes. I remember us saying, yes,  
 18 it looks like the child is having what appears to be a  
 19 seizure.  
 20 Q. How do you -- what does that look like?  
 21 A. It looks like an involuntary stiffening and  
 22 sometimes jerking and twitching of different limbs. It  
 23 doesn't look like normal movement that you would have  
 24 for arms and legs.  
 25 And so it looks like they're -- in an adult

1 sometimes they will kind of have a vacant stare. I  
 2 don't recall looking at the child's eyes during the  
 3 seizure, but the movements look very abnormal and more  
 4 stiff or twitchy or kind of involuntary motion of the  
 5 limbs in this case.  
 6 Q. Was that what you saw during transport, as  
 7 well?  
 8 A. Yes.  
 9 MR. SPOJA: Thank you. I have nothing  
 10 further, Your Honor.  
 11 THE COURT: All right. Cross?  
 12 **CROSS EXAMINATION**  
 13 **BY MR. SNIVELY:**  
 14 Q. You said you had done sort of a head-to-toe  
 15 visual of Everett during the time he's being  
 16 transported?  
 17 A. The team did, yes.  
 18 Q. All right. And you were part of that?  
 19 A. Yes.  
 20 Q. Several of you were examining him during that  
 21 time, correct?  
 22 A. Yes. I don't think that we were able to  
 23 examine his entire back. He was laying on his back, but  
 24 there was an attempt to make that head-to-toe  
 25 assessment.

1 Q. During that head-to-toe, there was no red  
 2 marks noted, correct?  
 3 A. I don't recall that being in the patient care  
 4 report, no, just the bruise on the forehead and the  
 5 head.  
 6 Q. On the front of the forehead, correct?  
 7 A. I recall seeing it on the front of the  
 8 forehead. I think the patient care report notes it  
 9 continuing back towards the occipital lobe, which would  
 10 be closer back towards the ear. I'm not sure exactly  
 11 how far it extended back that far.  
 12 Q. I guess what I'm asking you is not what  
 13 somebody else may have said, but what you saw. You saw  
 14 the bruise on the front of his forehead?  
 15 A. It was more towards the -- kind of the side  
 16 and front of over here.  
 17 Q. Okay. But on the front side?  
 18 A. That is what I observed more on the front,  
 19 yeah. Uh-huh.  
 20 MR. SNIVELY: Thank you. I have no further  
 21 questions.  
 22 THE COURT: Redirect?  
 23 MR. SPOJA: No, thank you, Your Honor,  
 24 THE COURT: Okay. May this witness be  
 25 excused?

1 MR. SPOJA: Yes.  
 2 MR. SNIVELY: Yes, Your Honor.  
 3 THE COURT: So you are excused, but you may  
 4 not discuss your testimony with any other witnesses, the  
 5 questions that you were asked or the answers that you  
 6 gave. Okay?  
 7 But you're released from your subpoena. You  
 8 may leave. Thank you.  
 9 Next witness.  
 10 MR. NIXON: Your Honor, I guess I would  
 11 simply ask, I don't believe we can finish up the next  
 12 witness.  
 13 THE COURT: Approach. Let's talk.  
 14 (Wherein, an off-the-record  
 15 discussion was held at the  
 16 bench outside of the hearing  
 17 of the jury.)  
 18 THE COURT: This is one of those times,  
 19 folks, the next witness will be of some time. Rather  
 20 than split that up again, I'm going to give us an early  
 21 lunch.  
 22 So let's break until five to 1:00.  
 23 During that time, I know you probably have  
 24 this memorized, but it is my duty to let you know and  
 25 remind you a lot that you must not talk about the

1 substance of the case in any way, among yourselves or  
 2 with anyone else, or access any information about the  
 3 case in any form or form or express any opinion on the  
 4 case until the case is submitted to you.  
 5 You may go ahead and go have lunch and I'll  
 6 have you come back to the jury room at five to 1:00.  
 7 We are in recess.  
 8 (Wherein, a recess was taken.)  
 9 THE BAILIFF: All rise.  
 10 THE COURT: Please be seated. Thank you.  
 11 This is back on the record in DC 19-17, State versus  
 12 Polakoff.  
 13 Counsel for the State is present.  
 14 Counsel for the defendant is present. The  
 15 defendant is present.  
 16 The jury is not present.  
 17 We just reconvened after lunch.  
 18 Mr. Nixon, Mr. Spojza, any reason not to bring  
 19 the jury?  
 20 MR. NIXON: No, Your Honor.  
 21 THE COURT: Mr. Snively?  
 22 MR. SNIVELY: Judge, I don't. Although, I  
 23 wanted to give the Court a heads up, I'm not sure the  
 24 exact order their calling witnesses, but before they  
 25 call Al Stuber I need a short hearing without the jury

1 to sort out one part of his testimony. And I just tell  
 2 the Court that so the Court is aware of it.  
 3 MR. NIXON: He will be the next witness after  
 4 Dr. Fouts.  
 5 THE COURT: How long do you anticipate Dr.  
 6 Fouts? I know it's hard to say.  
 7 MR. NIXON: I would guess between -- the way  
 8 the trial has gone so far, between 30 minutes and an  
 9 hour. I would imagine it's going to be somewhere in the  
 10 neighborhood of 45 minutes.  
 11 THE COURT: Do you got an indication of how  
 12 long it will take discuss your issue?  
 13 MR. SNIVELY: Judge, I don't think it's very  
 14 long. We're objecting to one part of his testimony.  
 15 THE COURT: Okay.  
 16 MR. NIXON: And, Your Honor, it's an issue  
 17 that you're aware of at this point in time. I will say  
 18 that Mr. Spojza will be handling the examination of  
 19 Officer Stuber, but it's most certainly going to be over  
 20 an hour, as there is -- there's a better part of an hour  
 21 worth of a video to watch.  
 22 He will be a longer one, so even though it  
 23 might be early for an afternoon break, it is going to be  
 24 before a fairly lengthy bit of testimony.  
 25 THE COURT: Okay. All right. Thank you for

1 the heads up. We'll go ahead and -- yeah, get some  
 2 testimony before the jury before we take that issue up,  
 3 then.  
 4 Go ahead and bring the jury up, please.  
 5 (Wherein, the jury is present.)  
 6 THE COURT: All right. Be seated. Thanks.  
 7 The jury is back.  
 8 Mr. Nixon, do you stipulate that the jury and  
 9 alternate are present?  
 10 MR. NIXON: Your Honor, I do.  
 11 THE COURT: Mr. Snively.  
 12 MR. SNIVELY: Yes, Your Honor.  
 13 THE COURT: All right. I hope you all had a  
 14 good lunch. We'll get right back to work.  
 15 Mr. Nixon, please call your next witness.  
 16 MR. NIXON: The State calls Dr. Brad Fouts.  
 17 Dr. Fouts.  
 18 THE COURT: Please step this way and be  
 19 sworn.  
 20 **DR. BRADLEY FOUTS,**  
 21 WITNESS HEREIN, BEING FIRST  
 22 DULY SWORN ON OATH WAS  
 23 EXAMINED AND TESTIFIED  
 24 AS FOLLOWS:  
 25 --o0o--

1 THE COURT: All right. If you would please  
2 take this chair right here.

3 **DIRECT EXAMINATION**

4 **BY MR. NIXON:**

5 Q. Dr. Fouts, could I have you start by stating  
6 and spelling your name, please.

7 A. F-o-u-t-s.

8 Q. And what is your occupation?

9 A. I'm a family medicine doctor here in Red  
10 Lodge, and previously worked in the emergency room also.

11 Q. Okay. And how long have you been a  
12 physician?

13 A. Since 2000.

14 Q. And how long have you been at SCL Health or  
15 Mountainview?

16 A. Since 2003.

17 Q. What is your specialty at Mountainview clinic?

18 A. Family medicine.

19 Q. And what exactly does that mean?

20 A. We take care of pretty much from birth  
21 through death. So a lot of children, but also all the  
22 way through, older adults, OB, in the past, not as much  
23 now.

24 Q. And would you please tell me about your  
25 educational background.

1 A. So I went Wake Forest University, School of  
2 Medicine in North Carolina and then did my residency in  
3 Billings in family medicine.

4 And then otherwise, did some time in  
5 pediatric emergency medicine down in Salt Lake. And  
6 worked as an ATLS instructor, so it's Advanced Trauma  
7 Life Support, also for probably 15 years.

8 Q. And do you have any special certifications as  
9 a physician?

10 A. So I was an instructor for Advanced Trauma  
11 Life Support and I keep Advanced Life Support, basic  
12 Pediatric Advanced Life Support and all the routine  
13 certifications up to date.

14 Q. What does it take to get one of those  
15 certifications?

16 A. For like Pediatric Advanced Life Support and  
17 Advanced Life Support, you have to do it every two  
18 years. You go through a course and an evaluation by  
19 other instructors. And to be an instructor in Advanced  
20 Traumatic Life Support, it was a multi-day course and  
21 you're selected to teach, and teach the trauma courses.

22 Q. Is that in addition to other ongoing  
23 continued education requirements?

24 A. Oh, yeah. That's outside of those.

25 Q. What do those entail?

1 A. As far as the continued ed?

2 Q. Continuing education.

3 A. It's usually 50 to 75 hours a year of classes  
4 that we do on different topics, that can range  
5 dramatically.

6 Q. Does continued practice require any further  
7 certification?

8 A. So the ALS, which is Advanced Life Support  
9 and then the Pediatric -- PALS, Pediatric Advanced Life  
10 Support, those are the main two.

11 Q. So you've told me you basically see patients  
12 from the cradle to the grave.

13 A. Yep.

14 Q. How many pediatric patients do you see?

15 A. Probably 20, 25 percent -- 20, 25 percent of  
16 my practice would be pediatrics.

17 Q. And what type of visits are those, generally?

18 A. So most commonly it would be acute illnesses  
19 or well-child checks in the clinic. In the emergency  
20 room it was everything, you know, from traumas to  
21 lacerations to seizures, you name it. All kinds of  
22 different things there. So it would vary depending on  
23 that, but a lot of well-child checks and a lot of acute  
24 care needs.

25 Q. Why don't we break that down a little bit.

1 What's a well-child check?

2 A. So kids usually come in at two months, four  
3 months, six months, nine months, 12 months, 15 months  
4 and et cetera, and they -- we just check to make sure  
5 that they're developing appropriately, that they have  
6 immunizations, that everything is going okay as far as  
7 meeting all of their milestones.

8 Q. And what would acute illness generally be?

9 A. So anywhere from colds to pneumonia to  
10 diarrhea, lacerations or injuries, all of those things.

11 Q. And what sort of challenges are posed by  
12 having a preverbal patient?

13 A. Well, they can't tell you what's wrong with  
14 them. You have to figure out what the problem is using  
15 the history from the parents, because they can't tell  
16 you. A lot of times they can't isolate where they're  
17 having pain and it's -- you're interpreting the findings  
18 that you see on them.

19 Q. Do you have a method that you generally  
20 approach treating that sort of patient?

21 A. So for an acute area issue in a child that's  
22 sick or is injured, first of all, you just observe them  
23 as you kind of come in the room, see how they're doing,  
24 try to get some history from their parents.

25 If they're a child that we know, then we know

1 their history and those things. Otherwise, we have to  
2 obtain that from the family or the parents or the  
3 medical record.

4 If we have time to do that before they get  
5 there that's always great. Like in the emergency room,  
6 sometimes we'll know when they are coming and who they  
7 are and we can read on that before they get there.

8 Otherwise, then it's examination head to toe,  
9 starting at the head and working your way down. And if  
10 it's in the emergency room, we use a specific method  
11 from Advanced Trauma Life Support, where we look at  
12 airway, breathing, circulation, disability, and then  
13 start with those things and their environment to make  
14 sure they're not hypothermic, and things like that, and  
15 then start with a head-to-toe examination.

16 Q. Go ahead.

17 A. Well, like in the emergency room we use a  
18 thing called a Broselow Tape very commonly and it's  
19 pediatric emergency room things that we use. And it's a  
20 pre-made kit that we can actually lay the baby on and  
21 based on their length, you can know their weight, the  
22 doses, their medications, the sizes of all their things.  
23 And so we start out with those kind of things, too.

24 Q. Do you also have expectations of where a  
25 child should be developmentally depending on their age?

1 making sounds. They're not going to necessarily be  
2 speaking verbally that you would be able to understand.  
3 They will be making a lot of cooing, gooing, different  
4 sounds.

5 They are not walking. I've seen  
6 ten-months-old walking, but never a nine-month-old.  
7 They are crawling, usually, at nine months, so that  
8 would be a developmental milestone that we're looking  
9 for. And then just kind of what they're doing, eating  
10 and those things are other things we're looking at.

11 Q. Do you also have some personal experience  
12 with children?

13 A. I have a couple of my own, yes. Yeah.

14 Q. And as part of your job at Mountainview, do  
15 you also take call at Billings Clinic?

16 A. Yes. So I quit take calling this year, but  
17 for the past 20 years I took call anywhere from six --  
18 three to six nights a month I'm in the emergency room  
19 and that would -- for all those years.

20 Q. Okay. And you may have mentioned this  
21 earlier, what's the range of cases that you see  
22 generally when you're on call?

23 A. You never know what you're going to see on  
24 call. Anywhere from small children to adults, illness,  
25 injury and intoxication, all kinds of things. It's

1 A. That can be variable, but in general it  
2 tracks pretty well, unless a child has a disability.

3 Q. How much harder is treating a patient if you  
4 don't have any sort of history with them?

5 A. It's a little -- it's a little harder,  
6 because you don't know the parents, you don't know the  
7 child and you don't know their history as much. You  
8 still -- you still do the same things as far as  
9 evaluation usually, but it is a little tougher when you  
10 don't know the family.

11 Q. Now, in the course of your practice, have you  
12 had the opportunity to see many nine-month-old babies?

13 A. Oh, yes, lots.

14 Q. Any idea how many?

15 A. Hundreds, a thousand. I mean, I see  
16 nine-month-olds probably most days of the week. At  
17 least -- in a week, three or four probably on average or  
18 more.

19 Q. So you've told me you've had some  
20 expectations about where a kid should be  
21 developmentally.

22 A. Sure.

23 Q. What are you thinking when you look at your  
24 charts and see you have a nine-month-old patient?

25 A. So a nine-month-old is usually going to be

1 really variable.

2 Q. Can you tell me whether or not that's similar  
3 to working in an emergency room?

4 A. Oh, you mean in the clinic versus the  
5 emergency room?

6 Q. In the clinic. Excuse me. I think I wasn't  
7 clear there. Taking call -- is taking call at Billings  
8 Clinic similar to working in an emergency room?

9 A. Yes. That's what we're doing pretty much.  
10 We're just dealing with emergencies then. You see --  
11 oh, it depends. I worked at the emergency room at St.  
12 Vincent's and at Billings Clinic and, you know, Salt  
13 Lake, and so there you see a lot higher acuities in  
14 general. So we see a lot more colds in our emergency  
15 room, where that would get shifted to the walk-in clinic  
16 there.

17 But we do see this time a year, obviously,  
18 lots of ski injuries, lots of traumas. In summertime, a  
19 lot of motorcycle wrecks. So we see pretty  
20 high-intensity trauma also.

21 Q. And what type of care is the Beartooth  
22 Billings Clinic able to provide?

23 A. We are a trauma-receiving facility and so we  
24 don't -- you know, if someone has a severe trauma we  
25 usually transfer them to Billings most of the time or

1 somewhere else, if needed.  
 2 Q. Okay. You know, what happens if -- let me  
 3 take a step back here. What sort of limitations does  
 4 Billings Clinic have in Billings as far as being able to  
 5 take patients?  
 6 A. So Billings Clinic and St. V's?  
 7 Q. Yes.  
 8 A. So they have limitations as far as certain --  
 9 especially with pediatrics, they have certain  
 10 specialties in pediatrics. There's no pediatric  
 11 neurosurgeons, so they will deal with some pediatric  
 12 trauma and some injuries, but more extensive pediatric  
 13 injuries oftentimes get transferred either to Denver or  
 14 Salt Lake. And burns, big burns, we have a lot of our  
 15 big burns we'll fly straight to Salt Lake, also.  
 16 Q. Why do they go to Salt Lake?  
 17 A. You know, it depends on -- sometimes they go  
 18 to Denver, but I would -- from here, we tend to send  
 19 more people to Salt Lake. And it's not because one is  
 20 better than the other, it's just that's the pattern,  
 21 mostly. Those are our two big tertiary care centers  
 22 with teaching medical schools with full-scale pediatric  
 23 specialties.  
 24 Q. Can you tell me is a pediatric patient more  
 25 likely to be transferred out?

1 A. A pediatric patient is definitely more likely  
 2 to be transferred out, yes.  
 3 Q. What hospital in Salt Lake do they go to?  
 4 A. They go to Primary Children's in Salt Lake is  
 5 the hospital that they go to.  
 6 Q. What do you know about Primary Children's?  
 7 A. It's an excellent facility. I was there  
 8 where I worked there for a month, a month and a half  
 9 during the Winter Olympics when they were in Salt Lake,  
 10 and it's a high-level, full-scale, very great facility.  
 11 Q. Okay.  
 12 A. Affiliated with the University of Utah.  
 13 Q. Okay. I'm looking at the name, but is  
 14 pediatrics their primary?  
 15 A. Yes, it's all pediatrics. They only do  
 16 pediatrics.  
 17 Q. And in April of 2019, were you still taking  
 18 call at Beartooth Billings Clinic?  
 19 A. Yes.  
 20 Q. Do you recall if you were on call on April  
 21 19th?  
 22 A. Yes. I mean, from the notes, I have to refer  
 23 to the notes because it's been about three years almost  
 24 now, but yes.  
 25 Q. Do you have reports that you generated based

1 on your experience that evening?  
 2 A. Yes, I pulled -- I have the reports from the  
 3 -- my notes from the ER visit. When we take care of  
 4 somebody, right after they leave we do a dictation of  
 5 their visit and so I have that. And then some of the  
 6 other notes from the CT scan and things like that.  
 7 Q. So while we're talking here today, would it  
 8 be helpful for you to be able to utilize your notes to  
 9 refresh your recollection?  
 10 A. I definitely need those, yes.  
 11 MR. NIXON: Your Honor, I just ask that he be  
 12 able to refer to his notes to refresh his memory for  
 13 purposes of his testimony.  
 14 THE COURT: Any objection to that, Mr.  
 15 Snively?  
 16 MR. SNIVELY: No, Your Honor.  
 17 THE COURT: That's fine, Mr. Nixon.  
 18 Q. (BY MR. NIXON) And do you recall seeing a  
 19 patient brought in by ambulance that night?  
 20 A. Yes.  
 21 Q. What was that patient's name?  
 22 A. The patient's name was Everett Musch. And I  
 23 hope I'm saying that right.  
 24 Q. And had you ever seen Everett before that  
 25 evening?

1 A. No, I had not.  
 2 Q. What information did you have prior to  
 3 Everett arriving at the hospital?  
 4 A. So we had a dispatch call for a child that  
 5 was potentially not breathing that was nine months old  
 6 and coming in by ambulance. And that was the initial  
 7 call that we got.  
 8 Q. Were you at the clinic at that point in time?  
 9 A. I don't remember if I was at the hospital or  
 10 they called me in. I cannot recall that.  
 11 Q. Okay. So when you get a report like that  
 12 what sort of concerns does that trigger?  
 13 A. So the first thing we do is try to activate  
 14 -- it puts us on high-level alert, obviously. And so we  
 15 motivate to get radiology techs in the building, to get  
 16 all of our staff there.  
 17 For a call like that, usually as a provider  
 18 we'll call one of the other providers just in case there  
 19 is a problem that you need help with. It's always hard  
 20 because they're not nearly as bad when they get there so  
 21 you never know, but we always try to be ready with all  
 22 the resources that we need.  
 23 Q. Did you call anyone that night?  
 24 A. I called Dr. Ole to come in and help me out  
 25 just in case we needed help. And then we also called



1 x-ray, lab, you know, extra nursing and all the things  
2 that we would standardly do. It's a trauma protocol  
3 that we do.

4 Q. And do you recall what time he made it to the  
5 clinic?

6 A. Oh, I would have to refer to the notes. But  
7 it was in the evening, I know that. Late in the  
8 evening. I would have to look and see the timeline. It  
9 was around 9 o'clock, but I don't know exactly.

10 Q. That's fine.

11 A. Okay.

12 Q. How was he brought to the emergency room?

13 A. He was brought to the emergency room by the  
14 ambulance, by a paramedic. We have different levels of  
15 response. So when we have a sick, sick person or a  
16 trauma patient, we call a trauma protocol, either one,  
17 if they're sick or if they look severe.

18 And the ambulance has -- because I'm the  
19 medical director for the ambulance, also, but the  
20 ambulance has the ALS response or a BLS response. And  
21 so ALS is paramedic level, meaning they can give IVs,  
22 they can give medications and things like that. So the  
23 ambulance responded with a paramedic.

24 Q. And before you see Everett, are you aware of  
25 anything that is going on on the ambulance?

1 A. So we pull -- I don't remember if I had  
2 looked right then or if it was shortly thereafter, but I  
3 did see that he had been in the clinic a day or two  
4 before with -- actually, I think we already knew that  
5 with a diarrheal illness, because we were kind of  
6 concerned when we heard the story that he wasn't  
7 breathing and that he had been sick that he could be  
8 terribly dehydrated and could be just an illness that  
9 was causing it, so we had that information also.

10 And then we could pull up his allergies from  
11 the chart and those things. As soon as we had the name  
12 we could do that.

13 Q. After seeing him, what were your concerns?

14 A. So once -- as mentioned previously, we kind  
15 of do this protocol where we look at airway, breathing,  
16 circulation. So his airway was intact, he was  
17 breathing, he was -- he had a blood pressure and his  
18 oxygen levels were good and has pulse were good. So  
19 that kind of takes our -- kind of reassures us somewhat,  
20 but he clearly had some disability.

21 So in that primary survey, we call it, he  
22 would have scored on the disability mark because he was  
23 showing signs of a head injury or a stroke from illness,  
24 a seizure, multiple different other possibilities. So  
25 that was kind of the big concern at that point.

1 A. We got a report from -- so the ambulance,  
2 once they pick up the patient and they start to do their  
3 care, they will usually call the hospital with a report.  
4 And so we would have received that report from them,  
5 that they had -- that they had picked up the patient.

6 And I don't recall right now if they told me  
7 before they got there or right when they got there that  
8 they had given Ativan for what appeared to be  
9 seizure-like motions.

10 Q. Where were you when you first saw Everett?

11 A. In the emergency room.

12 Q. What were your initial observations?

13 A. So I refer back to the notes, but he -- when  
14 he initially came in the concern was -- the call-out was  
15 that he might not even be breathing, but he was clearly  
16 breathing and he was maintaining his airway at that  
17 time, but he did have what appeared to be seizure-like  
18 or some atypical movements that were not normal.

19 But he was maintaining his airway, his oxygen  
20 level was good. So the initial impression was that he  
21 had something major going on, but that he did appear to  
22 be breathing, which was better than what we were  
23 concerned would be the case.

24 Q. At this point in time had you referred to any  
25 previous medical history?

1 After that, his temperature was good so his  
2 environmental stuff was fine. So he was not hypothermic  
3 or anything like that.

4 And so we then do a secondary survey where we  
5 listen to his heart and lungs and check everything out  
6 and there was no other gross deformities on his -- that  
7 we could see at that point.

8 He did have a bruise that was obvious on the  
9 front of his -- kind of the front of the scalp.

10 Q. And were you -- at that time can you tell me  
11 whether or not you were concerned about flu or a bump on  
12 the head?

13 A. So at that point, I mean, our level of  
14 concern was a higher level than just a flu or the bump  
15 on the head. It was that something else major was going  
16 on intracranially in his brain and so that's when we --  
17 I think even before we took him to the CT scanner we  
18 gave him another dose of the Ativan, because he was  
19 still having some intermittent  
20 coming-and-going-seizure-like motions.

21 The Ativan is a medication that tries to  
22 break the seizure motions. And then he stabilized and  
23 we took him to the CT scanner to look at the brain,  
24 because that was our main concern is the brain.

25 Q. Okay. I'm going to step back one second

1 before we talk about the CT.

2 A. Sure.

3 Q. For a layperson, what does it look like when  
4 you're observing -- what causes you to suspect a  
5 seizure?

6 A. So seizures can be really tough because you  
7 can have seizures that are obvious, that everybody knows  
8 because they're tonic-clonic, where their whole body is  
9 jerking. But we can also have seizures where somebody's  
10 eyes are just going off to the side and they're not  
11 actually having any movement disorders.

12 He was not -- he had a -- I can't remember --  
13 I think it was his left arm he was holding in a funny  
14 position and not moving appropriately. And then his --  
15 so then there's eye motions we're looking at also. So  
16 it was much milder. So it wasn't a -- you know, it was  
17 one of those things where we sometimes don't know for  
18 sure that it's a seizure but it looks like it is.

19 We do not have the ability to do a EEG, which  
20 is a brain wave test. Even in Billings, they wouldn't  
21 have done that in the emergency room. But it's  
22 something that you base it clinically on what's going  
23 on.

24 Q. Can you tell me whether or not he seemed to  
25 be moving both sides of his body with the same ability?

1 A. I would have to refer back to my notes to  
2 remember which side was which. He was not moving both  
3 sides of his body to the same ability. My remembrance  
4 from three years ago, was his left side. I would have  
5 to look at the notes. He was definitely not moving one  
6 side well.

7 Q. Okay.

8 A. And I can look at that and see.

9 Q. You mentioned earlier that you were  
10 considering the possibility of a stroke. Can you tell  
11 me whether or not that lack of movement on one side  
12 caused that concern?

13 A. Yes. That was one of the big things.

14 Q. And why?

15 A. Well, so a stroke -- so kids can have strokes  
16 from illness. They don't typically have strokes like  
17 adults do from just from blocked arteries as much as  
18 it's from illness. And so -- if their blood pressure  
19 gets too low and things like that and so that can cause  
20 similar things.

21 That would be in our differential diagnosis.  
22 It would be a stroke, head injury, seizure, all of those  
23 things can do that. And they can all overlap, because  
24 you could have a stroke that causes a seizure, a head  
25 injury that causes a seizure. So those things can all

1 intermix.

2 Q. Before you take Everett to the CT scan,  
3 what's your assessment of how severe his condition is?

4 A. His condition was severe throughout. I mean  
5 -- so, for instance, when we took him to the CT scanner,  
6 Dr. Ole and I both went because there's a fear at any  
7 point that he could stop breathing and we would have to  
8 put a breathing tube in him to breathe for him.

9 That was our biggest concern is his ability  
10 to continue maintaining breathing. So especially the  
11 medicines we gave, Ativan, is a medicine that helps to  
12 break seizures, but it also can cause excessive sedation  
13 that can cause you to not be able to maintain airway.  
14 If we see a problem from that we have to put a breathing  
15 tube to breathe for them.

16 So we went with him to the CT scanner, which  
17 is not normally what we do. And we took all of our  
18 supplies just in case that happened in the CT scanner.  
19 So we were watching very closely the whole time.

20 Q. Is that considered life-threatening?

21 A. Yes. I mean, anytime you could potentially  
22 stop breathing, it's definitely life-threatening.

23 Q. So what did you do next then after you decide  
24 to get the CT scan?

25 A. So the way that it works in the CT scanner is

1 the patient is in the CT scanner and it's radiation, so  
2 we cover them up. And we're behind a screen to avoid  
3 the radiation and we can see the computer from the CT  
4 scanner and so we could see immediately that there was a  
5 skull fracture on the CT scan as the images came up on  
6 the computer screen.

7 And so at that point, we knew that -- and  
8 there was some bleeding -- small amounts of blood in and  
9 around the brain that this was the probable cause for  
10 the other motion abnormalities.

11 Q. Are you trained in reading CT scans?

12 A. Yes. So we're trained in it, we're not  
13 radiologists. So it's not a -- I mean, there are  
14 definitely times when there's very small findings that  
15 the radiologist will tell us later that they see. But  
16 the obvious things we have extensive training in reading  
17 them, but we're not a radiologist at the same time.

18 Q. How about this one?

19 A. So it was obvious. It was very obvious that  
20 there was a fracture in the skull and so it was obvious  
21 enough to me. So a lot of times we wait until we get  
22 the report back from the radiologist before making  
23 decisions on what to do next, because we're not a  
24 hundred percent sure. But on this case we were a  
25 hundred percent sure.

1 And so I had already called St. Vincent's to  
2 try to transfer him and get him to their hospital as  
3 soon as I saw the CT scan.

4 Q. And what did they say?

5 A. They did not -- they reviewed the CT scan  
6 also, they did not feel that they were an appropriate  
7 receiving facility for him and that he needed to go to  
8 Salt Lake.

9 Q. And do you generally -- you sent those scans  
10 to a radiologist?

11 A. So at night -- this would have been, you  
12 know, in the evening, and at night at the hospital what  
13 happens is the radiologists in Billings don't read the  
14 CT scans. They go to an outside reading -- it's called  
15 VRad. And a VRad radiologist reads it at night and then  
16 the next morning the Billings Clinic radiologist looks  
17 over it to make sure they agree.

18 Q. Okay. And how do you normally get the  
19 feedback from the scans?

20 A. Usually they are just -- they come through  
21 the fax -- send it through the printer or the fax  
22 machine, we get a report.

23 Q. How did you get the feedback on this case?

24 A. We had an emergency call from the radiologist  
25 on this case, instead of a fax, which is almost -- I

1 message with Child Protective Services and had the  
2 nurses call back to talk to them later, but we also  
3 called law enforcement immediately.

4 Q. And at this point in time, did you know who  
5 was accompanying Everett Musch?

6 A. Yes. And I can't recall if they came in on  
7 the ambulance with him or shortly thereafter. But it  
8 was pretty close in time of him arriving and them being  
9 there also.

10 Q. Did you know either of those individuals?

11 A. I did. I did know Nathan from his childhood,  
12 just not well, but yes. And I did not know the mother  
13 at all.

14 Q. And when did you first talk with them?

15 A. So it kind of happened simultaneously. So  
16 what usually happens as -- we don't just talk to them  
17 and then go check the baby because the baby was in  
18 critical condition, we want to check the baby and we're  
19 talking to them as we check the baby. So as soon as  
20 they were in the room, we started talking to them,  
21 asking them what happened, what's been going on, getting  
22 some history from the parents.

23 Q. What sort of history were you getting?

24 A. We were -- so there was -- the child had  
25 apparently been sick with some vomiting and some

1 don't think I've had it otherwise with VRad.

2 Q. Did you consult with the radiologist over the  
3 phone?

4 A. Yes. We chatted and he was very concerned it  
5 was nonaccidental, which we were, too. And he -- in  
6 fact, he said he wanted to make sure that we were  
7 reporting this because he had an obligation to report  
8 also. And he wanted to make sure that we were going to  
9 report it so that he knew that that was done.

10 Q. Are you referring to an obligation as a  
11 primary reporter?

12 A. Yes. So we have -- anytime we have any  
13 suspicion of child abuse or elder abuse or disabled  
14 person abuse, we are obligated to report that to the  
15 authorities. And we're not the investigators, we just  
16 are obligated if there's any suspicion.

17 Q. Okay. And you talk about the authorities,  
18 who is it that you generally call?

19 A. So we call the Child Protection Services for  
20 children, obviously. And we there's a hotline number  
21 after hours and if it's -- but if there's anything more  
22 life-threatening or more concerning we call a law  
23 enforcement also.

24 Q. What did you do in this case?

25 A. We called law enforcement also. We left a

1 diarrhea, we were told that, and that he had been seen  
2 in the clinic a day or two before, which we kind of  
3 already knew. And then -- so then we were also told  
4 that he potentially had fallen off a futon or a couch,  
5 kind of a piece of furniture also.

6 Q. Were you told how far off the ground this  
7 futon was?

8 A. It was low. It was low and it was a carpeted  
9 surface. These are all things we usually ask to try to  
10 figure things out. So I don't know exactly, but it was  
11 not high off the ground.

12 Q. Who told you that story?

13 A. Nathan told me this story. And I think -- he  
14 gave most of the history. You know, and that was the --  
15 yeah, that was it.

16 Q. Okay. And at this point in time, did you  
17 know that Everett had skull fractures?

18 A. Not at that point in time, no. That was  
19 initially when we were seeing the child, doing the  
20 primary survey and checking him out. So at that point  
21 they were still in the room. And I don't remember if  
22 they left the room, but we became much more focused on  
23 the child and I think we actually had them step outside  
24 then.

25 Q. In your medical experience, even before you

1 saw the CT scans, was Everett's condition likely tied to  
2 a roll off a futon?

3 A. No. I would say that this was not a -- this  
4 was not an injury sustained from rolling off a futon.

5 Q. Based on your experience, what do you expect  
6 to see in the way of an injury if a baby rolls six  
7 inches onto a carpet floor?

8 A. We see lots of babies come in and parents  
9 worried because their kid rolled off the bed, rolled off  
10 of a couch and it's rare that we ever see an injury from  
11 that. Their mass is small enough that it's not usually  
12 enough to sustain major injuries from those kind of  
13 levels.

14 Q. Okay. So back to the scan again now. You  
15 talk about fractures. You consulted with the  
16 radiologist. How do you classify these two different  
17 skull fractures?

18 A. So they were major skull fractures. They  
19 weren't just small cracks. One was -- we call it a  
20 stellate, meaning "star like." And so with an impact, a  
21 lot of times the skull will break in a star-like pattern  
22 rather than just a snap like a long bone does. And so  
23 especially the one that was more posterior was more  
24 stellate, but they were both significant skull  
25 fractures. And one was stepped off, meaning that the

1 bone was actually pressed in on the other bone.

2 Q. Now, in the course of your decades of  
3 practice have you seen many skull fractures with this  
4 severity?

5 A. Only one. Only one, yeah.

6 Q. And what sort of trauma was involved with  
7 that?

8 A. It was -- it was abuse. And, I mean, I don't  
9 know exactly how it happened in the end, but it was  
10 definitely -- it was abuse.

11 Q. What sort of force do you associate with  
12 these sort of injuries?

13 A. And I would say that with children. I have  
14 seen other skull fractures like this a lot in car wrecks  
15 and in major -- it takes a lot of force. It's not  
16 something that happens with just mild injuries.

17 Q. One thing I'm wondering is can you tell me  
18 whether a child's skull is any easier to fracture than  
19 an adult skull?

20 A. In general, no. So in general, kids' bones  
21 absorb more. And so a child's skull -- the bones are  
22 not fused together. They're actually -- we call them --  
23 they're separate and there's a fontanelle in the middle.  
24 There's suture lines, we call it. So there's a place  
25 where bones are not attached so they have more ability

1 to move than in an adult.

2 Q. And when you look at this scan, you talked to  
3 the radiologist, did you have an opinion as to whether  
4 the two fractures were from the same event?

5 A. I don't know. I mean, that's -- I have no  
6 way of knowing.

7 Q. Okay.

8 A. I mean, it would -- for it to be the same  
9 event, it would have to be hit on different sides. I  
10 mean, unless there was a fall from, like, downstairs  
11 where you could hit your head several times. But it had  
12 to be two separate blows, because they're kind of coming  
13 from different sides.

14 Q. Okay. And can you tell me how seeing two  
15 separate fractures impacted your decision that this  
16 might be nonaccidental?

17 A. It would have been probably the same decision  
18 if it would have been one fracture. Either of those  
19 fractures look nonaccidental, in general. That just  
20 adds more to it.

21 Q. Can you tell me whether or not rolling off a  
22 futon is medically plausible for the injuries?

23 A. No. I do not think rolling off a futon could  
24 cause these injuries.

25 Q. Eventually, after you find out that there's

1 these two serious skull fractures, do you talk with  
2 Nathan and the mother again?

3 A. Yes. You know, I try not to be dishonest and  
4 I try to let people know -- I don't think I've ever  
5 called CPS and not told the parent that I was calling  
6 CPS. And I always try to explain to them that doesn't  
7 mean -- I always try to explain to them that any level  
8 of suspicion we're required to call them, and so we  
9 always say that. And so, yes, we did definitely tell  
10 them that.

11 Q. Can you tell me whether or not all of the  
12 calls you make are truly associated with child abuse?

13 A. No, no. I mean, definitely not all the calls  
14 we make are. We're required to call for any suspicion.  
15 And there's -- you know, there's times when it is not  
16 child abuse, clearly.

17 Q. So I believe you told me you like to be  
18 forthright with the patients, what did you tell the  
19 mother and Nathan?

20 A. I don't remember exactly what I told them,  
21 but I know I told them we were going to call CPS and  
22 this seemed to be a head injury that it was a much big  
23 -- that it was a significant head injury that required a  
24 significant blow.

25 Q. And how did they react?

1 A. Both parents were -- you know, it's always  
2 hard to read people, because with trauma people respond  
3 differently. And my recollection is I -- the mother was  
4 sitting, mostly, and she was upset, visibly upset.

5 Nathan was visibly upset, appropriately  
6 upset. He was walking. I had assumed he was the father  
7 of the baby. And so, you know, he was visibly upset  
8 also. There was an addition -- there was more additions  
9 to the story, when I said that. That potentially there  
10 was a radiator and maybe he could have hit his head on  
11 that.

12 Q. If I could slow you down there.

13 A. Uh-huh.

14 Q. What does Nathan initially tell you about  
15 what happened to Everett?

16 A. So there was -- the most specific things was  
17 there was a roll off of a futon was the thought that  
18 this may have occurred from. And then there was also  
19 a --

20 Q. I'll slow you down again. So what changes  
21 after you tell them this appears to be a nonaccidental  
22 skull fracture?

23 A. That's when the radiator -- that maybe he hit  
24 his head on that was brought up. That there was, I  
25 guess, by the futon or something like, a radiator of

1 explained that an injury that was not  
2 explained by the mechanism of injury from the family and  
3 they reported it to Child Protection Services also and  
4 the patient was safe in custody.

5 And I did say that they seemed appropriate,  
6 but that he continued to come up with explanations that  
7 may have been thoughts of how the child hurt his head by  
8 hitting this heater, was what he added on later.

9 Q. Okay. Thank you. Now, after you talked to  
10 Nathan and Ryann, what are you doing for Everett and his  
11 care at that point in time?

12 A. Mostly closely monitoring. He -- you know,  
13 our worry was that he was going to decompensate. And I  
14 had Dr. Ole helping me also. He did a thing called a  
15 FAST exam, where it's an ultrasound just to make sure  
16 there's no bleeding in the abdomen or other locations.

17 He -- and then we -- there's things we do to  
18 prepare a child for transport to Salt Lake but that you  
19 wouldn't have to do to Billings. We put a Foley  
20 catheter in.

21 We were talking to Salt Lake several times  
22 also asking them about what they wanted us to do. We  
23 usually defer to them, because they're the experts on do  
24 they want certain medications given, do they not want  
25 things given. So we were preparing all of those things.

1 some kind or a baseboard heating or something like that.

2 Q. Can you tell me whether or not that had been  
3 mentioned previous to your --

4 A. That hadn't been mentioned previous.

5 Q. Can you tell me anything else that Nathan  
6 said to you at that time?

7 A. There was also that he had the baby in the  
8 shower, was a part of the story that I never really  
9 quite understood, and that it had quit breathing when it  
10 was in the shower with him. That was another part of  
11 the story that was -- yeah, that was in there.

12 Q. Okay. Did you make any notes in your report  
13 regarding your communication with Nathan?

14 A. I'll have to look to see if I noted  
15 specifically about -- I think I noted telling them about  
16 the injury. I referred to him as the father of the  
17 baby, I know. Let's see. He was in the shower with him  
18 when he stopped breathing by his report. And he reports  
19 he was interacting, seemingly normally and then suddenly  
20 went limp and stopped breathing.

21 Q. If I may stop you. I think maybe I -- well,  
22 actually, go ahead and continue, please.

23 A. Okay. And so I did note that. And then I  
24 think at the end I talked to him a little bit more about  
25 it. So I noted that we did notify law enforcement and

1 And we gave an anti-seizure medication called Keppra and  
2 then it was mostly monitoring him closely until they got  
3 there so we could take him to the airport.

4 Q. And roughly, how long was Everett at --

5 A. He was in our hospital for roughly about two  
6 and a half hours. Because of the -- because we had to  
7 wait on the plane to come from Salt Lake. Way longer  
8 than we want a child to be there if we can get them to a  
9 facility. But, you know, it's quicker than him going to  
10 Billings and then having to go from Billings then to  
11 Salt Lake. So he got to the place he needed to faster  
12 that way.

13 Q. I think earlier you talked about being  
14 critical care. Can you tell me how much of that time  
15 was considered critical?

16 A. So we considered the whole time critical care  
17 pretty much, because throughout his stay we are  
18 concerned that he could at any minute -- when we have a  
19 serious significant head injury like this start to seize  
20 more severely, quit breathing. Those were the two big  
21 things. Cardiac-wise he was doing pretty well. We  
22 worried a lot about the breathing, other worsening of  
23 bleeding in the brain, things like that.

24 Q. You also mentioned earlier that this was  
25 actually life-threatening?

1 A. Sure.

2 Q. How much of that two and a half hours was  
3 considered life-threatening?

4 A. Oh, he was -- I mean, the whole time he was  
5 -- he had risk of -- when we have bleeding in the brain,  
6 the hard part is you don't know is that going to get a  
7 lot worse, and then, you know, things are going to get a  
8 lot worse quickly or is it going to stop. And so that's  
9 just something that we don't know.

10 Q. You just mentioned bleeding in the brain.  
11 Was that associated with the skull fracture?

12 A. Absolutely, yes. So there's subdural  
13 hematomas, which are collections of blood that occur  
14 just inside the skull fractures that were adjacent to  
15 the skull fractures and so those would be related to the  
16 head injuries.

17 Q. And what other injuries did you see that you  
18 believe were associated with the skull fracture?

19 A. So he had bruising along the scalp,  
20 especially you could see the bruising more in the front.  
21 He had really thick hair and so it was harder to see  
22 stuff in the back. There was definitely some bruising  
23 there also. You could see it really well on the CT  
24 scan.

25 Q. Does detecting these fractures or making sure

1 appearance, but the posterior one was definitely much  
2 more. It extended out in the bone quite a ways.

3 Q. Do you believe you could have felt the other  
4 fracture with your hand?

5 A. Yeah, if you were aggressive enough. In the  
6 old days, before there were CT scans, you would actually  
7 more squeeze the skull a little and you can feel it  
8 move, but there's not a reason to do that when you have  
9 a CT scan that you can see it, so we didn't do that.

10 Q. Is it tougher when the baby has a lot of  
11 hair?

12 A. Yeah. I mean, it's easier to see things and  
13 feel things when there's not a lot of hair for sure,  
14 yeah.

15 Q. Do you have any medical opinion about how  
16 quickly you would have expected ramifications from these  
17 skull fractures to manifest?

18 A. I mean, they look like acute injuries that I  
19 would expect that if you received these injuries you  
20 would have an immediate loss of consciousness, immediate  
21 change of mental status. It would be immediate.

22 Q. Okay. Did you do much more than monitor for  
23 his well-being for the rest of his stay at --

24 A. We gave him medications and then monitored  
25 and those were the main things. Yeah, that was mostly

1 someone does not have a fracture require some sort of  
2 scanning?

3 A. Yes. I mean, obviously, yeah, the only way  
4 you know really well is -- so you can't see it real well  
5 on an x-ray. You have to see a CT scan to be able to  
6 see the skull fractures. There are times that you know  
7 they are there. In fact, I think I went back and felt  
8 the area where I see the fracture afterwards and you  
9 could definitely feel the one where the bones were  
10 stepped off.

11 Q. Now, when you're saying the one, where on the  
12 head was the one that you could feel?

13 A. Sometimes I get right and left mixed up. One  
14 was anterior on the left side, I'm pretty sure, and the  
15 one was right on the posterior. But that could be -- it  
16 was opposing sides front and back.

17 Q. Okay. And which one did you consider the  
18 more severe?

19 A. So the one in the posterior was definitely a  
20 bigger fracture and it was -- yeah, it was the bigger  
21 fracture.

22 Q. Now, earlier you talked about a stellate  
23 fracture. Can you tell me whether that's the fracture  
24 you were talking about.

25 A. They both had somewhat of a stellate

1 it.

2 Q. And did you have any more communication with  
3 Nathan and Ryann?

4 A. You mean after that evening?

5 Q. I should say, you've talked about meeting  
6 with them twice. Did you confer with them very often  
7 during that evening?

8 A. No, we weren't, you know, conferring back and  
9 forth regularly. We talked to them a couple of times  
10 and there was several folks there and we usually try to  
11 get most of the folks into the waiting room just to try  
12 to keep the space -- you know, so we can get in and out  
13 better. There's a limited amount of room. So, yeah.

14 Q. Have you seen either Nathan or Ryann since  
15 that evening?

16 A. Just today. I mean, the first time I've seen  
17 Nathan probably since then.

18 You know, if I've seen Ryann, I don't know.  
19 Yeah.

20 MR. NIXON: I might note for the record that  
21 Dr. Fouts pointed towards the defendant.

22 THE COURT: All right. The record will  
23 reflect that.

24 MR. NIXON: May I have just a moment, please?

25 THE COURT: Sure.

1 MR. NIXON: I don't believe I have any  
2 further questions at this point in time.  
3 THE COURT: All right. Mr. Snively, do you  
4 wish to cross?  
5 MR. SNIVELY: Thank you, Your Honor.  
6 **CROSS EXAMINATION**  
7 **BY MR. SNIVELY:**  
8 Q. Good afternoon, Doctor.  
9 A. Good afternoon.  
10 Q. You previously gave a statement which you  
11 said these injuries could be two days or so old. Do you  
12 remember saying that?  
13 A. No, I don't remember saying that. I don't --  
14 I am not able to judge the length of the injuries, but  
15 in general, I don't remember saying they could be. I  
16 don't know how old they could be.  
17 MR. SNIVELY: Judge, if I may approach?  
18 I'm going to hand you a page of a transcript.  
19 THE WITNESS: Sure. It's been three years,  
20 so that would be great.  
21 MR. SNIVELY: Just take a moment and look.  
22 THE WITNESS: Sorry, I don't have glasses on.  
23 MR. SNIVELY: Just read it to yourself.  
24 THE COURT: Don't say anything yet and just  
25 wait for a question.

1 THE WITNESS: Oh, okay. I'm sorry. Can you  
2 give me just a second?  
3 MR. SNIVELY: Sure.  
4 THE WITNESS: My arm is just long enough.  
5 Q. (BY MR. SNIVELY) Do you see there where you  
6 said the injuries could have been a couple of days?  
7 A. Sure. Sure. Yes.  
8 Q. And that was a true statement that you gave  
9 at that time?  
10 A. Yeah. I think I was questioned could they be  
11 a day or two old.  
12 Q. Right.  
13 A. And, you know, I don't know that we can -- I  
14 mean, I don't have the expertise to say exactly when  
15 these injuries occurred. I would say that an injury  
16 like this --  
17 Q. Okay.  
18 A. Okay.  
19 Q. So from your medical experience and training  
20 you cannot date these injuries?  
21 A. I cannot date them exactly, no.  
22 Q. Nor can you medically say how they were  
23 caused?  
24 And you're hesitating. Let me rephrase it.  
25 A. Yeah. Can you rephrase it?

1 THE COURT: Hold on. One at a time.  
2 MR. NIXON: I just wanted him to -- either  
3 withdraw the question or allow him to answer it.  
4 MR. SNIVELY: I'll withdraw the question and  
5 ask a different question.  
6 THE COURT: Okay. Doctor, just so we know,  
7 we're taking every word down --  
8 THE WITNESS: I'm sorry. I'll slow down.  
9 THE COURT: You're doing fine.  
10 THE WITNESS: Okay.  
11 THE COURT: I'll jump in when I have to.  
12 Go ahead, Mr. Snively.  
13 Q. (BY MR. SNIVELY) With your training, your  
14 medical training, you're not able to medically state  
15 what the mechanism of injury was?  
16 A. So I would say I can medically state that it  
17 was a contusive blow to the head, yes.  
18 Q. Okay.  
19 A. Is that...  
20 Q. I think we're --  
21 A. I can't say --  
22 Q. -- asking two different things.  
23 A. Okay.  
24 Q. Just based on the scan, you couldn't say if  
25 this was a head that went into a car jam, for example,

1 or a side of a car versus other possible ways that it  
2 could have happened?  
3 A. No, I couldn't say that, yes. I could just  
4 say it was a contusive injury to the head.  
5 Q. All right. You also medically cannot  
6 determine who would have caused the injuries?  
7 A. No, sir, I didn't try to.  
8 Q. I mean, and that's not part of your job?  
9 A. No.  
10 Q. Your job --  
11 A. Take care of the baby, yes, exactly.  
12 Q. And when you talked to the Nathan, Nathan was  
13 appropriate?  
14 A. He was disturbed, which is appropriate, yes.  
15 I think -- yeah.  
16 Q. All right. And he was providing information,  
17 trying to provide you information to help you?  
18 A. He was -- he seemed to be providing  
19 information trying to help us, yes.  
20 MR. SNIVELY: May I have just a moment,  
21 Judge? Sorry.  
22 Q. (BY MR. SNIVELY) Again, Doctor, with the two  
23 separate fractures, you can't say if they are bang, bang  
24 or one happened an hour after the other? I mean, you  
25 can't date --

1 A. No.  
 2 Q. -- how those happened either, can you?  
 3 A. No, sir.  
 4 MR. SNIVELY: I don't have any other  
 5 questions, Judge.  
 6 THE COURT: Any redirect?  
 7 MR. NIXON: Your Honor, may Dr. Fouts be  
 8 excused?  
 9 THE COURT: No redirect, you said?  
 10 MR. NIXON: No, thank you, Judge.  
 11 THE COURT: Mr. Snively?  
 12 MR. SNIVELY: No, Judge.  
 13 THE COURT: So you may be excused. Don't  
 14 talk about your testimony with any other witness or talk  
 15 about the questions asked or any of the answers that you  
 16 gave. But you are excused from your subpoena.  
 17 THE WITNESS: Okay. Thank you.  
 18 THE COURT: Do we need to deal with that  
 19 other matter, then, or is there another...  
 20 MR. NIXON: Your Honor, I believe so. The  
 21 State will next call Al Stuber.  
 22 THE COURT: Okay. Folks, it's a little  
 23 inefficient, but I'm going to have to give you a little  
 24 break right now. There's something I've got to deal  
 25 with. We'll try to 10, 15 minutes and we'll get back on

1 track. I'll send you down there in a minute, just  
 2 remember the same admonition.  
 3 Don't talk about the case, don't access any  
 4 information, don't form or express any opinion until the  
 5 case is submitted to you.  
 6 You may go to the jury room for break.  
 7 (Wherein, the jury is not  
 8 present.)  
 9 THE COURT: The jury is out. Counsel for the  
 10 State is here, as is counsel for the defendant and the  
 11 defendant.  
 12 Apparently, there's an issue that the parties  
 13 need to address outside of the presence of the jury. Is  
 14 that right?  
 15 MR. SNIVELY: That's correct, Your Honor.  
 16 THE COURT: Okay.  
 17 MR. SNIVELY: The defense anticipates that  
 18 the State is going to try to elicit from Mr. Stuber  
 19 testimony about the defendant's marijuana use and we  
 20 would ask the Court to exclude that evidence.  
 21 We believe it's more prejudicial than  
 22 probative to anything before the Court.  
 23 During his interview, Nathan -- there's a  
 24 question about, "Did you do this," or something along  
 25 those lines and Nathan's response is, "It would have

1 only been if I'd blacked out."  
 2 And then the officer then follows up, "Well,  
 3 why would you have blacked out?" And they start a  
 4 discussion about the medications he was on and the fact  
 5 that he used marijuana but he didn't have a medical  
 6 card.  
 7 And our position is that that's not  
 8 admissible. And if the Court thought it was relevant  
 9 it's more prejudicial than probative than anything  
 10 before the jury. He made a comment, the marijuana.  
 11 There's no evidence to show that had anything to do with  
 12 it, other than to prejudice the jury that Nathan used  
 13 marijuana without a medical card.  
 14 THE COURT: How prejudicial is marijuana use  
 15 this day and age, frankly?  
 16 MR. SNIVELY: Well, Judge, that's an  
 17 interesting question and a question that we've  
 18 discussed. But the same point is we don't know that.  
 19 We have some jurors here of the age where it  
 20 would have been a serious thing to marijuana and whether  
 21 their views or changed or not is hard to predict.  
 22 I mean, there's still a lot of people that  
 23 believe marijuana use is inappropriate and they don't  
 24 like it, even though now in Montana it's legal. At the  
 25 time of this incident, it wasn't legal without the card

1 and they discuss the card issue.  
 2 Judge, I don't think it's admissible just  
 3 because it may not be as a general societal thing as  
 4 prejudicial as it once was, when you don't know what the  
 5 jury perceptions are, because you do have jurors that  
 6 can hold that view that they believe and have not, I  
 7 guess, what I'll say, is modernized the view of  
 8 marijuana.  
 9 THE COURT: In the context, though -- isn't  
 10 the context that the defendant was talking about things  
 11 that may have made him blackout? Is that the context?  
 12 MR. SNIVELY: Potentially that is what the  
 13 discussion is, is what medications he's on and the fact  
 14 that he uses marijuana. But they go way beyond just the  
 15 fact that I use marijuana. They start talking about do  
 16 you have a Montana marijuana card and that information,  
 17 too. It's not like just one reference and it's left.  
 18 THE COURT: Mr. Spojka.  
 19 MR. SPOJKA: Yes, Your Honor.  
 20 THE COURT: What's the State's position?  
 21 MR. SPOJKA: Well, we believe it's the  
 22 defendant's own statement, he made it relevant to his  
 23 statement by offering that to Officer Stuber at the  
 24 time.  
 25 And the exchange, it's in reference to a



1 question by Officer Stuber, it says, "I mean, isn't it  
2 possible you could have gotten really, really angry and  
3 just threw him down?"

4 And the response is, "Unless I blacked out,  
5 no." Then Officer Stuber follows that up with, "Is  
6 there any reason why you would have blacked out?"

7 And the answer is, "Not that I know of. None  
8 of my medications cause it. If you need a list, I can  
9 provide a list of my medications."

10 And the next question is, "Do you take any  
11 illegal drugs?"

12 "I smoke pot. I won't lie."

13 "Okay."

14 "I use it for chronic pain."

15 "Do you have a prescription for it?"

16 "Unfortunately, no, I don't."

17 "Okay. You need to get one."

18 Then he references later on that he used it  
19 last night, being the night of the -- of Everett's  
20 injury.

21 THE COURT: Well, back up. When is this  
22 interview being done?

23 MR. SPOJA: This interview is done on the  
24 morning of the 20th, so the day after the victim's  
25 injuries.

1 after the blackout is said and the question, "Is there  
2 any reason that you would blackout?"

3 And the answer being, "Not that I know of.  
4 None of my medications cause it."

5 That that should be the end of it. There  
6 shouldn't be the further discussion about the marijuana  
7 and the fact that he'd -- that it increased -- they're  
8 also trying to get in that he used it at some point  
9 after the accident and it caused his panic to get worse.  
10 That's not relevant for the jury to hear.

11 THE COURT: Okay. I agree with the defense.  
12 I think you get exactly what you need. There's no  
13 context lost by ending the statement after the blackout  
14 statement and the none of my medications caused it,  
15 essentially.

16 It is 404 evidence, really. And while the  
17 risk of prejudice might not be extreme, it really is not  
18 relevant and not necessary. And the Court on 403  
19 grounds will exclude it.

20 So can you fix your exhibit?

21 MR. SPOJA: I'm going...

22 THE COURT: Counsel, this should have been  
23 brought to me before if that exhibit was...

24 MR. SNIVELY: I thought we talked about it.

25 THE COURT: You did. But I'm talking about

1 THE COURT: Okay.

2 MR. SPOJA: If I -- just a couple more  
3 relevant statements here.

4 THE COURT: Sure.

5 MR. SPOJA: He said he tried last night to  
6 calm down and it just made my panic attack a thousand  
7 times worse and I threw everything out. I'm done, I  
8 have more important things to focus on.

9 And that's actually the end where we -- where  
10 we end the video. There's further discussion of his --  
11 what we've referred to as the Missoula stuff, but that's  
12 not part of what the exhibit is.

13 THE COURT: Okay. This is -- part of this  
14 testimony is not going to be question and answer, it's  
15 going to be an exhibit?

16 MR. SPOJA: It's in the video of the  
17 defendant's interview.

18 THE COURT: Okay. Anything else, Mr.  
19 Snively?

20 I guess I'll ask, is this something that's  
21 going to come up in the defense case regarding any sort  
22 of incapacitation or anything like that?

23 MR. SNIVELY: No, Your Honor. We're not  
24 presenting that. We're not going to present the  
25 marijuana use. You know, I guess it's our position that

1 an exhibit that needs to be modified right now with the  
2 jury sitting out there.

3 MR. SNIVELY: Oh, I'm sorry.

4 THE COURT: Can we fix it, Mr. Spoja?

5 MR. SPOJA: I can. I probably need about ten  
6 minutes.

7 THE COURT: Or when you publish it, do you  
8 trust...

9 MR. SPOJA: I'm not sure that --

10 THE COURT: It would be in the middle? I  
11 want it so that you're comfortable that it will work,  
12 because it sounds like it's in the middle of you --

13 MR. SPOJA: It's close to the end, so I'd  
14 feel a whole lot more comfortable if I could trim it and  
15 then return it.

16 THE COURT: If you think you can do that in a  
17 timely fashion, otherwise we'll have to go a different  
18 witness.

19 What do you guys think? Mr. Nixon and Mr.  
20 Spoja, can you do it in ten?

21 MR. NIXON: Your Honor, I don't think it's  
22 going to take necessarily ten minutes. The part that  
23 we're looking at excluding is going to be basically at  
24 the very end of the interview. The rest of the stuff is  
25 very clearly 404(b), which was discussed regarding like

1 heroine and cocaine use and that is not relevant.  
 2 THE COURT: Do you know exactly when to push  
 3 stop, or not?  
 4 MR. SPOJA: If I can have just a few minutes  
 5 to make sure the exact time stamp, I can give Ms. Pratt  
 6 instructions.  
 7 THE COURT: Sure. That sounds good. We'll  
 8 be in recess, hopefully, for five minutes. And if you  
 9 need a little more time, just let you know, so we can  
 10 get back to the jury as soon as we can.  
 11 MR. SPOJA: Thank you, Your Honor.  
 12 MR. NIXON: While Mr. Spoja is doing that,  
 13 can Mr. Snively and I approach?  
 14 THE COURT: In chambers or are you good?  
 15 MR. NIXON: In chambers would be fine.  
 16 THE COURT: Do you need a record?  
 17 MR. NIXON: You know, that's probably wise.  
 18 THE COURT: Okay. We definitely need Mr.  
 19 Polakoff.  
 20 (Wherein, the following took  
 21 place in chambers.)  
 22 THE COURT: This is continuation of State v.  
 23 Polakoff, in chambers on the record with Mr. Nixon for  
 24 the State.  
 25 Mr. Snively for the defense and Mr. Polakoff

1 is present.  
 2 While the jury is out, the parties asked for  
 3 -- to come before the Court and just to address an  
 4 issue.  
 5 So Mr. Nixon, go ahead.  
 6 MR. NIXON: First, I apologize this delay is  
 7 on me. I had not previously caught that there was  
 8 mention of Mr. Polakoff's mom's occupation in the  
 9 interview. And the concern that the State has already  
 10 articulated still stands. There's not been any  
 11 statement or any transcript or any ability to question  
 12 Ms. Goedde about what she will testify to.  
 13 And the State's concern is that she'll be  
 14 given some sort of expert status by mentioning that she  
 15 is a nurse and that -- it seems like in the video  
 16 there's also a statement by the defendant, which  
 17 basically states that, "Well, my mom is a nurse. She  
 18 should have known if there was anything wrong."  
 19 And I think as a matter of fundamental  
 20 fairness, since the State has no idea what she's go  
 21 going to say, that if she is going to testify, it has to  
 22 be outside of the realm of any sort of perceived  
 23 expertise.  
 24 THE COURT: Okay. Mr. Snively, I thought we  
 25 might have addressed this at a final, final pretrial.

1 MR. SNIVELY: I think we did. I indicated  
 2 I'm not going to talk about her being a nurse. I'm  
 3 going to talk about her as a mother who held the baby  
 4 and what other her observations were. I don't intend to  
 5 even ask her her occupation.  
 6 MR. NIXON: Okay. I think that satisfies the  
 7 State.  
 8 I may just ask for a minute. Bob was going  
 9 to look at that and it might just take a minute more. I  
 10 don't think it's going to be long. It's a little bit  
 11 more problematic than the last one just because the last  
 12 one was at the very end and we could have hit stop. But  
 13 that wouldn't make it a clean exhibit either.  
 14 Again, I'd like Bob to do that. It should be  
 15 more clear.  
 16 THE COURT: Mr. Spoja.  
 17 MR. NIXON: Mr. Spoja said that he would like  
 18 to just clip it so it is, you know, a true and accurate  
 19 exhibit as to what the jury heard.  
 20 THE COURT: That's probably good for the  
 21 record. Yeah. Just the fact that rather than playing  
 22 -- publishing it, according to my ruling, they're  
 23 actually fixing it so that the record will reflect that  
 24 that's what the jury heard.  
 25 MR. SNIVELY: Are you going to delete the

1 reference to mom being a nurse, then, too?  
 2 MR. NIXON: I would, yes.  
 3 MR. SNIVELY: Okay.  
 4 THE COURT: All right.  
 5 MR. NIXON: Then we would stop it cold at  
 6 just where you wanted and where the judge ordered it to  
 7 be stopped.  
 8 MR. SNIVELY: It would be the end of the  
 9 video at that point.  
 10 MR. NIXON: Maybe for the record just to  
 11 reiterate, the State has already excised the interview  
 12 to exclude mention of having been mirandized previously.  
 13 That's clearly outside the -- out of bounds. It's just  
 14 not relevant.  
 15 THE COURT: Okay. That sounds like -- I  
 16 understand why you brought it before the Court. It  
 17 doesn't appear to be an issue. Mr. Snively seems well  
 18 aware of the reason if he does call these witnesses that  
 19 that won't come in and be argued.  
 20 Anything else?  
 21 MR. NIXON: I don't believe so, Judge.  
 22 THE COURT: So Mr. Stuber is the interview of  
 23 the defendant.  
 24 MR. NIXON: Obviously, I've been more long  
 25 winded than I'd guessed so far.

1 THE COURT: I know Mr. Spoja is not here, but  
2 just in general, I know the first day got a little away  
3 from us maybe. Do you feel like we're getting back on  
4 track?

5 MR. NIXON: I don't see that we're going to  
6 have any issues finishing by Friday.

7 Do you, Bob?

8 THE COURT: Well, he doesn't know.

9 MR. SNIVELY: It's your call. You keep  
10 saying you're calling a witness and then you're not  
11 calling a witness.

12 THE COURT: You don't need to clarify it.

13 MR. NIXON: I don't mind clarifying.

14 THE COURT: You should finish evidence  
15 tomorrow.

16 MR. NIXON: Yes. We will finish tomorrow.

17 THE COURT: All right.

18 MR. NIXON: I don't anticipate it -- well,  
19 let's just assume that I've just been a poor judge so  
20 far that we'll do it by noon. I don't expect it to last  
21 that long.

22 THE COURT: Very good. Each party, you're  
23 trying the cases.

24 But I will say to you, Mr. Snively, based on  
25 this kind of general idea, if you do plan to call

1 MR. NIXON: We're probably going to need a  
2 couple of hours, at the very least.

3 MR. SNIVELY: I anticipated that. But I  
4 didn't she think she would stay here, so yeah.

5 MR. NIXON: I do anticipate, Judge, that  
6 we're going to be able to knock out at least another  
7 two.

8 I've got two more witnesses of length. We  
9 have Dr. Laskey and Al Stuber.

10 Al is largely going to be -- he has to take  
11 some time just because if the interview's admitted then  
12 we have about an hour of watching the video. So I'm  
13 going to guess that he's probably going to be minimally  
14 about two hours.

15 I have a couple of short witnesses that we  
16 can -- Jesse Thompson from MATIC, who will not take  
17 long; Bonnie Rothe, who will not take long; and also  
18 Jennifer Cormier, who is the sister. She's not going to  
19 take long.

20 Really, this is the next-to-last big hurdle  
21 as far as time required for testimony.

22 THE COURT: It sounds like, just so you're  
23 prepared, we'll probably do Mr. Stuber then and then I  
24 might even -- I hope I don't -- we might just take a  
25 short break and if you've got a -- probably your doctor

1 witnesses, have them ready, technically somewhere around  
2 that noon mark so that we're not sitting and waiting.  
3 Okay?

4 MR. SNIVELY: I will, Judge. They're about  
5 ten minutes from here.

6 THE COURT: You know how it is sometimes and  
7 you don't plan. And the defense is always somewhat at a  
8 disadvantage, because you don't know. I am simply not  
9 going to send this jury home with half a day.

10 MR. SNIVELY: Oh, no. Within a few minutes  
11 we'll be ready to go.

12 MR. NIXON: And I assume we'll be taking a  
13 break for the inevitable motion that happens after the  
14 State rests anyway.

15 THE COURT: Yeah, yeah. At which time you  
16 can get your people and call witnesses.

17 MR. NIXON: Bob, may I tell Ryann she's  
18 released now or do you want to keep her under subpoena?

19 MR. SNIVELY: I'd like to keep her just to  
20 make sure the rest of this.

21 MR. NIXON: She asked if she could go home, I  
22 told her yes. At this point in time, the State is not  
23 going to call her. If you want us to contact her,  
24 please keep in mind that we're going to need...

25 MR. SNIVELY: I'll give you plenty of time.

1 is not going to fit in in an hour or close.

2 MR. NIXON: I can tell you with one hundred  
3 percent certainty since her flight was cancelled this  
4 morning, she's not going to be here today.

5 THE COURT: If you hear me, if we have that  
6 additional 50 minutes or whatever I sure want to use it.

7 MR. NIXON: We have all of our witnesses  
8 lined up to go today except Dr. Laskey. We'll be able  
9 to -- I cannot imagine we can't fill today. I think  
10 we're going to be -- I hope to knock out two or three.  
11 Maybe even get down to where it's only Dr. Laskey  
12 tomorrow.

13 Like I said, I've not been very good at  
14 looking in my crystal ball.

15 THE COURT: Well, it sounds like we're back  
16 on track. I appreciate that heads up.

17 You guys can go ahead and take a break.  
18 Hopefully not a very long one, but go ahead. I think  
19 we're in recess, I'll just ask the State to let me know  
20 as soon as you get that exhibit and we'll bring the jury  
21 back you up.

22 (Off the record.)

23 (Wherein, the following took  
24 place in open court.)

25 THE BAILIFF: All rise.

1 THE COURT: Please be seated. Thanks.  
 2 Back on the record, State v. Polakoff, DC  
 3 19-17.  
 4 Counsel for the State is present.  
 5 Counsel for the defendant is present. The  
 6 defendant is present.  
 7 We just had a break. The jury is not  
 8 present.  
 9 There was a ruling by the Court that  
 10 necessitated to fix a modification of the State's  
 11 exhibit.  
 12 Mr. Spoja, were you able to do that?  
 13 MR. SPOJA: I was, Your Honor. The only  
 14 issue is that I have prepared and modified what will be  
 15 played -- or what we'll ask to be published today. The  
 16 actual disk that would be submitted into evidence, I've  
 17 not been able to modify yet. I can do that later on.  
 18 It will take a little more time.  
 19 I've explained as much to Mr. Snively.  
 20 Whatever the Court's pleasure is as far as  
 21 how we get it to the -- into evidence, we'll do.  
 22 THE COURT: I think why don't -- if you offer  
 23 it for efficiency sake -- is it State's 26 or something?  
 24 MR. SPOJA: Yes. It would be 26.  
 25 THE COURT: Do you want to call it 26A?

1 MR. SPOJA: Okay.  
 2 THE COURT: Because I don't want that one in  
 3 really. Knowing -- but I do want the record to reflect,  
 4 assuming that I accept it, that it comes in. The one  
 5 that will be part of our record will be the one that was  
 6 played.  
 7 Does that sound good, Mr. Snively?  
 8 MR. SNIVELY: Judge, I agree. That's fine.  
 9 THE COURT: All right.  
 10 MR. SPOJA: And pardon -- I'm going to ask  
 11 for some real basic guidance here as far as what the  
 12 Court would like to see. How I normally do these, as  
 13 you've seen with my prior witnesses, I had them identify  
 14 their mark on the disk, I'm not going to be able to do  
 15 that with number 26. I have that on the existing 26, I  
 16 won't on 26A.  
 17 THE COURT: I guess I don't know. I don't  
 18 mean to put words in your mouth, Mr. Snively, but you  
 19 don't have a foundational objection to this thing, do  
 20 you?  
 21 MR. SNIVELY: No. We're not objecting. So  
 22 we're fine with just having him say, "You taped it and  
 23 we're going to play it."  
 24 THE COURT: Why don't you just identify it as  
 25 the disk containing the interview, offer it. I don't

1 anticipate an objection. We'll get it into evidence,  
 2 knowing that what really will come into evidence is  
 3 essentially what you're playing and we'll make sure that  
 4 the disk that's part of the file is that. Does that  
 5 makes sense?  
 6 MR. SPOJA: I think so, yes.  
 7 THE COURT: So I wouldn't worry about the  
 8 normal foundation for that reason and just identify that  
 9 it is the interview.  
 10 MR. SPOJA: Thanks, Your Honor.  
 11 THE COURT: You bet. Thanks for fixing that  
 12 so quickly.  
 13 MR. SPOJA: Absolutely.  
 14 THE COURT: Any reason for the jury not to  
 15 come in?  
 16 MR. NIXON: No, Your Honor.  
 17 THE COURT: All right. Let's bring them.  
 18 (Wherein, the jury is present.)  
 19 THE COURT: Jury is now present.  
 20 Mr. Nixon, do you so stipulate?  
 21 MR. NIXON: I do, Your Honor.  
 22 THE COURT: Mr. Snively.  
 23 MR. SNIVELY: Yes, Your Honor.  
 24 THE COURT: All right. We're back.  
 25 Now you know what my wife deals with when I

1 say ten minutes, right?  
 2 As I said, and I won't waste any more of your  
 3 time to say, I did kind of warn you, I understand it can  
 4 be frustrating. Some of these delays are just something  
 5 that we can't fix.  
 6 And just know that we've been working while,  
 7 hopefully, you were taking a little bit of a break,  
 8 stretching your legs and having some refreshments.  
 9 We'll go right back to it.  
 10 Mr. Spoja, your next witness.  
 11 MR. SPOJA: Thank you, Your Honor. The State  
 12 calls Al Stuber.  
 13 **ALAN STUBER,**  
 14 WITNESS HEREIN, BEING FIRST  
 15 DULY SWORN ON OATH WAS  
 16 EXAMINED their TESTIFIED  
 17 AS FOLLOWS:  
 18 --o0o--  
 19 THE COURT: Sir, right to this chair, please  
 20 **DIRECT EXAMINATION**  
 21 **BY MR. SPOJA:**  
 22 Q. Good afternoon.  
 23 A. Good afternoon.  
 24 Q. Can you state your name and spell it for the  
 25 record.

1 A. Alan, A-l-a-n, Stuber, S-t-u-b-e-r.  
 2 Q. And do you go by "Al"?  
 3 A. I go by Al.  
 4 Q. Al, can you tell us what do you do right now?  
 5 A. I'm retired and I own a private business.  
 6 Q. And you retired from?  
 7 A. I retired from the Red Lodge Police  
 8 Department December 31st of 2020, after 22 years of  
 9 working for the Red Lodge Police.  
 10 Q. And before -- when did you come to Red Lodge?  
 11 You're not from here originally?  
 12 A. That's correct. I moved to Red Lodge in 1988  
 13 and opened up a private business. Then in 1997, I got  
 14 on the Red Lodge Police reserves, and did that for --  
 15 until they hired me as a part-time police officer,  
 16 working Friday and Saturday nights from, oh, like at 9  
 17 o'clock at night until 7:00 in the morning. And then I  
 18 was hired on full time August 1st of 1999, I believe.  
 19 Or -- no, probably -- '98 probably.  
 20 Q. That would have been about the time that you  
 21 went to the law enforcement academy?  
 22 A. Yes, I went that March.  
 23 Q. Okay. And from that point forward, do you  
 24 maintain your training?  
 25 A. I did. I was constantly going to some kind

1 of training every year. There was a lot of stuff going  
 2 on in Billings and throughout the state that I'd go to.  
 3 Q. Okay. In April of 2019, you were working  
 4 with Red Lodge Police Department at that point?  
 5 A. I was.  
 6 Q. Okay. What were your duties at that point?  
 7 A. I was a patrol officer. I do whatever calls  
 8 came up, take them, and cases or, you know, whatever law  
 9 enforcement had to deal with.  
 10 Q. Okay. And specifically, April 20th, 2019,  
 11 were you working on that day?  
 12 A. I did, yes.  
 13 Q. Were you working day shift or night shift?  
 14 A. I was working the day shift. I came on, I  
 15 believe, it was 7 o'clock in the morning.  
 16 Q. Okay. And so was there -- did you receive a  
 17 briefing from the night shift that morning?  
 18 A. I did. When I come to work, I usually come  
 19 about 15 minutes early, and Officer Grieshop briefed me  
 20 on a case that had happened the night before, somewhere  
 21 around 9 o'clock or 9:30 in the evening, of a child that  
 22 wasn't breathing over there on South Hauser. And I'm  
 23 not sure the address, but it's 7-something South Hauser.  
 24 Q. What other information did you receive at  
 25 that point in time?

1 A. He told me that the --  
 2 MR. SNIVELY: Your Honor, I object to the  
 3 hearsay.  
 4 THE COURT: It's an investigation.  
 5 Overruled. Go ahead.  
 6 MR. SPOJA: Thank you, Your Honor.  
 7 Q. (BY MR. SPOJA) You may answer.  
 8 A. I was told that the child or baby was nine  
 9 months old, he wasn't breathing, that Officer Grieshop,  
 10 and I believe there was another officer in training with  
 11 him, arrived on scene, and ambulances showed up. They  
 12 had to do CPR and take the baby to the hospital. And  
 13 that the baby had some severe head injuries, that they  
 14 had to fly the baby to Salt Lake City.  
 15 Q. Okay. So what did you do with that  
 16 information?  
 17 A. Well, the first thing I had to do was start  
 18 trying to figure out who to contact. One of the -- the  
 19 mother, apparently, had gone with the baby to Salt Lake  
 20 City. I believe the first person that I contacted -- I  
 21 talked to the chief, as well. That was the first person  
 22 I talked to. And then we were able to get ahold of  
 23 Nathan Polakoff.  
 24 Q. Okay. Did you gather any information before  
 25 you spoke to Mr. Polakoff?

1 A. Well, I'd have to maybe refer to see if I  
 2 contacted anybody other than that, but...  
 3 Q. Would that be in your report?  
 4 A. It might be, yeah.  
 5 Q. Okay. Would reviewing your report refresh  
 6 your recollections or assist in refreshing it?  
 7 A. Yes.  
 8 MR. SPOJA: Your Honor, may he refer to his  
 9 report?  
 10 MR. SNIVELY: No objection.  
 11 THE COURT: Yes, he may.  
 12 THE WITNESS: (Witness peruses document.)  
 13 I think from the information that Officer  
 14 Grieshop gave me was enough to be able to ask for an  
 15 interview with Mr. Polakoff.  
 16 Q. (BY MR. SPOJA) Okay. So did Mr. Polakoff  
 17 agree to be interviewed?  
 18 A. Yes, he did.  
 19 Q. And when did he come in and speak to you?  
 20 A. He came in at 9:45 that morning.  
 21 Q. Okay. Now, as part of your investigation,  
 22 you identified Mr. Polakoff, did you learn his date of  
 23 birth, phone number, all of those things?  
 24 A. I did. I believe his date of birth is  
 25 11-27-96.

1 Q. Okay. And I assumed that you provided him a  
2 Miranda warning?  
3 A. I did. I read and also have a copy of his  
4 Miranda warning so he could read it and sign that he  
5 understood it.  
6 Q. And after signing that, he agreed to be  
7 interviewed?  
8 A. Yes, he did.  
9 Q. Did you record the interview?  
10 A. I did.  
11 MR. SPOJA: May I approach the witness?  
12 THE COURT: Yes, you may.  
13 Q. (BY MR. SPOJA) I'm handing you  
14 what's been marked State's Exhibit 26. Do you know what  
15 that is?  
16 A. Yes, it's a DVD.  
17 Q. Is that the recording of the defendant's  
18 interview?  
19 A. Yes, I signed it.  
20 MR. SPOJA: Your Honor, the State would move  
21 for admission of State's Exhibit 26.  
22 THE COURT: Mr. Snively.  
23 MR. SNIVELY: No objection.  
24 THE COURT: Without objection, 26 is  
25 admitted.

1 (Wherein, State's Exhibit No.  
2 26 was received.)  
3 MR. SPOJA: Your Honor, can I publish the  
4 same?  
5 THE COURT: Yes, you may.  
6 MR. SPOJA: And can we dim the lights,  
7 please?  
8 (Wherein, the video was  
9 played.)  
10 Q. (BY MR. SPOJA) Do you notice anything out of  
11 the ordinary at this point?  
12 A. Yes. I was looking for -- when I'm doing  
13 interviews, I always look for other stuff besides what  
14 they're saying, body language, and so forth and I  
15 noticed that he wasn't shedding any tears.  
16 Q. And did he seem to be wiping at his eyes?  
17 A. He was. He was indicating that he was quite  
18 upset and crying and yet there was no tears and he was  
19 just wiping dry eyes.  
20 MR. SPOJA: Go ahead.  
21 (Wherein, the video was  
22 played.)  
23 Q. (BY MR. SPOJA) Mr. Stuber, the defendant  
24 provided you or he showed you a picture he had ready of  
25 his bedroom?

1 A. He did.  
2 Q. Did that strike you as unusual?  
3 A. Yeah. I've never had anyone bring me  
4 pictures of a -- supposedly -- whether it's a crime  
5 scene or an incident scene or whatever, I've never had  
6 that happen.  
7 Q. And remind us, when was this interview?  
8 A. This was the day after the occurrence, in the  
9 morning about 12 hours later.  
10 Q. Okay. And was he presenting it as basically  
11 the same as it was when Everett was injured?  
12 A. He did state that the pillow wasn't in the  
13 same place as in the picture. It was, you know -- he  
14 kind of mentioned in the statement that the pillow was  
15 up a little higher or somewhere else on the bed. But  
16 other than that, that it was pretty accurate as to what  
17 it looked like.  
18 Q. Okay.  
19 (Wherein, the video was  
20 played.)  
21 Q. (BY MR. SPOJA) He told you it was really  
22 hard to try not completely breakdown. We talked earlier  
23 about when he appeared to be crying. Have we seen  
24 similar events through the video so far?  
25 A. Yes. There was -- I think there was a little

1 bit earlier and this one here where he'd go to start  
2 talking about the incident, especially in the shower or  
3 just the injury of the baby, and he would start shaking  
4 and then crying and/or appeared to be crying.  
5 Again, his eyes were dry and I didn't see any  
6 tears or even tearing up in his eyes. I was close  
7 enough to be able to view that.  
8 Q. Did that strike you as odd?  
9 A. Well, yeah. I know -- you know, when I get  
10 emotional or --  
11 MR. SNIVELY: Your Honor, I object, his own  
12 personal information.  
13 THE COURT: Sustained.  
14 THE WITNESS: I have --  
15 THE COURT: Sustained.  
16 MR. SPOJA: I'll rephrase.  
17 Q. (BY MR. SPOJA) Based on your experience as  
18 an officer in interviewing individuals, did the  
19 defendant's behavior strike you as odd?  
20 A. It did.  
21 Q. And what about it was odd?  
22 MR. SNIVELY: Your Honor, I still object. He  
23 doesn't have the training to tell us what normal  
24 reactions are in people.  
25 THE COURT: Overruled. Go ahead.

1 THE WITNESS: The fact, he was getting so  
2 emotional and then I wasn't seeing tears, which the  
3 reaction didn't seem to be what you would expect from  
4 that kind of an emotional incident.

5 Q. Okay.

6 (Wherein, the video was  
7 played.)

8 Q. (BY MR. SPOJA) You said that he was upset  
9 that he wasn't able to go with. Did that strike you as  
10 odd?

11 A. At the time I thought, like, you know, if  
12 you're that involved, why weren't you going or at least  
13 getting in the car and heading out right away? So, yeah  
14 I thought that was kind of odd.

15 Q. And was the -- strike that.

16 Continue, please.

17 (Wherein, the video was  
18 played.)

19 Q. (BY MR. SPOJA) we heard him telling you that  
20 they had talked about spanking and they hadn't made any  
21 decisions. And then shortly before that, you heard his  
22 statement that, admitted that they just kind of jumped  
23 into this. Did those statements seem incongruous to  
24 you?

25 A. Say that again? That he tried to jumped into

1 what?

2 Q. That they sort of jumped into this, their  
3 relationship. Did those two statements seem to be at  
4 odds?

5 A. Well, for just being together for a couple of  
6 months and then, you know, deciding to just jump into  
7 the role of a father, and some of the statements that he  
8 was making about, you know, discipline and so forth. I  
9 felt it was --

10 MR. SNIVELY: Your Honor, I object to what he  
11 thinks is the meaning of what's being said.

12 THE COURT: Sustained. That's the province  
13 of the jury and you can argue it, Mr. Spojka.

14 MR. SPOJA: Very well. Let's go ahead and  
15 continue, please.

16 THE WITNESS: I just --

17 THE COURT: Mr. Stuber, you need to stop. I  
18 sustained the objection.

19 THE WITNESS: Oh, all right.

20 (Wherein, the video was  
21 played.)

22 Q. (BY MR. SPOJA) When you were done with that  
23 interview, what was your next step?

24 A. I believe I talked to the chief. He wanted  
25 me to give him his business card. And I believe -- I

1 would have to check my notes, but I believe after he  
2 left, I thought of a couple more questions that I wanted  
3 to ask him, so I called him back.

4 Q. And asked him a couple more questions?

5 A. Yes. He did come back and I read the Miranda  
6 to him again and he signed it, like the first time. And  
7 I just wanted to clarify again about -- I believe it was  
8 Shane, Jr., Link, if there was any other people that  
9 might have been in the house -- in his house in Red  
10 Lodge, and tried to establish if there was any other  
11 people that we need to talk to.

12 Q. Okay. And did the defendant tell you there  
13 was anybody else around those few days that they were  
14 all in Red Lodge?

15 A. He stated it was just him, Ryann, and  
16 Everett.

17 Q. What did you do next?

18 A. Then I received a phone call, dispatch told  
19 me that the hospital down in Salt Lake City was trying  
20 to contact me. So I called back and talked to Jill  
21 Willis, I believe is her name. And she gave me some  
22 information about the injuries.

23 Q. Did that provide you additional information  
24 about the extent of the injuries?

25 A. It did. It was -- there were two different

1 injuries.

2 MR. SNIVELY: Your Honor, I object to the  
3 hearsay.

4 THE COURT: Sustained.

5 Q. (BY MR. SPOJA) What did you do after you  
6 spoke to -- did you speak with anyone else, other than  
7 this Ms. Willis?

8 A. I did. I then talked to Dr. Laskey.

9 Q. Okay. And what did you do after you spoke to  
10 Dr. Laskey?

11 A. She had requested --

12 MR. SNIVELY: Your Honor, I object again to  
13 the hearsay.

14 THE COURT: Sustained. Just the question is  
15 what you did.

16 THE WITNESS: Okay.

17 Q. (BY MR. SPOJA) So what did you do?

18 A. I went and took -- and called Mr. Polakoff up  
19 to see if I could take pictures of his residence.

20 Q. Okay.

21 A. And I told him why.

22 Q. What was the reason why?

23 A. The reason why was to take pictures of  
24 possible areas where the injuries could have occurred,  
25 the bedroom and the bathroom and, you know, essentially

1 probably the house itself, because there's furniture and  
2 stuff.

3 Q. Okay. And did he agree to allow you to come  
4 over?

5 A. He did. He said to come on over. I did go  
6 over there and asked him to read the Miranda again, have  
7 him sign it again. I also got a consent to search his  
8 house so I could take pictures and/or if I saw anything  
9 else that would have been evidentiary. And so he signed  
10 that.

11 He had a question about it, because it was a  
12 consent to search for a motor vehicle, which I had put  
13 in instead of the type of vehicle I put in the address  
14 of his residence. And explained to him that it was just  
15 a consent to search and he could tell me at any time to  
16 stop and I would have to stop and leave. And so he  
17 stated he understood that. He did sign the consent to  
18 search and I took pictures.

19 Q. Did you have a body cam running while you  
20 were over there?

21 A. I did. I turned on the body cam.

22 MR. SPOJA: May I approach?

23 THE COURT: Yes.

24 Q. (BY MR. SPOJA) Handing you what's been marked  
25 as State's Exhibit 27. Do you recognize that?

1 A. Yes. My initials are on there and dated.

2 Q. What is it?

3 A. It's a DVD of my body cam.

4 Q. About how long is that?

5 A. Gosh, I'm not sure. A half hour, 45 minutes.

6 Q. Okay.

7 A. Yeah.

8 MR. SPOJA: Your Honor, the State moves for  
9 admission of State's Exhibit 27.

10 THE COURT: Any objection?

11 MR. SNIVELY: No, Your Honor.

12 THE COURT: 27 is admitted.

13 (Wherein, State's Exhibit No.  
14 27 was received.)

15 MR. SPOJA: Approach the witness, Your Honor?

16 THE COURT: Yes.

17 Q. (BY MR. SPOJA) I'm handing you what's been  
18 marked as State's Exhibit 28 through 47. Will you take  
19 a look at those real quick.

20 A. (Witness complies.)

21 Q. Beginning with No. 28, that's the first one  
22 on top there.

23 A. Okay.

24 Q. Do you recognize what that is?

25 A. This is an extraction report.

1 Q. And what's that from?

2 A. From his cell phone.

3 Q. Okay. And does that reference anything in  
4 particular?

5 A. It references when it was created, the type  
6 of phone that it is, the model, the time that the  
7 picture was -- there's a picture here, the time that it  
8 was captured, and the actual pixel resolution and the  
9 orientation, which is horizontal, and the tech  
10 information.

11 Q. Is that a true and accurate depiction of data  
12 retrieved in your investigation?

13 A. Yes, it is.

14 MR. SPOJA: Your Honor, the State moves  
15 admission of State's Exhibit 28.

16 THE COURT: Any objection?

17 MR. SNIVELY: No, Your Honor.

18 THE COURT: Without objection, State's 28 is  
19 admitted.

20 (Wherein, State's Exhibit No.  
21 28 was received.)

22 MR. SPOJA: May I approach the witness?

23 THE COURT: Yes.

24 Q. (BY MR. SPOJA) I'm going to hand you what's  
25 been mark as State's Exhibit 4. That's the picture that

1 the defendant provided you; is that correct?

2 A. Yes.

3 Q. And we saw him email it actually to you  
4 during that video, correct?

5 A. Yes.

6 Q. And is that picture -- is that what that data  
7 in Exhibit 28 is for?

8 A. It is. I was looking at it and it appears to  
9 be the same.

10 Q. Okay. What's the date and time that the  
11 photograph was captured? Was created, I guess.

12 A. It was created on 4-19 at 11:03 p.m.

13 Q. Okay. And that was after Everett had been  
14 taken to the hospital?

15 A. Yes.

16 Q. But before he'd been flown to Salt Lake,  
17 correct?

18 A. Yes, I believe so.

19 Q. Okay. Let's move to State's Exhibit 29. Do  
20 you recognize that?

21 A. Yes, I do.

22 Q. Well, I guess, frankly, let's just --  
23 If I may, Your Honor.

24 You've reviewed all the photographs?

25 A. I did.



1 Q. And what are those?  
 2 A. These are the photographs I took of the  
 3 bedroom and the bathroom.  
 4 Q. Okay. And the defendant's house, in general?  
 5 A. Yes, sir.  
 6 MR. SPOJA: Your Honor, the State moves for  
 7 admission of State's Exhibit --  
 8 Q. (BY MR. SPOJA) Well, I guess, first off, are  
 9 they true and accurate depictions of the defendant's  
 10 house on the day that you photographed them?  
 11 A. They are.  
 12 Q. Okay.  
 13 MR. SPOJA: The State moves for admission of  
 14 State's Exhibit 29 through 47.  
 15 THE COURT: Mr. Snively, do you have an issue  
 16 with any of those?  
 17 MR. SNIVELY: Judge, give me a second,  
 18 please.  
 19 MR. SPOJA: Did I move admission of 28  
 20 already?  
 21 THE COURT: You did and it's been admitted.  
 22 MR. SPOJA: Thank you, Your Honor.  
 23 MR. SNIVELY: We don't object to Exhibit 29  
 24 through 47.  
 25 THE COURT: All right. 29 through 47 are

1 admitted.  
 2 (Wherein, State's Exhibit Nos.  
 3 29 through 47 were received.)  
 4 MR. SPOJA: May I publish, Your Honor?  
 5 THE COURT: You may.  
 6 MR. SPOJA: Let's begin with 29.  
 7 Modern technology is great until it quits  
 8 working right. There we go.  
 9 THE COURT: I was going to say, you could  
 10 publish the old fashion way and pass them around, too.  
 11 MR. SPOJA: This is where modern technology  
 12 is actually working for us today.  
 13 Q. (BY MR. SPOJA) And was this what you were  
 14 talking about, the capture time of the photograph and  
 15 all the other data of the photograph?  
 16 A. Yes.  
 17 Q. All right.  
 18 MR. SPOJA: Let's move on to 30.  
 19 Q. (BY MR. SPOJA) All right. What are we seeing  
 20 here?  
 21 A. This here is a -- I'm standing at the front  
 22 door of the apartment and this is to my right, looking  
 23 into the kitchen.  
 24 Q. And what do we see through the kitchen there?  
 25 A. You can see through the kitchen and into the

1 bedroom.  
 2 Q. Okay.  
 3 MR. SPOJA: 31, please.  
 4 Q. (BY MR. SPOJA) What do we have here?  
 5 A. Now I'm standing in the kitchen and taking a  
 6 picture into the bedroom.  
 7 MR. SPOJA: 32, please.  
 8 Q. (BY MR. SPOJA) And what's this?  
 9 A. This is in the bedroom to my left, as you  
 10 walk through the door. And to the left of the bed --  
 11 well, there's closets. I guess you call them closets.  
 12 And then on the floor is the Styrofoam, that was  
 13 referred to earlier, and then his left side of his bed.  
 14 MR. SPOJA: 33, please.  
 15 Q. (BY MR. SPOJA) What do we have here?  
 16 A. This, I believe, was kind of like the frame  
 17 or something to keep the mattress off the floor. A  
 18 piece of wood.  
 19 Q. Okay.  
 20 MR. SPOJA: 34, please.  
 21 THE WITNESS: This here is -- on the right  
 22 side of the bed is the heater, which was on the south  
 23 end of the heater, which is a wall heater that goes  
 24 along the floor.  
 25 MR. SPOJA: 35.

1 THE WITNESS: This was on the right side of  
 2 the bed at the head of the bed. It's just a little  
 3 round coffee table or end table.  
 4 THE COURT: 36.  
 5 THE WITNESS: This here is looking from the  
 6 right side of the bed to the left side, where his  
 7 closets are and his bed.  
 8 MR. SPOJA: 37, please.  
 9 THE WITNESS: This here was as you came in  
 10 the bedroom door, that was the little bassinet, or  
 11 whatever you call it, where the baby would sleep.  
 12 MR. SPOJA: 38, please.  
 13 THE WITNESS: This here is the living room,  
 14 their little dinner table with the TV on it, and  
 15 furniture.  
 16 THE COURT: 39.  
 17 THE WITNESS: This here is the -- standing in  
 18 the living room, taking a picture of the table but to  
 19 the right there is where the bathroom door is.  
 20 MR. SPOJA: 40.  
 21 THE WITNESS: And then I took a picture as it  
 22 was, into the bathroom.  
 23 Q. (BY MR. SPOJA) And you can kind of see on the  
 24 right door frame it looks to be a curtain of some sort.  
 25 What's that?

1 A. I believe that probably is the shower  
2 curtain.  
3 Q. Okay.  
4 MR. SPOJA: 41, please.  
5 THE WITNESS: That's the toilet area to the  
6 left of the shower.  
7 MR. SPOJA: 42.  
8 THE WITNESS: That's the shower. And on the  
9 bottom there is like a little end table with stuff on  
10 it.  
11 MR. SPOJA: 43.  
12 THE WITNESS: That's the end table with items  
13 on it.  
14 Q. (BY MR. SPOJA) About how much space is there  
15 between the shower and that little table we're showing?  
16 A. I would -- you know, maybe a foot. I didn't  
17 measure it, but --  
18 Q. Pretty close?  
19 A. Pretty close.  
20 Q. Okay.  
21 MR. SPOJA: 44.  
22 THE WITNESS: This is a picture into the  
23 shower.  
24 Q. Okay.  
25 MR. SPOJA: 45.

1 THE WITNESS: This was a picture of the  
2 handle in the shower, the one on the right. And I used  
3 a measuring device to capture the size of the faucet.  
4 Q. Okay.  
5 MR. SPOJA: And 46.  
6 THE WITNESS: And this is the one on the  
7 left. And for the same reason, to get the size. That's  
8 the faucet that had the blue washcloth on it.  
9 MR. SPOJA: And then 47.  
10 THE WITNESS: And that's the washcloth.  
11 Q. (BY MR. SPOJA) That shower is not  
12 particularly large?  
13 A. No. It's probably a couple feet by a couple  
14 of feet, I guess.  
15 Q. Okay. And what did you do with these  
16 pictures immediately after you took them?  
17 A. I took and put them in the case, but I also  
18 then -- Dr. Laskey, I think is her last name, she wanted  
19 to have pictures of the scenes, but I didn't send them  
20 all, but I sent the ones of the shower and the bathroom  
21 area, and the bedroom.  
22 Q. Okay. And what did you do -- what did you do  
23 next?  
24 A. Then I had to give Mr. Polakoff a receipt for  
25 the pictures and he signed the receipt for them and then

1 I had to go to the PD and get a copy and take them back  
2 to him.  
3 Q. Okay. Then after you were done with that,  
4 what was your next step?  
5 A. I think I did have a conversation with a  
6 doctor, but I would have to review my report to see if I  
7 did.  
8 Q. Did that inform you as far as what your next  
9 steps in your investigation were -- should be?  
10 A. It gave me a lot more direction as to where  
11 to go.  
12 MR. SPOJA: Your Honor, may he refresh his  
13 recollection from his report?  
14 THE COURT: He doesn't remember, otherwise?  
15 MR. SPOJA: Just to determine whether it was  
16 then that he spoke to Dr. Laskey.  
17 THE COURT: If you don't remember that  
18 without it, you can refresh your memory.  
19 THE WITNESS: I did talk to -- I'm not  
20 exactly sure time. It was that same day.  
21 MR. SPOJA: Okay, that's fine then.  
22 THE WITNESS: It was after I got done talking  
23 to Mr. Polakoff, then I did talk to Dr. Laskey.  
24 Q. (BY MR. SPOJA) Okay. What were your next  
25 steps after talking to her?

1 A. I put -- well, I did call the Salt Lake City  
2 Police Department, requested agency assist, to see if  
3 somebody, a detective or an officer, could go up and  
4 interview Ryann and see -- and maybe her mother or  
5 whoever was there. And also informed them that Mr.  
6 Polakoff was going to head down that direction, too, and  
7 they agreed to help us out on the interviews.  
8 Q. Okay. Were they -- did you ask them to  
9 interview him, as well, if he got down there?  
10 A. Yes, I did.  
11 Q. Okay. Did you do anything -- I guess what  
12 happened next?  
13 A. Then I believe I did a preservation letter.  
14 Q. What's that?  
15 A. That is to preserve any information on a  
16 phone number for an investigation into any kind of  
17 situation, a crime. And they request to do that, they  
18 need a case number and so forth, so I went ahead and  
19 preserved the phone numbers for Nathan Polakoff and  
20 Ryann Wells.  
21 Q. And what did you do after that?  
22 A. I did talk to -- later that evening, I did  
23 talk to one of the officers from Salt Lake City.  
24 Q. Okay.  
25 A. And he told me that --

1 MR. SNIVELY: Your Honor, I object to the  
2 hearsay.  
3 THE COURT: Sustained.  
4 Q. (BY MR. SPOJA) Without telling us what the  
5 officer told you, what was your next step?  
6 A. Well, I had received that phone call when I  
7 was off duty, so the next morning I went back to work to  
8 see -- I believe I wanted to do another interview with  
9 Mr. Polakoff.  
10 Q. Okay. Did you conduct any other interviews?  
11 A. Well, later on I did, yes.  
12 Q. Who did you speak with?  
13 A. Well, I went down and interviewed Jennifer  
14 Cormier, Shane Link, which is the 12-year-old son.  
15 Present was his father, who was down there. I didn't  
16 really interview him, but he was present during the  
17 interviews.  
18 I also spoke to the vice principal of the  
19 school down there, and that was Ms. Fucs, F-u-c-s. A  
20 couple of days later, I then interviewed the  
21 grandfather.  
22 Q. And that's Ryann's stepdad?  
23 A. That's Ryann's stepdad, yes.  
24 Q. Okay.  
25 A. And his name is Ray -- I'd have to review his

1 last name.  
2 Q. Did you interview Ryann?  
3 A. Yes, I did. Actually, it was Ryann and her  
4 mother came up to the police department. Chief Wells  
5 was there, so we conducted the interviews separately, of  
6 course, but I was with the chief and the chief did most  
7 of the interview.  
8 Q. Okay. And did you gather any information at  
9 any point -- well, I guess, did you get information  
10 relative to the defendant's cell phone?  
11 A. We did get some information back, went  
12 through MATIC to ask for assistance and they were able  
13 to help us. And I did get a search warrant for the  
14 phone and there was information that was retrieved.  
15 Q. And that was -- the extraction report was  
16 part of that information?  
17 A. I believe that's all it was, yes.  
18 Q. After all of your investigation, we've  
19 covered it pretty well, that's about everything that  
20 you've accomplished, right?  
21 A. Yes. I also had interviewed the medical  
22 people that responded to the call that night in  
23 question.  
24 Q. Okay.  
25 A. Yeah.

1 Q. After all of that, did you develop a suspect?  
2 A. Say that again?  
3 Q. After all of that, did you develop a suspect  
4 and have some recommendations for the county attorney's  
5 office?  
6 A. I did.  
7 Q. What were those?  
8 MR. SNIVELY: Your Honor, I object. What his  
9 conclusions were are not relevant.  
10 THE COURT: Sustained.  
11 MR. SPOJA: Can I ask him what the  
12 recommendations to the county attorney's office was?  
13 THE COURT: I believe that Mr. Polakoff is on  
14 trial here and I think that's pretty of obvious.  
15 MR. SPOJA: All right. As long as we can  
16 draw that line for the jury.  
17 MR. SNIVELY: Judge, I object to the running  
18 commentary from the prosecutor.  
19 THE COURT: Sustained. It's been a long day.  
20 MR. SPOJA: I have no further questions.  
21 THE COURT: Thank you, Mr. Spoja.  
22 So you've got some cross, right?  
23 MR. SNIVELY: I do.  
24 THE COURT: I'm just going to ask the jury if  
25 they just want to stand for a minute before

1 cross. I'm going to stand, but nobody has to. I know  
2 we took our break early, but we really are doing some  
3 good work.  
4 If it's okay, we'll just let us stretch a  
5 minute.  
6 (Pause.)  
7 THE COURT: Mr. Spoja, are we okay to go on?  
8 I see Mr. Nixon stepped out.  
9 MR. SPOJA: Yes.  
10 THE COURT: All right. Go ahead and cross.  
11 MR. SNIVELY: Thank you, Your Honor.  
12 **CROSS EXAMINATION**  
13 **BY MR. SNIVELY:**  
14 Q. Sir, when you were at the house, or the  
15 cabin, as it's been called by other witnesses, did you  
16 take measurements of the place?  
17 A. I just took measurements of the faucets.  
18 Q. You didn't measure how far it was from the  
19 couch to the bathroom?  
20 A. No, I took no other measurements.  
21 Q. You didn't take the measurement as to the  
22 size of the living room?  
23 A. No.  
24 Q. You didn't take an actual measurement of the  
25 shower?

1 A. No.  
 2 Q. You didn't take a measurement of the  
 3 bathroom?  
 4 A. No.  
 5 Q. Didn't take a measurement of the kitchen?  
 6 A. No.  
 7 Q. Didn't take a measurement of the bedroom?  
 8 A. No.  
 9 Q. Isn't one of the investigative techniques of  
 10 police is to diagram and get measurements of a place if  
 11 they believe a crime had occurred there?  
 12 A. That does come up, yes.  
 13 Q. And that would answer the question of how far  
 14 it is from the couch to the shower, wouldn't it?  
 15 A. It would.  
 16 Q. And it would also answer the question of how  
 17 far it is from the couch to the bedroom, correct?  
 18 A. Yes.  
 19 Q. And did you note that the only door inside  
 20 the cabin was on the bathroom?  
 21 A. Yes.  
 22 Q. There was no door on the bedroom?  
 23 A. I didn't see one.  
 24 Q. Well, have you looked at your photos?  
 25 There's --

1 A. Yeah. May I look?  
 2 Q. Sure. Look at them.  
 3 A. (Witness complies.) Yeah. There's no door  
 4 into the bedroom.  
 5 Q. So the only door in that cabin inside was the  
 6 bathroom?  
 7 A. Correct.  
 8 Q. And there was one entry door, correct?  
 9 A. Right.  
 10 Q. Which was right by the couch?  
 11 A. Yes.  
 12 Q. When you walk in the front door and the couch  
 13 is like right here in front of it?  
 14 A. That's correct.  
 15 Q. There's enough room for the door to swing  
 16 open?  
 17 A. Right.  
 18 Q. And there's -- how far is there between the  
 19 couch and the table?  
 20 A. I'm not sure.  
 21 Q. Pretty short, isn't it?  
 22 A. Well, it was close, I guess.  
 23 Q. All right. And how long was the couch?  
 24 A. You know, I didn't measure it.  
 25 Q. I thought you were there to search.

1 A. Well...  
 2 MR. SPOJA: Objection, badgering. It's not a  
 3 question.  
 4 THE COURT: Sustained. Go ahead.  
 5 MR. SNIVELY: I'll move on. I didn't hear  
 6 what the objection was, but I'll move on.  
 7 THE COURT: Okay.  
 8 Q. (BY MR. SNIVELY) You asked him and he  
 9 consented to a search of the cabin, correct?  
 10 A. Yes.  
 11 Q. All right. But all that you did was take  
 12 photographs?  
 13 A. Yes.  
 14 Q. You didn't conduct a search?  
 15 A. No.  
 16 Q. And, in fact, when you took the photographs  
 17 that are Exhibit 44, 45, 46, and 47 -- do you have those  
 18 in front of you?  
 19 A. Okay.  
 20 Q. First of all, those pictures all depict  
 21 various parts of the shower, correct?  
 22 A. That's correct.  
 23 Q. When all of those pictures were taken, you  
 24 were standing outside of the shower, correct?  
 25 A. That's right.

1 Q. You never took a picture while you were  
 2 standing in the shower, did you?  
 3 A. I did not stand in the shower. I just  
 4 reached over into the shower.  
 5 Q. From outside the shower?  
 6 A. Yes.  
 7 Q. And your estimation is that the shower is two  
 8 foot by two foot?  
 9 A. Pretty small.  
 10 Q. All right. I mean, you're a decent-sized  
 11 man, you would have had trouble fitting in there,  
 12 wouldn't you?  
 13 A. Yes.  
 14 Q. Now, the defendant had told you when you  
 15 interviewed him on Saturday morning the 20th of April,  
 16 that he'd only had three hours of sleep, correct?  
 17 A. Yes.  
 18 Q. And do you agree with me that people react  
 19 differently to situations?  
 20 A. I guess so.  
 21 Q. So when you say that he didn't act the way  
 22 you thought he should, I mean, you agree with me  
 23 everyone reacts differently to situations?  
 24 A. Everyone is different.  
 25 Q. And being interviewed by a police officer for

1 some people is a very stressful situation, even if  
 2 they've not done anything wrong. Do you agree?  
 3 A. That's possible, yes.  
 4 Q. And what is your estimation of the distance  
 5 from the couch to the bathroom?  
 6 A. The bathroom door, the entryway?  
 7 Q. Yes. The door.  
 8 A. Maybe six feet.  
 9 Q. And from the door to the shower, how many  
 10 feet?  
 11 A. Probably another maybe six feet.  
 12 Q. Six feet?  
 13 A. It wasn't a very big bathroom. I didn't  
 14 measure it, so -- it couldn't have been any...  
 15 Q. So if you take a moment and look at photo 43,  
 16 please.  
 17 A. (Witness complies.)  
 18 MR. SNIVELY: Could you project 43 for me,  
 19 please.  
 20 THE COURT: 43, you said?  
 21 MR. SNIVELY: Yes.  
 22 Q. (BY MR. SNIVELY) So to the right of that  
 23 picture of 43 is the doorway, correct?  
 24 A. The right of that picture?  
 25 Q. Yes.

1 A. Well, not really. It would have been to the  
 2 right and then back towards -- there was a wall right  
 3 here.  
 4 Q. So where you're standing is in line with the  
 5 doorway?  
 6 A. Well, not really. The door would be like  
 7 over here (indicating.) You walk through the door,  
 8 there's a wall. There's a wall right here. And then it  
 9 went alongside where the vanity is, the vanity is  
 10 attached to the wall on two sides.  
 11 Q. Give me just a second here.  
 12 MR. SNIVELY: So if we could project photo  
 13 40.  
 14 Q. (BY MR. SNIVELY) Does that photo show the  
 15 wall that you're referencing?  
 16 A. No. That wall separates the toilet from the  
 17 shower and then...  
 18 Q. So your testimony is there's another wall in  
 19 that bathroom?  
 20 A. It's the wall that is opposite of that is the  
 21 living room. So the vanity, if you look in this picture  
 22 here -- the right side of that vanity --  
 23 Q. Hold on a minute. Which picture are you  
 24 looking at?  
 25 A. 43.

1 MR. SNIVELY: If we can go back to 43,  
 2 please.  
 3 Q. (BY MR. SNIVELY) All right. That's the  
 4 picture you're referring to?  
 5 A. Right. Right.  
 6 Q. And to the left of that picture is the  
 7 shower?  
 8 A. Correct.  
 9 Q. And from the previous picture we know down on  
 10 this picture by the shower it would be the toilet,  
 11 correct?  
 12 A. Correct. It would be on the left side of the  
 13 shower there.  
 14 Q. Right. But the orientation of this picture  
 15 would be down blow that, correct?  
 16 A. The toilet would be to the left of the  
 17 shower.  
 18 Q. Okay. We're talking the same thing. We're  
 19 just use using different terms.  
 20 A. Yeah.  
 21 Q. So where is the second wall in the bathroom?  
 22 A. The wall I was talking about is the one that  
 23 -- the vanity -- in the back of the vanity is on the  
 24 north wall and the right side of the vanity is on the  
 25 east wall and then there's a door.

1 Q. Okay. They are the outside walls of the  
 2 bathroom, correct?  
 3 A. Correct.  
 4 Q. There's no internal wall, other than  
 5 separating the shower from the toilet?  
 6 A. That's correct.  
 7 Q. And so this picture you're saying the doorway  
 8 is just to the right of this picture and back a little  
 9 bit, correct?  
 10 A. That's correct. I'm probably standing  
 11 somewhat -- there's a little bit of a wall and then the  
 12 door. I'm probably standing in front of the vanity.  
 13 THE COURT: Again, the record should reflect  
 14 this is State's Exhibit 43, when we're talking about  
 15 this picture. I think it's clear, but it's awhile back.  
 16 MR. SNIVELY: Thank you, Your Honor.  
 17 If we could go to picture 39, please.  
 18 Q. (BY MR. SNIVELY) And the left bottom corner  
 19 of 39 shows the couch, correct?  
 20 A. Correct.  
 21 Q. And then that -- the door is the door to the  
 22 bathroom, correct?  
 23 A. Correct.  
 24 Q. So that's the distance from the couch -- that  
 25 picture 39 shows the distance from the couch to the

1 bathroom, correct?  
 2 A. Correct.  
 3 Q. In picture 36 -- wait a minute. 38, I'm  
 4 sorry. The bathroom door is to the upper left of that  
 5 picture, correct?  
 6 A. The bathroom door?  
 7 Q. Yes.  
 8 A. No. The bathroom door to be to the upper,  
 9 the right side.  
 10 Q. Oh, I'm sorry. I said left, didn't I?  
 11 A. Yes.  
 12 Q. I meant the upper right.  
 13 A. Yeah. The other left.  
 14 Q. Yeah. My other left.  
 15 A. Yes, it's to the right of that.  
 16 Q. All right. Just so we all are oriented.  
 17 It's my other left on the right side of the picture?  
 18 A. Yes.  
 19 Q. All right. And Nathan on the 20th cooperated  
 20 with you, came in voluntarily for an interview and  
 21 that's the interview played here today?  
 22 A. Yes.  
 23 Q. And then you called him and asked him to come  
 24 back for a second interview?  
 25 A. Yes.

1 Q. And he did that?  
 2 A. He did.  
 3 Q. And you then -- he leaves and you call him a  
 4 third time to say, "Hey, can I come over and take  
 5 pictures?"  
 6 A. Correct.  
 7 Q. And he was cooperative with that?  
 8 A. Yes.  
 9 Q. And agreed to let you in to take pictures?  
 10 A. That's correct.  
 11 Q. And these are the pictures that we just  
 12 talked about that you took at that time?  
 13 A. Yes.  
 14 MR. SNIVELY: Can I have just a moment,  
 15 Judge?  
 16 THE COURT: Sure.  
 17 MR. SNIVELY: Your Honor, I have to no  
 18 further questions.  
 19 THE COURT: Any redirect?  
 20 MR. SPOJA: No, Your Honor.  
 21 THE COURT: May this witness be excused?  
 22 MR. SPOJA: Yes, please.  
 23 THE COURT: Mr. Snively?  
 24 MR. SNIVELY: Judge, I need him subject to  
 25 re-call.

1 THE COURT: All right. So you're not  
 2 released from your subpoena, but you're done for today.  
 3 They'll be in touch with you.  
 4 In the meantime, I must tell you not to  
 5 discuss your testimony with any other witness. Don't  
 6 discuss the questions you were asked or the answers that  
 7 you gave. You're free to leave for now.  
 8 Again, someone will contact you for sure if  
 9 you've been released. Thank you.  
 10 THE WITNESS: Okay. Do I leave these here?  
 11 MR. SPOJA: I'll retrieve that.  
 12 THE COURT: Would you? Thank you, Mr. Spojka.  
 13 I invite the jury to stand up again, because  
 14 I think we have just a short witness.  
 15 MR. SPOJA: The State calls Jesse Thompson.  
 16 THE COURT: Mr. Thompson, come forward here,  
 17 please. Raise your right hand.  
 18 **JESSE THOMPSON,**  
 19 WITNESS HEREIN, BEING FIRST  
 20 DULY SWORN ON OATH WAS  
 21 EXAMINED their TESTIFIED  
 22 AS FOLLOWS:  
 23 --o0o--  
 24 THE COURT: You may proceed.  
 25 MR. SPOJA: Thank you, Your Honor.

1 **DIRECT EXAMINATION**  
 2 **BY MR. SPOJA:**  
 3 Q. Can you state your name and spell it for the  
 4 record, please.  
 5 A. My name is Steven Jesse Thompson, S-t-e-v-e-n  
 6 J-e-s-s-e, T-h-o-m-p-s-o-n.  
 7 Q. And what do you do, Mr. Thompson?  
 8 A. Right now, nothing. I'm unemployed.  
 9 Q. What were you doing a couple of weeks ago?  
 10 A. I just got back from a contract in  
 11 Antarctica.  
 12 Q. What were you doing in Antarctica?  
 13 A. I was supply and logistics.  
 14 Q. How long were you there?  
 15 A. Four months.  
 16 Q. Was it as cold there as it is here?  
 17 A. No, actually. It's their summer down there.  
 18 Q. I'd like to take you back to 2019. Spring of  
 19 2019. What were you doing then?  
 20 A. I was a crime analyst with the Montana  
 21 Analysis and Technical Information Center.  
 22 Q. We colloquially refer to as MATIC?  
 23 A. Correct.  
 24 Q. Okay. And as an analyst, what were some of  
 25 the things that you do?

1 A. I would do case support on different cases  
2 around the state, analyze cell phone records, and then  
3 do analysis on terrorism and extremism-related issues.

4 Q. Okay. So in April or May of 2019, did you  
5 receive a request for assistance from Red Lodge Police  
6 Department?

7 A. April of 2020, I believe. March of 2020.

8 Q. Okay. And what was that relative to?

9 A. That was relative to a child abuse case out  
10 of Carbon County.

11 Q. Okay. Do you recall what functions you  
12 performed?

13 A. I received a warrant return from Verizon that  
14 was passed onto me from the investigating officer. And  
15 I used one of the tools that we use for analyzing cell  
16 phone records to determine locations of that record --  
17 or locations of the cell phone.

18 Q. Okay. And you developed a report?

19 A. I did.

20 Q. And as part of that report, did you do some  
21 mapping to assist with the -- your report itself?

22 A. I did.

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

24 THE COURT: Yes.

25 Q. (BY MR. SPOJA) Handing you what's been

1 MR. SPOJA: Your Honor, the State moves for  
2 admission of 48 and 49.

3 THE COURT: Any objection?

4 MR. SNIVELY: No.

5 THE COURT: Without objection, State's  
6 Exhibit 48 and 49 are admitted.

7 (Wherein, State's Exhibit Nos.  
8 48 and 49 were received.)

9 MR. SPOJA: Your Honor, at this time I'd like  
10 to log with the Court, Demonstrative Exhibit 1. It's  
11 basically an area map.

12 Mr. Snively, we've discussed this before.

13 THE COURT: Okay.

14 MR. SPOJA: To assist Mr. Thompson with his  
15 testimony.

16 THE COURT: No objection, Mr. Snively?

17 MR. SNIVELY: That's correct, Judge.

18 MR. SPOJA: Let's publish No. 48, if we may.  
19 (Wherein, State's Exhibit No.  
20 48 was published.)

21 Q. (BY MR. SPOJA) Can you tell us what this is  
22 that we're looking at.

23 A. Yes. All the numbers there represent some  
24 kind of record, whether it's data usage, text message,  
25 phone call, in those Verizon records that we got.

1 marked as State's Exhibit 48 and 49, do you recognize  
2 those?

3 A. I do.

4 Q. Can you tell me what those are?

5 A. That is a map taken over -- these are from 20  
6 April to 21 April, a map of different cell phone towers  
7 that the phone was pinging off of, basically.

8 Q. Do you recall which -- was that the  
9 defendant's phone?

10 A. Correct.

11 Q. Okay. And that -- what were you able to  
12 determine with regard to where the towers -- how that --  
13 I guess, what were you able to determine as a result of  
14 the information that you had from that?

15 A. I was able to determine that the phone was  
16 taken out of Red Lodge around midday on 20, April, 2019.  
17 And it hit on towers headed south and then west in  
18 Wyoming. It went through Cody, Thermopolis, down to  
19 southwestern Wyoming, Kemmerer, Green River, Little  
20 America area. And then turned back and was back in Red  
21 Lodge about midday on the 21st of April, 2019.

22 Q. I guess I neglected to do this. Are these  
23 images are they true and accurate copies taken from your  
24 report?

25 A. They are.

1 Q. Okay.

2 A. How Verizon does their records is a little  
3 confusing sometimes, so the order -- the number that you  
4 see there doesn't necessarily mean something happened in  
5 certain sequential based on that number and that's  
6 different records mixed together. Like I said, the data  
7 usage, text, phone calls.

8 The red that you see there are area covered  
9 by different cell phone towers. And those towers --  
10 this is the outbound from Red Lodge map. Those towers  
11 were the ones that the cell phone was on during that  
12 trip.

13 Q. Okay. And we only see -- I guess is that  
14 Thermopolis in the upper right corner?

15 A. It is.

16 Q. I see Green River. What else is in that  
17 area?

18 A. I think just to the west of Green River is  
19 Little America. And north and I think a little best bit  
20 west of that is Kemmerer.

21 Q. Okay.

22 MR. SPOJA: Can we look at 49, please.

23 Q. (BY MR. SPOJA) What are we looking at here?

24 A. Similar to the previous, this one, Exhibit  
25 49, is the return trip to Red Lodge. And again, during

1 that trip the red represents the coverage area of the  
 2 cell phone -- the tower that the cell phone is on.  
 3 THE COURT: Mr. Spojka, can you step back, the  
 4 jurors are having a hard time seeing.  
 5 MR. SPOJKA: My apologies.  
 6 Q. (BY MR. SPOJKA) So this is the return trip?  
 7 A. Correct.  
 8 Q. Were you able to determine -- strike that.  
 9 Let's look at Demonstrative 1.  
 10 And this is -- is this the route that you  
 11 would have expected him to take between Red Lodge and  
 12 Salt Lake City?  
 13 A. That looks like based on the cell phone  
 14 towers that the phone was on, that is definitely a route  
 15 that could have been taken.  
 16 Q. Okay. And can you highlight --  
 17 So you mentioned Green River, Little America  
 18 and Kemmerer based on the data that you had, did the  
 19 defendant's phone proceed any further toward Salt Lake  
 20 than those areas?  
 21 A. No.  
 22 Q. And about what time of day do you recall that  
 23 he was there?  
 24 A. That was approximately -- they came up on  
 25 Little America in one instance at 10:52 p.m. on the 20th

1 of April. And then shortly after that time is when he  
 2 appears in Green River at 11:01, at least on the tower,  
 3 the Green River tower, and then after that, it appears  
 4 that the phone starts a return to Red Lodge.  
 5 Q. Do you know approximately how far it is from  
 6 Kemmerer to Salt Lake City?  
 7 A. I do not.  
 8 Q. And did there appear to be any delay in the  
 9 return trip?  
 10 A. No.  
 11 MR. SPOJKA: One moment, please.  
 12 THE COURT: Sure.  
 13 Q. (BY MR. SPOJKA) Going back to -- we can turn  
 14 the lights back on.  
 15 I'll have you look at Exhibits 48 and 49.  
 16 There's the table on the bottom, right below the  
 17 photograph. Can you tell us what that is?  
 18 A. It's select calls during return to Red Lodge.  
 19 Q. That's in Exhibit 49?  
 20 A. Exhibit 49.  
 21 Q. Okay. And is the date and time -- what are  
 22 those indicative of?  
 23 A. The time of the records, the time of the  
 24 call.  
 25 Q. Okay. And then on 48, that same table, or

1 where it says a similar table, what are those?  
 2 A. Select calls during the outbound trip from  
 3 Red Lodge to southwestern Wyoming.  
 4 Q. And the dates and times, those are also  
 5 indicative of the --  
 6 A. Times of the phone calls.  
 7 Q. All right. Now, these aren't the entirety of  
 8 his usage?  
 9 A. No.  
 10 Q. Just selected calls?  
 11 A. Yes.  
 12 MR. SPOJKA: Nothing further, Your Honor.  
 13 THE COURT: Okay. Mr. Snively, cross?  
 14 **CROSS EXAMINATION**  
 15 **BY MR. SNIVELY:**  
 16 Q. Sir, especially in Kemmerer and Green River  
 17 area, a cell phone can ping from those different towers?  
 18 When you say that time in Little America,  
 19 you're not saying he was physically in Little America.  
 20 It's just his phone pinged off that tower?  
 21 A. That's correct. Different cell phone towers  
 22 have different propagation ranges. And so just because  
 23 he's on this Little America tower doesn't mean he's  
 24 physically at Little America.  
 25 Q. And also he could be -- there could be

1 several towers that he could hit at the same time?  
 2 A. If they have overlapping ranges, yes.  
 3 Q. And those in that area appear to have some  
 4 overlap, right?  
 5 A. Yes.  
 6 Q. So when your chart shows that he was in  
 7 Little America at 22:52, that's -- it pinged that tower  
 8 at that time?  
 9 A. Correct. That pings the Little America  
 10 tower.  
 11 Q. Your report cannot pinpoint when he turned  
 12 around and headed back to Red Lodge, can it?  
 13 A. It cannot pinpoint that exact time that he  
 14 turned the vehicle around and headed back to Red Lodge.  
 15 Q. All right. And when you say that there was  
 16 -- well, in your information it didn't document when he  
 17 left here, either, did it?  
 18 A. As I recall, it showed up in Cody, Wyoming,  
 19 at 3:53 on the 20th of April. And so in the report I  
 20 think he said he left Red Lodge midday. Based on  
 21 approximate travel time between Red Lodge and Cody,  
 22 but --  
 23 Q. But you should have been able to pick a ping  
 24 off the tower in Red Lodge, correct?  
 25 A. If I'd had a record in Red Lodge that showed



1 what looked like an obvious time or closer -- I guess a  
2 ping between Red Lodge and Cody, it might give me a  
3 little bit more accurate data on exact time he left Red  
4 Lodge.

5 Q. So you're, again, just approximating, you  
6 think it was around noon?

7 A. Correct.

8 Q. When you say there was no delay when he  
9 turned around, I mean, it took him 13 hours on about a  
10 six-hour trip, didn't it, on Exhibit 49?

11 A. Correct.

12 MR. SPOJA: Your Honor, I'm going to object.  
13 There's -- I guess I've not heard any evidence that  
14 there's a six hour -- I'm not exactly sure what he's  
15 referring to.

16 THE COURT: Facts not in evidence?

17 MR. SPOJA: Yes, sorry.

18 MR. SNIVELY: Judge, he asked the question  
19 and he turned and came back without delay.

20 THE COURT: Okay.

21 MR. SNIVELY: And that's what I'm asking the  
22 witness about.

23 THE COURT: No. I think the objection was  
24 you interjecting a certain amount of time that the trip  
25 took that no one has testified to any amount of time

1 Q. Did you prepare one?

2 A. Did I prepare that?

3 Q. Yes.

4 A. No.

5 Q. Have you seen that before today?

6 A. No.

7 Q. But you prepared 48 and 49?

8 A. I did.

9 MR. SNIVELY: Thank you.

10 THE COURT: All right. Any redirect?

11 MR. SPOJA: No, Your Honor.

12 THE COURT: All right. May this witness be  
13 excused?

14 MR. SPOJA: Yes, please.

15 THE COURT: All right. Sir, you are excused  
16 from your subpoena. But I have to tell you, please  
17 don't talk about your testimony with any other witness  
18 or talk about the questions you've been asked or answers  
19 that you've given, but you are free to go.

20 THE WITNESS: Thank you.

21 THE COURT: Counsel, approach, please.

22 (Wherein, an off-the-record  
23 discussion was held at the  
24 bench outside of the hearing  
25 of the jury.)

1 that the trip took, that I'm aware of.

2 MR. SNIVELY: I'm sorry.

3 THE COURT: Okay. That's what was sustained.

4 Q. (BY MR. SNIVELY) Sir, on Exhibit 49, you show  
5 ping number 83 at 23:01, which is 11:01 at night,  
6 correct?

7 A. Correct.

8 Q. And you show a ping 41 in Red Lodge, the next  
9 day, April 21 at 12:15 p.m., correct?

10 A. Correct.

11 Q. So that would account for the 13 hours,  
12 right?

13 A. There is an approximate 13-hour difference  
14 between those times, yes.

15 Q. And that's your exhibit that you put  
16 together?

17 A. Yes. That was my estimation of the time that  
18 he stopped moving southwest.

19 Q. All right. And the Demonstrative Evidence  
20 1 --

21 MR. SNIVELY: Can you project that for him?

22 Q. (BY MR. SNIVELY) In the middle of that for  
23 the time, eight hours and 40 minutes, is from Red Lodge  
24 to Salt Lake City, correct?

25 A. Yes.

1 THE COURT: Folks, it's been a long day.

2 You're almost done today. I just wanted to talk to  
3 counsel about where we were so I could give you an idea  
4 about that. It does appear that at least the evidence  
5 is very likely to be done tomorrow. That's where we are  
6 in timing. On the giving it to you guys, I can't tell  
7 you that right now. But we are on track that way. I  
8 wanted to give you an idea.

9 I think there's maybe a few more witnesses  
10 for the State and the defense has a chance to put on a  
11 case, as well. Just to give you that idea.

12 We will take our break for the night. And so  
13 we'll start again at 8:30, as we did. Please get here  
14 so that -- you're going to say, "Yeah, so we can sit in  
15 the jury room waiting for you, Judge."

16 We want to start as soon as we can for your  
17 sake and get in as much as we can. In the meantime, I'm  
18 going to give you the same admonishment not to talk  
19 about the case with other people. And I know in the  
20 evening it's even worse, just tell them I said, and  
21 don't answer any questions, discuss the case at all or  
22 try to form or express any opinion on the case until it  
23 is presented to you.

24 Please leave your notebooks on your chair.  
25 We'll take them for safekeeping. We'll be back

1 tomorrow. We're in recess until tomorrow.  
 2 (Wherein, the jury is not  
 3 present.)  
 4 THE COURT: We're still on the record. I  
 5 don't know that there's anything any party needs to  
 6 address to the Court right now.  
 7 Anything, Mr. Nixon?  
 8 MR. NIXON: No, Your Honor.  
 9 THE COURT: Okay. Mr. Snively?  
 10 MR. SNIVELY: No, Your Honor.  
 11 THE COURT: All right. Again, I'll ask  
 12 counsel to be prepared to go on the record at least with  
 13 the Court at 8:15, just to make sure there's no issues  
 14 before we get the jury going.  
 15 As usual, if something arises this evening  
 16 you have my contact information, let me know as soon as  
 17 possible because we could meet earlier if we had to.  
 18 At this point, 8:15 will be when I want to  
 19 see you. If there is nothing else, we'll be in recess  
 20 until morning.  
 21 Thanks.  
 22 (Wherein, an evening recess was  
 23 taken.)  
 24 \* \* \*  
 25 CARBON COUNTY COURTHOUSE

1 RED LODGE, MONTANA  
 2 MARCH 10, 2022  
 3 DAY THREE OF TRIAL  
 4 \* \* \*  
 5 (Wherein, the following took  
 6 place in chambers.)  
 7 THE COURT: This is DC 19-17, State v.  
 8 Polakoff. This is the continuation of the jury trial.  
 9 We're in chambers in the morning of day  
 10 three.  
 11 Counsel for the State is present.  
 12 Counsel for the defendant is present. And  
 13 the defendant is present, as well.  
 14 The Court asked the parties to appear here  
 15 before we go in and resume testimony to determine if  
 16 there's issues that need to be addressed to prevent,  
 17 obviously, further -- any sort of issues that would  
 18 maybe send the jury out prematurely and too often.  
 19 So I'm going to ask one thing, and then the  
 20 parties can sure chime in. Initially, at the final,  
 21 final pretrial, right before we started voir dire in  
 22 this case there was just a review of the State's  
 23 proffered jury instructions. The indication was it's  
 24 not necessarily the kind of technical money laundering  
 25 or something case where instructions are highly

1 technical, it's more of a denial of the defendant having  
 2 done anything here. So it didn't appear like jury  
 3 instructions were a major issue.  
 4 There was a conversation about given the fact  
 5 that the State does have two distinct time frames  
 6 charged for Count I and Count II that the elements  
 7 instructions would reflect that.  
 8 And I didn't really get anybody's position on  
 9 that, but the indication was nobody really -- that the  
 10 State didn't object to that and was going to modify.  
 11 MR. SPOJA: And I've done so, Your Honor.  
 12 THE COURT: Okay.  
 13 MR. SPOJA: They were printing off as I was  
 14 walked out of my office, so Sabrina is going to bring  
 15 them up and I'll have a copy for the Court and counsel.  
 16 It's a clean copy, if you will.  
 17 THE COURT: Oh, okay. And I know that we're  
 18 not quite done here and, obviously, a couple of these  
 19 instructions are dependent on what you do in your case,  
 20 Mr. Snively. But still, kind of at the point where at  
 21 this point the State's pretty much stock and you're not  
 22 objecting to any of those?  
 23 I mean, we don't have to settle instructions  
 24 now I just kind of want to know.  
 25 MR. SNIVELY: That's correct, Judge. I don't

1 anticipate a long instructions argument.  
 2 THE COURT: All right. Go ahead. Anything  
 3 else, Mr. Nixon?  
 4 MR. NIXON: I don't think so.  
 5 THE COURT: Did you need to put anything on  
 6 the record here or you just did that or are you guys  
 7 okay with each other's?  
 8 I guess the record should reflect it's just a  
 9 proffered State's exhibit, and I do appreciate -- and  
 10 let me just say, I appreciate counsel communicating with  
 11 each other and the Court to make this presentation to  
 12 the jury as clean as we can.  
 13 And if I express any difference from  
 14 yesterday, as you probably know, I get a little growly  
 15 with the jury's time and I don't mean that to reflect on  
 16 counsel. You all are doing an exceptional, professional  
 17 job.  
 18 Anything else, Mr. Snively, you need to place  
 19 on the record?  
 20 MR. SNIVELY: No, Your Honor.  
 21 MR. SPOJA: Nothing.  
 22 THE COURT: So we're ready to start  
 23 witnesses?  
 24 MR. NIXON: Here at 8:30, I believe so.  
 25 THE COURT: Yeah. And you believe you'll

1 rest your case this morning?  
 2 MR. NIXON: I think unless something  
 3 unforeseen happens, we'll be done before lunch.  
 4 THE COURT: Okay.  
 5 MR. NIXON: Or by lunch.  
 6 THE COURT: All right.  
 7 MR. NIXON: Maybe even sooner.  
 8 THE COURT: Okay. We'll figure that out. If  
 9 it does get sooner then we can -- you know, I'll have --  
 10 get the jury out of here, do what we've got to do in a  
 11 legal fashion.  
 12 And, Mr. Snively, just so you know, it is my  
 13 practice prior to the defendant's case in chief is to  
 14 address the defendant on the record with his right to  
 15 testify, the pros and cons of that. It's not in any way  
 16 indicative that I don't think you've had that  
 17 conversation, but it is my practice.  
 18 I'm going to make sure we do that. So that  
 19 I'm sure that Mr. Polakoff has weighed that, understands  
 20 all of that and makes note of his decision. Okay?  
 21 MR. SNIVELY: Thank you.  
 22 THE COURT: All right. That gives us five  
 23 minutes to go and get yourselves ready and we'll start  
 24 as close to 8:30 as we can. Thank you.  
 25 (Wherein, off the record.)

1 (Wherein, the following took  
 2 place in open court.)  
 3 THE BAILIFF: All rise.  
 4 THE COURT: Please be seated. Thank you.  
 5 All right. We're back in court on DC 19-17,  
 6 State versus Nathan Polakoff.  
 7 Counsel for the State is present.  
 8 Counsel for the defense is present. The  
 9 defendant is present.  
 10 The jury is not present.  
 11 Counsel, any reason not to bring in the jury  
 12 at this time?  
 13 MR. NIXON: I don't believe so, Judge. We  
 14 did get a request from the gallery asking if there could  
 15 be a microphone put somewhere closer to the podium. I'm  
 16 not sure if that's possible or not.  
 17 THE COURT: It might affect your moving the  
 18 podium around a lot.  
 19 MR. NIXON: I'm wondering if it could even be  
 20 set on the rail.  
 21 THE COURT: True. I don't really want it in  
 22 front of the jury.  
 23 MR. SNIVELY: It's going to interfere with  
 24 our notes and stuff.  
 25 MR. NIXON: Maybe down by the hand sanitizer?

1 Is that going to bother you, Bob?  
 2 MR. SNIVELY: No, that's fine.  
 3 THE COURT: That should help. Anything else?  
 4 MR. NIXON: No, Your Honor.  
 5 MR. SNIVELY: No, Your Honor.  
 6 THE COURT: Okay. Let's bring in the jury.  
 7 (Wherein, the jury is present.)  
 8 THE COURT: Go ahead and be seated.  
 9 The jury is the now present.  
 10 Mr. Nixon, do you stipulate that the jury and  
 11 alternate are present?  
 12 MR. NIXON: I do, Your Honor.  
 13 THE COURT: Mr. Snively.  
 14 MR. SNIVELY: I do.  
 15 THE COURT: All right. Good morning to you  
 16 all. I hope you had a good, restful evening and we're  
 17 ready to charge right into our job today.  
 18 Mr. Nixon, you may call your next witness.  
 19 MR. SPOJA: Your Honor, the State calls  
 20 Jennifer Cormier.  
 21 **JENNIFER CORMIER,**  
 22 WITNESS HEREIN, BEING FIRST  
 23 DULY SWORN ON OATH WAS  
 24 EXAMINED AND TESTIFIED  
 25 AS FOLLOWS:

1 --o0o--  
 2 THE COURT: You can take a seat right here.  
 3 Ms. Cormier, I'll just say, it is an  
 4 intimidating place but we need to make sure you speak up  
 5 so we can hear you. I may bug you if I don't feel like  
 6 we can hear you. Okay?  
 7 THE WITNESS: Okay.  
 8 THE COURT: All right. Go ahead, Mr. Spoja.  
 9 MR. SPOJA: Thank you, Your Honor.  
 10 **DIRECT EXAMINATION**  
 11 **BY MR. SPOJA:**  
 12 Q. Good morning.  
 13 A. Good morning.  
 14 Q. Will you state your name and spell it for the  
 15 record, please  
 16 A. Jennifer Kristen Cormier, J-e-n-n-i-f-e-r,  
 17 C-o-r-m-i-e-r.  
 18 Q. Thank you. And you're Ryann's sister. Is  
 19 that correct?  
 20 A. Yes.  
 21 Q. A little older than her?  
 22 A. Quite a bit, yeah. Fourteen years.  
 23 Q. So, I guess, I'd like to have you start just  
 24 kind of describing your family and how things are.  
 25 A. Sure. My mom had cancer when she was 38 and

1 she didn't think she would ever be able to have any more  
2 kids and then she got pregnant with my sister when she  
3 was almost 40, so she was kind of our little miracle.

4 She and I have been close the whole time that  
5 we have grown up. When I started having kids, when I  
6 had my first son, she was always there helping me watch  
7 him. And then when Everett -- I mean, when Elgin was  
8 born prematurely, that was my second son, she was there  
9 with me for that.

10 I had a daughter four years ago and she was  
11 my only nanny for the first three years of her life.

12 Q. Okay. Would you describe your family as  
13 pretty close-knit?

14 A. Yeah. We're very, very close.

15 Q. Okay. And you described all your kids  
16 growing up and their contact with Ryann. When Everett  
17 came along, how did that affect the rest of the family?

18 A. When my sister told us that she was planning  
19 on having a baby with her then fiance', I wouldn't say  
20 we were excited. She was 19, but she was making her own  
21 decisions.

22 And then Everett came along, he was the  
23 easiest, sweetest little baby. And my sister was so  
24 scared that her milk wasn't coming in enough. My  
25 daughter was only a year old, so after work, I went to

1 MR. SPOJA: Certainly, Your Honor.

2 Q. (BY MR. SPOJA) So you're telling us how  
3 Everett refers to your daughter. He's got a special  
4 name for her?

5 A. Ma Poet.

6 Q. And so how was the relationship between he  
7 and Poet during, I guess, the first nine months of his  
8 life?

9 A. They were rarely ever away from each other.

10 Q. Okay. Did they seem to play together fairly  
11 well?

12 A. Oh, my gosh, yeah. Yeah. I mean, they took  
13 naps together. They still will cuddle up on the couch  
14 right next to each other and fall asleep.

15 Q. How much older is Poet?

16 A. She's about 13 months.

17 Q. So young kids being young kids, you know,  
18 infants and early toddlers sometimes do things that are  
19 little out of the ordinary. Was there ever a time that  
20 Poet or Everett were -- I don't want to say violent, but  
21 would do things that you had to maybe correct as far as  
22 toward each other?

23 A. No. No.

24 Q. Okay. No throwing of books or anything like  
25 that?

1 my mom's house where my sister was living and I would  
2 nurse Everett. I nursed him for the first almost six  
3 months of his life, whenever my sister felt like she  
4 wasn't making enough milk.

5 I also pumped milk for him when I was at work  
6 and brought it after work, to the chagrin of my baby.  
7 She was not happy.

8 But he and my sister traveled with me and my  
9 husband. I travel for work a lot, so does my husband,  
10 and since she was my nanny, she came with me. Even when  
11 Everett was as young as six days old, I had to go  
12 remodel a store in Helena and they came with me.

13 When my sister was doing her testing for her  
14 cosmetology school, we had to drive to Great Falls and  
15 that was a six- or seven-hour test, so I got to just  
16 have Everett and Poet, and I got to be the nanny that  
17 day and that was a lot of co-nursing.

18 Everett and my daughter are almost litter  
19 mates, you know. They're that close. Everett calls  
20 Poet, "Ma Poet."

21 MR. SNIVELY: I'm going to object. I don't  
22 think this is responsive to the question at this point.

23 THE COURT: Well, it's responsive, but it  
24 gets a little narrative so maybe more question and  
25 answer.

1 A. Never.

2 Q. Okay. Were Poet and Everett ever left alone  
3 together?

4 A. No. There was always someone there.

5 Q. Not quite old enough yet?

6 MR. SNIVELY: Your Honor, I object, to the  
7 form of the question, leading.

8 THE COURT: Sustained.

9 MR. SPOJA: I'll move on.

10 Q. (BY MR. SPOJA) You've got two older boys?

11 A. I do.

12 Q. And Shane is the oldest?

13 A. Yes.

14 Q. And back in 2019 he was 12; is that right?

15 A. Yes.

16 Q. Can you describe the relationship that he had  
17 with Everett.

18 A. Yeah, absolutely. Shane was very excited for  
19 a little baby boy to come along. And he is -- he's just  
20 so naturally good with babies. He baby-sits for a  
21 couple of my friends, which is kind of unheard of for a  
22 boy, you know, but he really takes an interest in kids.

23 Q. Okay. And has it been like that for the last  
24 few years, at least?

25 A. Forever.

1 Q. Okay.  
 2 A. Forever. Even when his brother came along,  
 3 he was 15 months old.  
 4 Q. Back in 2019, Shane got in a little bit of  
 5 trouble at school?  
 6 A. He did.  
 7 Q. Can you tell me about that.  
 8 A. Yeah, he was being bullied pretty badly. He  
 9 was going to school in Hardin. The boys' dad was the  
 10 head custodian there. But he was getting bullied pretty  
 11 badly by a couple of boys that are a grade older than  
 12 him and it ended up in an altercation that they all got  
 13 in-school suspension for.  
 14 Q. And did that -- did the trouble that he got  
 15 into, did that spill over outside of the school?  
 16 A. No.  
 17 Q. Okay. Has he got into any real trouble since  
 18 then?  
 19 A. No. But we also moved him schools. He came  
 20 to live in Billings to come to school here.  
 21 Q. Now, you said that Ryann was your nanny for  
 22 the first, what, three years of Poet's life?  
 23 A. Yes.  
 24 Q. What did that look like as far as on a  
 25 day-to-day basis?

1 A. If she didn't just stay the night with  
 2 Everett, she got to my house between 6:30 and 7:30 in  
 3 the morning and then she left when I got home from work.  
 4 I work 48 hours a week, and sometimes my husband doesn't  
 5 get home until Saturday night, so there were times where  
 6 she was with Poet upwards of 50 hours a week.  
 7 Q. During that time, I assume that she was,  
 8 essentially, the only adult?  
 9 A. Yeah, she was the only person.  
 10 Q. Okay. So during that time, did you have any  
 11 issue with your kids suffering any injuries?  
 12 A. No. Never.  
 13 Q. Any unexplained illnesses?  
 14 A. No.  
 15 Q. Any hospital visits for other than  
 16 well-child?  
 17 A. No. Nothing like this has ever happened to  
 18 anyone of our kids.  
 19 Q. Now, can you describe what -- you were around  
 20 Ry when she started dating Nathan?  
 21 A. Yes.  
 22 Q. Can you tell us about that.  
 23 A. She was excited. We told her that she  
 24 couldn't, you know, go to visit him in another town  
 25 unless we all met him, because they had been talking for

1 -- I'm not sure how long, a month or two, maybe -- and  
 2 she wanted to spend the weekend with him in Red Lodge,  
 3 so my mom told her, "Well, he's got to come and meet  
 4 Jay."  
 5 MR. SNIVELY: I'm going to object to the  
 6 hearsay.  
 7 THE WITNESS: Oh, sorry.  
 8 THE COURT: Sustained, I guess. Yes,  
 9 sustained.  
 10 Q. (BY MR. SPOJA) Yeah.  
 11 A. Right.  
 12 Q. Without talking about --  
 13 A. Right.  
 14 Q. -- the things that other folks said.  
 15 A. Right. We all wanted to meet him before he  
 16 was going to be alone with my sister or her son.  
 17 Q. Okay. And did you eventually -- did you meet  
 18 him?  
 19 A. I did.  
 20 Q. And do you recall when that was?  
 21 A. The 16th.  
 22 Q. Of?  
 23 A. April.  
 24 Q. Oh, okay. All right.  
 25 A. It might have been the 15th, but I know it

1 was only a day or two before she came to stay in Red  
 2 Lodge.  
 3 Q. Okay. Do you know, had he come to visit your  
 4 sister in Billings before then?  
 5 A. Yes. At my mom's house.  
 6 Q. Okay. And had she -- strike that.  
 7 What were your impressions of Nathan when you  
 8 met him?  
 9 A. He was very soft-spoken. I asked him some  
 10 pointed questions about, you know, what he does for work  
 11 and whether or not his family is still together or  
 12 they're supportive. He seemed like he would be okay.  
 13 It seemed like it would be okay to let my sister go  
 14 there.  
 15 Q. Okay.  
 16 A. He said that he was an EMT for Red Lodge  
 17 Mountain, which made me feel better because Everett was  
 18 so young, you know anything could happen with a little  
 19 baby, SIDS death, everything. So that made us all feel  
 20 a lot better, that he had some medical training and he  
 21 seemed like a good kid.  
 22 Q. Okay. Do you recall what things were like on  
 23 the 17th, then?  
 24 A. Which part?  
 25 Q. Well, let's start with when you and Ry went

1 to Hardin or did that happen -- did you guys have to go  
 2 to Hardin to pick up Shane?  
 3 A. Yeah, but that was in the morning.  
 4 Q. Okay.  
 5 A. Uh-huh. And then we came back. They were  
 6 going to Red Lodge, though, right after that.  
 7 Q. Okay. "They" being Ryann and...  
 8 A. Ry and Everett and Nathan.  
 9 Q. And so did you talk to your sister between  
 10 then and the 19th or 20th?  
 11 A. Yes.  
 12 Q. And what did you guys talk about? Not  
 13 telling me what she said, but generally what were the  
 14 topics of conversation?  
 15 A. She called me because Everett was throwing  
 16 up. And I asked her if she wanted me to drive to Red  
 17 Lodge. I had already started driving to Red Lodge and  
 18 she put Nathan on the phone.  
 19 Q. Okay.  
 20 A. And I asked Nathan what was going on.  
 21 Q. What day was this?  
 22 A. I think it was late the 17th, the afternoon,  
 23 4:00 or 5:00.  
 24 Q. All right.  
 25 A. And I asked Nathan what was going on and he

1 said he thought he had some sort of flu and they were  
 2 going to take him to the clinic.  
 3 Q. Okay.  
 4 A. But my sister did tell me about him falling  
 5 off a futon.  
 6 MR. SNIVELY: Your Honor, I object to  
 7 hearsay.  
 8 THE COURT: Sustained.  
 9 Q. (BY MR. SPOJA) So you can only tell us what  
 10 Nathan would have told you.  
 11 A. Okay.  
 12 Q. So what I guess what was the end result of  
 13 that phone call?  
 14 A. I didn't drive to Red Lodge.  
 15 Q. Okay. And you can go back to telling us what  
 16 the conversation with Nathan was about.  
 17 A. I asked him what was going on, if the baby  
 18 had a bump on his head. He said that he thought he had  
 19 the flu and they were going to take him to the clinic.  
 20 He told me not to worry about coming out there, he had  
 21 everything under control.  
 22 Q. Okay. And then when is the next time that  
 23 you talked to either your sister or Nathan?  
 24 A. That would be not the next day, but that  
 25 night. But I didn't -- it wasn't -- that isn't when I

1 talked to them. That is when I talked to my mom and she  
 2 told me to get to the hospital.  
 3 Q. Okay. So that would have been the 19th?  
 4 A. Uh-huh.  
 5 Q. So after -- this is when you learned that  
 6 Everett had been injured?  
 7 A. Yes.  
 8 Q. What did you do after learning that?  
 9 A. I drove to the hospital in downtown Billings,  
 10 because they did not know yet if he was going to be life  
 11 flighted to Billings or somewhere else. I texted Nathan  
 12 and asked him what was going on and if he had any  
 13 information.  
 14 Q. Did you receive any information back?  
 15 A. Yes. He told me in the text message that he  
 16 -- that someone thought it was an electrolyte imbalance  
 17 and he was having seizures and that my sister was really  
 18 shaken up. You know, just stuff like that. He told me  
 19 that they were his whole world and he would keep them  
 20 safe.  
 21 Q. When was the next time that you either texted  
 22 or spoke to Nathan?  
 23 A. About two or three hours later, maybe.  
 24 Q. Okay. What did you learn from that?  
 25 A. He said that he was going to be driving down

1 there.  
 2 Q. Okay. And this was late on the 19th?  
 3 A. No. I guess it was more like five hours,  
 4 because it was the morning, 9:00 or so in the morning.  
 5 Q. Of the 20th?  
 6 A. 20th.  
 7 Q. All right. And what did you do at that  
 8 point?  
 9 A. I started helping my mom pack.  
 10 Q. Okay. And your mom and her husband then left  
 11 for Salt Lake?  
 12 A. Yes.  
 13 Q. Did you speak to Nathan again?  
 14 A. I did a few times.  
 15 Q. Okay. What was the next time that you talked  
 16 to him?  
 17 A. The next time I talked to him was about an  
 18 hour later, it must have been 10:00 or 11:00. And I  
 19 think I asked him where he was. And when he texted me  
 20 back he said that he had been sleeping, he had taken a  
 21 nap and he was getting ready to leave.  
 22 Q. Okay.  
 23 A. I don't remember what I said after that. I  
 24 think I thanked him for getting on the road to be with  
 25 my sister, because I couldn't leave yet. And then I

1 didn't talk to him for another almost 12 hours. It was  
2 a quarter to 11:00 at night or so, when I texted him and  
3 asked him what was going on and he said that he had just  
4 woken up and he was very turned around and he was  
5 thinking he was just going to turn back.

6 Q. Okay.

7 A. And I asked him where he was and he said he  
8 was somewhere in Wyoming.

9 Q. Okay. What did you think about all of this  
10 at that time?

11 MR. SNIVELY: Your Honor, I object to the  
12 speculation.

13 THE COURT: Sustained.

14 Q. (BY MR. SPOJA) What was the next thing you  
15 did?

16 A. I texted him and I said, "I'm going to call  
17 you." And I called and he answered and I asked, "What  
18 is going on? Why is it taking you this long to get down  
19 there?"

20 He said he just didn't know the way down  
21 there. And the last thing that he said to me before I  
22 got off the phone, and it was the last time I talked to  
23 him was, "Make sure you tell your sister that I wasn't  
24 alone with that baby."

25 Q. Okay.

1 A. No, I did not know that.

2 Q. All right. And you knew your sister had  
3 already been interviewed in Salt Lake City, didn't you?

4 A. I did know that.

5 Q. All right. To your knowledge, your sister  
6 had already given a statement prior to any comment about  
7 to relay a message to her, correct?

8 A. All I know is that they took her out of the  
9 room where she was with her baby. I didn't know if she  
10 had talked to them or anything else. I hadn't gotten  
11 any other information.

12 Q. You hadn't talked to your mom around 11:00 to  
13 midnight on the 20th?

14 A. No, I don't think so.

15 Q. And so you didn't -- you helped your mom pack  
16 and then didn't talk to her again until sometime on the  
17 21st, is that your testimony?

18 A. Yes.

19 Q. But your mother had gotten to Salt Lake --  
20 when did your mother get to Salt Lake?

21 A. I'm not sure.

22 Q. But your mother was in communication with  
23 your sister, correct?

24 A. I think so.

25 Q. But your mother wasn't giving you any updates

1 MR. SPOJA: I have no further questions, Your  
2 Honor.

3 THE COURT: Mr. Snively, do you wish to  
4 cross?

5 MR. SNIVELY: I do, Judge. If I can have  
6 just a moment.

#### **CROSS EXAMINATION**

8 **BY MR. SNIVELY:**

9 Q. When you talk about texting, you did not text  
10 on the traditional cell phone text, did you?

11 A. No. I think it was on Facebook.

12 Q. And what is your mother's name?

13 A. Katherine.

14 Q. And what last name does she use?

15 A. Kolpin.

16 Q. Thank you. And so that last conversation,  
17 was it roughly almost midnight on --

18 A. I think so.

19 Q. I'm sorry?

20 A. I think so.

21 Q. And that would have been on the night of the  
22 20th, maybe early morning of the 21st?

23 A. Correct.

24 Q. And you knew at that point that Nathan had  
25 already talked to the Red Lodge Police Department?

1 as to what was going on with your sister and Everett in  
2 Salt Lake?

3 A. No, there was really no time for that. The  
4 only thing that I knew --

5 Q. Hold on. Wait. Okay. So there was no time  
6 for your mother to update --

7 A. Me.

8 Q. -- you as to what was going on?

9 A. Correct.

10 Q. And what was it that your mother was doing  
11 that she didn't have time to update you?

12 A. What do you mean?

13 MR. SPOJA: Objection, speculation.

14 THE COURT: Sustained.

15 Q. (BY MR. SNIVELY) You don't know what time  
16 Nathan left Red Lodge on the 20th, do you?

17 A. No.

18 Q. And you don't know what he did with Red Lodge  
19 Police Department prior to leaving, do you?

20 A. No. I don't -- I didn't even know that he  
21 had talked to them.

22 Q. And...

23 MR. SNIVELY: Thank you. I don't have any  
24 other questions.

25 THE COURT: Okay. Any redirect?

1 MR. SPOJA: No further questions, Your Honor.  
 2 THE COURT: All right. May this witness be  
 3 excused?  
 4 MR. SPOJA: Yes, please, Your Honor.  
 5 THE COURT: Mr. Snively?  
 6 MR. SNIVELY: Yes, Your Honor.  
 7 THE COURT: All right. So you are excused  
 8 from your subpoena, but don't talk about your testimony  
 9 with any other witness, don't talk about the questions  
 10 that you were asked, the answers that you gave.  
 11 You're free to leave now or you can stay, if  
 12 you wish.  
 13 THE WITNESS: Okay.  
 14 THE COURT: Next witness.  
 15 MR. NIXON: The State calls Bonnie Rothe.  
 16 **BONNIE ROTHE,**  
 17 WITNESS HEREIN, BEING FIRST  
 18 DULY SWORN ON OATH WAS  
 19 EXAMINED AND TESTIFIED  
 20 AS FOLLOWS:  
 21 --o0o--  
 22 THE COURT: Ms. Rothe, please take the  
 23 witness chair.  
 24 THE WITNESS: Thank you.  
 25 ///

1 **DIRECT EXAMINATION**  
 2 **BY MR. NIXON:**  
 3 Q. Bonnie, will you please start by stating and  
 4 spelling your name for the record.  
 5 A. Yeah. It's Bonnie Rothe, B-o-n-n-i-e,  
 6 R-o-t-h-e.  
 7 Q. And what is your occupation?  
 8 A. I'm a child protection specialist supervisor  
 9 for the State of Montana.  
 10 Q. And what does that job entail?  
 11 A. That job entails supervising CPS workers,  
 12 child protection specialist workers who investigate  
 13 child abuse reports and also do the case management if  
 14 child abuse is found.  
 15 Q. How many case workers do you supervise?  
 16 A. Four currently.  
 17 Q. What region of the state do you serve through  
 18 your office?  
 19 A. We cover Region 3. And for my unit that's  
 20 Yellowstone, Carbon and Stillwater counties.  
 21 Q. And as the supervisor, do you also basically  
 22 monitor all of the activities as far as with the court  
 23 and what your case workers are doing?  
 24 A. Yes.  
 25 Q. And how long have you been supervisor?

1 A. I've been a supervisor for three years.  
 2 Q. And were you a case worker before that?  
 3 A. Yes. I was a case worker for four years  
 4 prior to becoming a supervisor.  
 5 Q. What sort of educational background do you  
 6 have?  
 7 A. I have a bachelor's in social work and I've  
 8 done the trainings that the State of Montana offered  
 9 that they're called MCAN trainings. They're the  
 10 training that the social workers get as we get into this  
 11 child protection field.  
 12 Q. And you may have touched on it a little bit,  
 13 simply what is the objective of the child protection  
 14 team?  
 15 A. Our objective is keeping kids safe and  
 16 families strong.  
 17 Q. What is a temporary investigative authority?  
 18 A. Temporary investigative authority is a legal  
 19 custody that we use when we have impending dangers, we  
 20 have imminent risk of a child and emergency protective  
 21 services are necessary, which is where the State takes  
 22 custody of a child. But instead of filing for a  
 23 temporary legal custody, which is a six-month amount of  
 24 time of legal custody, the State will sometimes file for  
 25 a temporary investigative authority which is about a

1 ninety day, if we feel that reunification is possible  
 2 within a shorter time frame.  
 3 Q. Do you call it TIA?  
 4 A. Yeah, we call it TIA.  
 5 Q. Do you use a lot of acronyms?  
 6 A. I use a lot of acronyms, yes.  
 7 Q. How do you initiate a TIA?  
 8 A. So TIA is decided through staffing. So the  
 9 investigative worker, who receives the report and does  
 10 the investigation, will then staff with a supervisor and  
 11 during that staffing where we find that we've crossed  
 12 that safety threshold where there's imminent risk,  
 13 immediate danger and it's clearly observable that this  
 14 child is at a safety risk, the Department decides to  
 15 take emergency protective services, which means we take  
 16 custody and then we staff, "Is this something we can do  
 17 within ninety days or is this something that will need a  
 18 longer term fix?"  
 19 Q. I believe you mentioned you do monitor all of  
 20 the filings made by your office?  
 21 A. Yes. All workers have to report with a --  
 22 staff with a supervisor prior to the decision to make  
 23 sure that we've followed our safety model and that we  
 24 have reached that safety threshold where we have the  
 25 legal right to intervene and take custody.



1 Q. And you were the supervisor in April of 2019?  
 2 A. I was.  
 3 Q. And do you recall if your office had case  
 4 involving Ryann Wells and her son Everett Musch?  
 5 A. Yes, we did.  
 6 Q. What was your initial involvement in that  
 7 case?  
 8 A. The initial involvement came through with a  
 9 P1 critical-near-death report, an on-call worker was  
 10 dispatched to the night of Everett being flown to Salt  
 11 Lake City due to his injuries.  
 12 The investigation continued with an assigned  
 13 worker and then we later took custody of Everett.  
 14 Q. Who is the assigned worker?  
 15 A. The assigned work was Spela Bertoncelj. I  
 16 always say her name wrong.  
 17 Q. It's a tough one for all of us.  
 18 A. Yes.  
 19 Q. Where was Spela located out of?  
 20 A. Spela is located out of Red Lodge.  
 21 Q. And where were Ryann and Everett located?  
 22 A. They were located in Yellowstone County in  
 23 Billings.  
 24 Q. Did your involvement change because of their  
 25 location in Billings?

1 A. It did. Because initially it was believed  
 2 that the family lived in Carbon County so it was  
 3 assigned to Spela, but when it was found that mom  
 4 actually resided in Yellowstone County, the legal case  
 5 and the CPS case were transferred to Yellowstone County.  
 6 Q. And did you seek TIA?  
 7 A. We did.  
 8 Q. And did you, in fact, get that authority?  
 9 A. Yes, TIA was granted.  
 10 Q. Do you recall roughly when that was?  
 11 A. Oh, I believe we filed on April 24th and we  
 12 were granted I think within the first 20 days, so May of  
 13 2019.  
 14 Q. You told us earlier your goal is to keep  
 15 families safe, what sort of plan did you put in place  
 16 for Everett and Ryann?  
 17 A. We put in -- it was called an in-home safety  
 18 plan, because Ryann moved in to her parents' home, so we  
 19 were able to use them as safety resources to help the  
 20 Department monitor. So an in-home safety plan was put  
 21 into place and Everett was returned to his mother's  
 22 care.  
 23 Q. And what were the different elements of the  
 24 safety plan?  
 25 A. The safety plan involved grandparents

1 supervising as safety resources, the Department was  
 2 allowed to make unscheduled and scheduled visitations  
 3 into the home, Ryann had to attend individual  
 4 counseling, Everett had to make every and any medical,  
 5 PT, occupational therapy appointment. And Everett was  
 6 not allowed to have contact with Nathan.  
 7 Q. By that, do you mean Nathan Polakoff?  
 8 A. I do.  
 9 Q. How did Ryann do in her safety plan?  
 10 A. She did really well and the Department  
 11 dismissed after the 90 days.  
 12 Q. And did you do any sort of in-home checks  
 13 while you were there?  
 14 A. Yes. Because Spela was based in Carbon  
 15 County and I am based in Yellowstone County, I did the  
 16 in-home safety checks for her because it made no sense  
 17 to have her drive an hour just to do those visits.  
 18 Q. And what did you observe on those home  
 19 visits?  
 20 A. I observed mom doing the things that we asked  
 21 her to do. It was a safe and appropriate housing. I  
 22 observed the injuries to the baby and what was being  
 23 done to help him. I observed the family working  
 24 together to address those medical needs.  
 25 Q. What, if any, safety concerns did you have

1 after that visit?  
 2 A. After my multiple visits, I did not have any.  
 3 Q. How many times did you visit?  
 4 A. In the beginning it was weekly, announced and  
 5 unannounced. Then it went to biweekly and then it went  
 6 to monthly.  
 7 Q. You said you dismissed; is that correct?  
 8 A. Yep.  
 9 Q. Do you recall when that was?  
 10 A. It would have been 90 days after the original  
 11 order granting TIA.  
 12 Q. And has the Department had any further  
 13 intervention with either Ryann or Everett?  
 14 A. We have not.  
 15 MR. NIXON: No further questions.  
 16 THE COURT: All right. Mr. Snively.  
 17 MR. SNIVELY: No questions.  
 18 THE COURT: May this witness be excused?  
 19 MR. NIXON: Please, Your Honor.  
 20 MR. SNIVELY: Yes, Your Honor.  
 21 THE COURT: Ms. Rothe, you are released from  
 22 your subpoena. I need to admonish you not to discuss  
 23 your testimony with any other witness. Don't talk about  
 24 any of the questions that you were asked or the answers  
 25 you have given you're free to go or stay.

1 THE WITNESS: Okay.  
 2 THE COURT: Mr. Nixon.  
 3 MR. NIXON: May we approach, Your Honor?  
 4 THE COURT: Yes.  
 5 (Wherein, an off-the-record  
 6 discussion was held at the  
 7 bench outside of the hearing  
 8 of the jury.)  
 9 THE COURT: We're going take an early break  
 10 and then I do believe we may be with the State's last  
 11 witness, just so you know we're moving along.  
 12 We're going to take a 15-minute break. Don't  
 13 clock me, please. And then we'll get right back to it.  
 14 So you can go down to the jury room.  
 15 Remember, the admonishment. I do have to  
 16 tell you, don't talk about the case, the substance of  
 17 the case, amongst yourselves or with anyone else. Don't  
 18 access any information about the case in any way or form  
 19 or express any opinion on the case until the case is  
 20 submitted to you. Have a good break.  
 21 We'll be in recess.  
 22 (Wherein, a recess was taken.)  
 23 THE BAILLIFF: All rise.  
 24 THE COURT: Please be seated. Thanks.  
 25 We're back in court in State v. Polakoff, DC

1 **DR. ANTOINETTE LASKEY,**  
 2 WITNESS HEREIN, BEING FIRST  
 3 DULY SWORN ON OATH WAS  
 4 EXAMINED AND TESTIFIED  
 5 AS FOLLOWS:  
 6 --o0o--  
 7 THE COURT: Doctor, I'll have you sit right  
 8 here in this witness chair. Thank you.  
 9 THE WITNESS: Thank you, Your Honor.  
 10 **DIRECT EXAMINATION**  
 11 **BY MR. NIXON**  
 12 Q. Would you please start by stating and  
 13 spelling your name.  
 14 A. Sure. Dr. Antoinette Laskey, L-a-s-k-e-y.  
 15 Q. And what is your occupation, Dr. Laskey?  
 16 A. I'm a professor of pediatrics at the  
 17 University of Utah.  
 18 Q. And can you tell me a little bit about your  
 19 educational background.  
 20 A. Sure. I got my undergraduate degree at the  
 21 University of Missouri in Columbia in 1993. I got my  
 22 medical doctorate at the University of Missouri,  
 23 Columbia, 1998.  
 24 I completed my pediatric residency at the  
 25 University of Missouri Hospitals and Clinics. I

1 19-17.  
 2 Counsel for the State is present. Mr. Spoja  
 3 is present.  
 4 Mr. Snively for the defense is present. The  
 5 defendant is present.  
 6 The jury is not present.  
 7 Counsel, any reason we can't bring the jury  
 8 in at this time?  
 9 MR. NIXON: The State is prepared to go.  
 10 THE COURT: Mr. Snively.  
 11 MR. SNIVELY: We're ready.  
 12 THE COURT: Okay. Please bring in the jury.  
 13 (Wherein, the jury is present.)  
 14 THE COURT: Please be seated. Thanks.  
 15 Does the State stipulate that the jury and  
 16 alternate are present?  
 17 MR. NIXON: Yes, Your Honor.  
 18 THE COURT: And, Mr. Snively?  
 19 MR. SNIVELY: Yes, Your Honor.  
 20 THE COURT: All right. Very well.  
 21 Mr. Nixon, the State may call its next  
 22 witness.  
 23 MR. NIXON: The State calls Antoinette  
 24 Laskey.  
 25 ///

1 finished that in 2001.  
 2 Then I went to University of North Carolina  
 3 at Chapel Hill and got my master's degree in public  
 4 health and completed what's called a fellowship, which  
 5 is additional training in child abuse pediatrics.  
 6 And then I went -- after I graduated there, I  
 7 started my first faculty position in Indianapolis.  
 8 Q. And how long were you in Indianapolis?  
 9 A. I was in Indianapolis until 2012. When I  
 10 left there, I went to the University of Utah and Primary  
 11 Children's in Salt Lake City.  
 12 Q. And are you still there today?  
 13 A. I am.  
 14 Q. Okay. And you mentioned you're a professor.  
 15 What do you do as a professor there at the  
 16 University of Utah?  
 17 A. So professor is my academic rank, so I teach  
 18 in the medical school, but then I also have -- my  
 19 primary job is clinical responsibilities, so I take care  
 20 of patients at Primary Children's, which is part of  
 21 Intermountain Healthcare.  
 22 Q. Do you have any sort of special medical  
 23 certifications or board memberships?  
 24 A. I do. I'm double certified in general  
 25 pediatrics, as well as child abuse pediatrics.

1 Q. Can you tell me a little bit about what it  
2 takes to become certified in both of those, I guess,  
3 disciplines?

4 A. Sure. To become board certified you first  
5 have to complete -- after you finish your medical  
6 school, you complete your specialized training.

7 After you've completed at least three years  
8 of training, somebody says that you've met all of their  
9 requirements in terms of clinical care, then you're  
10 allowed to sit for the board exam.

11 If you are certified in a subspecialty, which  
12 is a further specialization of the broader field of  
13 pediatrics, you have to complete additional training and  
14 be allowed to sit for the board exam.

15 Once you passed the board exam, you have to  
16 keep passing it on a rolling basis, in addition to doing  
17 ongoing learning at a certain level each year.

18 Q. And does that require keeping up to date on  
19 the latest literature and findings in the field?

20 A. Yes.

21 Q. Do you also have to do the same as a  
22 professor?

23 A. Yes.

24 Q. And as if that wasn't enough, do you have any  
25 other advanced degrees?

1 A. I got my master's of business administration  
2 in 2015 at the University of Missouri -- or sorry -- at  
3 the University of Utah, David Eccles School of Business.

4 Q. How is Primary Children's associated with the  
5 University of Utah?

6 A. So pediatric care in the intermountain west  
7 is concentrated at Primary Children's Hospital. So we  
8 provide services for children throughout the  
9 intermountain region, including Montana, Wyoming, Idaho  
10 Nevada, and all of Utah. So all of the physicians at  
11 Primary Children's are University of Utah faculty.

12 Q. Are all of your patients pediatric patients?

13 A. Yes. I only see patients up to the age of  
14 18.

15 Q. Okay. Now, why is the range so large on that  
16 Primary Children's Hospital?

17 A. So just like if you were to have a heart  
18 attack or have a stroke, you want to go to a place that  
19 has lots of experience dealing with that. If you  
20 concentrate services you develop higher levels of  
21 expertise.

22 So with children, children aren't small  
23 adults and their problems actually require a very high  
24 level of specialization. So the University of Utah and  
25 Intermountain Healthcare decided the best way to provide

1 specialized services was to concentrate it all in one  
2 place.

3 So we develop partnerships with other  
4 hospitals in that intermountain region, so when they  
5 have a child who needs very specialized care they can  
6 send them to us and we can provide that care and then  
7 send them back to their community with the supports that  
8 they would need.

9 Q. Are you a part of any particular team as part  
10 of, I guess, your pediatric practice?

11 A. Sure. So my area at Primary Children's, I'm  
12 the division chief, which means the head of the program  
13 called Center for Safe and Healthy Families, which is a  
14 team that specializes in the evaluation and management  
15 of the potentially abused child, as well as providing  
16 trauma therapy services for patients who have  
17 experienced some sort of abuse.

18 Q. How many doctors are on that team?

19 A. So I have one faculty partner, where we've  
20 just hired a third one, and we also provide training, so  
21 we're the training program for people that are  
22 specializing in child abuse pediatrics.

23 Q. And how do you become involved with a  
24 patient?

25 A. So patients can be either sent to our

1 hospital by another physician. For example, another  
2 emergency department, when somebody has a concern about  
3 abuse or neglect. Families can bring their patients --  
4 their child to us in our clinic. Or sometimes we are  
5 involved when somebody -- a patient that's already in  
6 our hospital, somebody has a concern, so they ask for  
7 our help evaluating the patient.

8 Q. And if your team is called in, does that  
9 necessarily mean that there has been child abuse?

10 A. No. It means somebody is worried about it.  
11 And, in fact, the statistics that we keep, we actually  
12 undiagnose abuse in more cases than we actually diagnose  
13 abuse. Because our job is to figure out -- somebody is  
14 worried about it, what else do we need to do to figure  
15 out is this a medical condition, is this an accident or  
16 did something happen.

17 Q. When you're working as a member of the Safe  
18 and Healthy Families team, are you working with law  
19 enforcement or Child Protective Services?

20 A. So our job is to help be an interface with  
21 what we call our community partners and help them  
22 understand difficult medical concepts. So we help them  
23 understand things and we talk with them about what our  
24 medical findings are, but our job is separate and  
25 distinct from their job. My job is medical, their job

1 is investigation.

2 Q. So when you find -- you make a finding that  
3 there may be child abuse, what do you generally do?

4 A. So we always go in with the understanding of  
5 what raised the concern, what is wrong with the child  
6 that somebody is asking for help. And depending on what  
7 that concern is, we develop a plan of what other medical  
8 conditions should we be thinking about, so what tests  
9 should we be running or what x-rays or things like that.

10 And then we're also thinking about what -- if  
11 this is, for example, trauma, so like a broken bone,  
12 what other information do I need to know how likely it  
13 is that it happened in the way that was described to me.

14 Q. And are you a mandatory reporter?

15 A. Yes, I am.

16 Q. What does that mean to you?

17 A. So mandatory reporting is the law in all 50  
18 states and U.S. territories and it requires certain  
19 designated people to report their concerns about child  
20 abuse or neglect to whatever the state designated  
21 authority is. So, for example, because I work in Utah,  
22 and as I said, we serve the intermountain west, I have  
23 to know the laws for the six states that we work with.

24 And if I'm concerned about abuse or neglect,  
25 I need to make a report to the appropriate authorities.

1 So in Montana, I would call your Child Protective  
2 Services and the law enforcement agency for where the  
3 event might have happened.

4 Q. And you went into this a little bit, but  
5 maybe we'll break it down a little bit more, what's the  
6 first thing you do when you get this referral?

7 A. So usually when a child is admitted to the  
8 hospital with an injury, the trauma team is the one that  
9 calls us. So the trauma team is made up of trauma  
10 surgeons and also other types of surgeons that might be  
11 involved in the care of a patient with an injury, so  
12 orthopedic surgeons or neurosurgeons.

13 So it's standard policy across the board of  
14 if a patient is admitted with an injury and there's a  
15 concern about abuse or neglect, trauma calls my team.  
16 So we have a call schedule and somebody is on call 24  
17 hours a day. Whoever is on call gets the request and  
18 then we make arrangements to go in and see the patient  
19 with our social worker.

20 Q. And how do you initially assess a patient  
21 when you're called in?

22 A. So as a pediatrician, the way that I approach  
23 a case is just like a pediatrician does in the office  
24 for like a well-child check. So I ask questions about  
25 mom's pregnancy and delivery. I ask questions about

1 their family history, so types of medical conditions  
2 that might run in the family, like easily broken bones  
3 or seizures, things like that.

4 I ask questions about -- so in pediatrics,  
5 children obviously live in a social environment that  
6 influences their health and well being, so I ask about  
7 who lives at your house and who takes care of your child  
8 and where do you work. And I need to know if there's  
9 animals in the home, things like that.

10 Then we take a history called "Review of  
11 Systems," and it literally -- the way I tell a family is  
12 thinking about the last two weeks, how would you  
13 describe your child's health, and let them just tell me  
14 about everything about the last two weeks, if there's  
15 been anything like cough or cold or fever. And then I  
16 ask very specific questions thinking about things that  
17 could have happened over the last couple of weeks that I  
18 want to understand better.

19 And then finally, after I've done all of  
20 that, I do what's called the "History of Present  
21 Illness." So the way I ask a family is tell me the last  
22 time that you saw your baby completely, totally normal.  
23 What time was that?

24 Now tell me how you know they were normal.  
25 Now tell me everything that's happened since then until

1 you came to the hospital today.

2 Q. Is that conversation with the caregiver  
3 integral to your diagnosis -- I'm tongue-tied today --  
4 diagnostic process?

5 A. Yes. It helps me think about what other  
6 conditions might be going on, as well as when did all of  
7 this possibly start and what does that mean.

8 Q. And do you rely on what these people tell you  
9 to actually make your diagnosis?

10 A. I do.

11 Q. Okay. And why is it important to go so far  
12 back in the history?

13 A. Well, so it's sometimes not too far back,  
14 because babies -- particularly young babies, I'm only  
15 going back a few months sometimes. But babies are  
16 influenced by -- you know, things can happen during  
17 pregnancy or delivery, and then things can happen just  
18 based on their age and their development. So I need to  
19 understand who they are right this minute. We don't  
20 change very much day to day, but babies change quite a  
21 bit.

22 Q. Is this especially important when you find  
23 yourself with a preverbal patient?

24 A. Yes. Obviously, a caregiver is the  
25 historian, because a child can't tell me what hurts or

1 when things started. I have to rely completely on a  
2 parent or caregiver.

3 Q. How old does a patient have to be before you  
4 can rely on what they report?

5 A. It depends on how verbal kids are. Some kids  
6 are super talkative and they'll tell you anything you'd  
7 ever wanted to know at the age of, like, three. But  
8 some -- you know, really, I ask kids even that are very,  
9 very young to tell me things to assess their verbal  
10 status. But they're generally not reliable historians  
11 until they're at least school-age and even then.

12 Q. How important is it to refer to -- let me  
13 strike that. Do you have expectations of where a child  
14 should be developmentally?

15 A. So, yes, there's standards that were  
16 established decades ago looking at what is normal child  
17 development. And so your pediatrician might ask you  
18 questions about, "Tell me things your baby is doing."

19 We like to ask the question for you to tell  
20 us whatever you perceive. And then we'll start going  
21 through a checklist in our head based on the age of the  
22 patient and say are they doing this, this, or this,  
23 because it helps us know are they a little on the slower  
24 side, are they average or are they advanced for their  
25 age.

1 Q. When do you expect children to become verbal?

2 A. Well, you -- there's -- you want a child to  
3 have a hundred percent of their speech understandable by  
4 age 4. They should be putting two-word sentences  
5 together between the age of, like, 18 months and two.  
6 And the vocabulary just grows exponentially once they  
7 start talking, so at about two to three is when they  
8 start getting words. That's when we have to be careful  
9 of what say around them.

10 Q. When do you expect a child to start walking?

11 A. So most children start walking around the age  
12 of 12 months. Some very early kids will pull to a stand  
13 and do what's called cruising up around ten months,  
14 which means they can hold on to furniture and walk,  
15 holding, but those are really early bloomers. So 12  
16 months is average. 14 months is when we start getting  
17 worried if they haven't started walking yet.

18 Q. In the course of your practice, roughly, how  
19 many pediatric patients would you see a year?

20 A. Oh, in a year? A couple hundred -- about a  
21 couple hundred in a year, I would say.

22 Q. And how many years have you been doing it?

23 A. More than 20. Oh, you want me to do the  
24 math?

25 Q. No.

1 A. Okay. That's not fair.

2 Q. Have you seen nine-month-olds during that  
3 period of time?

4 A. Yeah, quite a few.

5 Q. What do you expect when you encounter a  
6 nine-month-old patient?

7 A. So a nine-month-old should be rolling both  
8 directions, meaning front to back and back to front.  
9 They should be able to sit independently, which means  
10 they can get to a sitting position and hold that without  
11 too much effort.

12 They're starting, but not super good yet, at  
13 what we call pincher grabs, which is the Cheerio test,  
14 where they can pick things up and feed themselves.

15 They should be babbling, so repetitive  
16 syllables, ma, ma, ma, da, da, da, but not necessarily  
17 with purpose. They definitely should be smiling and  
18 laughing. They're crawling. But that's pretty much the  
19 extent of their mobility at nine months, is crawling.  
20 And some of them won't even be crawling yet.

21 Q. You told us part of your job is to look at  
22 trauma and you've told us you look at the developmental  
23 stage. How does the developmental level of a child  
24 correlate with what you might expect in the way of  
25 injuries?

1 A. So there's a concept in medicine -- in  
2 pediatric medicine called sentinel injuries. So  
3 sentinel injuries are things that are warning signs.  
4 They're things that tell us this isn't right for a child  
5 this age, so we should think about what else might be  
6 going on, either in their care environment as well as  
7 like what could be going on on the inside of the baby  
8 that we can't see on the outside.

9 So when a child is perambulatory, meaning  
10 they can't walk on their own two feet, they should not  
11 have a bruise anywhere on their body. There are,  
12 obviously, some times that bruises happen by accident,  
13 but it's more common that a bruise in a nonambulatory  
14 baby is something that's warning us that's something is  
15 happening and we should think about that.

16 So once a child pulls to a stand and starts  
17 moving around on their own two feet, it's what I call  
18 the danger time, because babies that can cruise or can  
19 walk on their own, 50 percent of babies that age will  
20 have a bruise on them at any given point in time. So  
21 that's not terribly newsworthy and that's why we don't  
22 think much about it if they can walk.

23 But if they can't walk, if we see things like  
24 bruises or blood spots in the white parts of their eyes  
25 or blood coming from their nose or mouth, those are

1 warning signs that we should do other tests for.

2 Q. So if you see a bruise in a nine-month-old,  
3 what sort of suspicion does that trigger?

4 A. So that should cause us to think -- one of  
5 the things that I teach people that are learning to take  
6 care of children, is you always have to think about what  
7 will kill this child if I miss it. That's my  
8 responsibility to not miss that, right?

9 So the two things that cause bruises that  
10 could kill you if I don't find it, is a bleeding  
11 disorder, meaning something is wrong with your blood --  
12 it doesn't clot or it clots too much -- or abuse. So  
13 these are the two things that I have to think about when  
14 I see bruising in a baby that's not ambulatory.

15 Q. And I guess just to clarify since we're using  
16 this term, what do you mean by "ambulatory"?

17 A. Ambulatory is being able to walk on two feet.  
18 So we all are ambulatory. Babies that are what I call  
19 ground based, so a crawler is not ambulatory.

20 Q. Have you ever seen a nine-month-old walking?

21 A. No.

22 Q. This is out of, roughly, how many  
23 nine-month-olds if you had to guess?

24 A. Oh, God, I've seen gajillions. That's not a  
25 number, but it's a lot.

1 Q. Fair enough. So if you do encounter  
2 something that you think is possibly life-threatening  
3 like you said, what is important for you to do as a  
4 pediatrician?

5 A. Well, history is always important, right?  
6 Because there are -- not every baby that has a bruise  
7 has a bleeding disorder or is abused. That's absurd,  
8 right? There are things that can happen.

9 But I need a history. So I take a history  
10 from caregivers. I say tell me, you know, when did you  
11 notice this, what else is going on, those sorts of  
12 things.

13 But then I'm also going to do tests, because  
14 the way that I find out if they have a bleeding disorder  
15 is to test their blood. So there's specific tests that  
16 I can do to make sure that blood is normal.

17 And then we have to do x-rays. So when you  
18 are worried about abuse in a child less than the age of  
19 two, the standard of care in medicine is that you do  
20 what's called a skeletal survey.

21 So the skeletal survey is an x-ray of all the  
22 bones in your body. And it can be anywhere between 20  
23 and 25 films, depending on what they see and what they  
24 need to do to position the baby to better figure things  
25 out. But that's going to tell us if there's any broken

1 bones on the inside.

2 Q. Can you tell me whether or not it's possible  
3 to bypass the tests and just rely on visual or tactile  
4 examination?

5 A. No. Because you can't tell that a baby has a  
6 broken bone without doing an x-ray. Sometimes it's  
7 obvious. Like sometimes they're not moving their leg  
8 and it's bent funny and it's obvious that it's broken,  
9 but I can't tell you what kind of break that is if I  
10 don't get the x-ray.

11 But babies can also have broken bones that  
12 you can't see anything on the outside. So they have no  
13 bruises, no swelling. They're just crying because  
14 they're crying because they can't say, "My arm hurts,  
15 stop touching it," right?

16 So that's why I have to get an x-ray to see  
17 if there is a fracture.

18 Q. Would that be the same thing with skull  
19 fractures?

20 A. Yes. Skull fractures are very hard. And, in  
21 fact, you can have a skull fracture and somebody not  
22 know that it's there for many days, even with like  
23 looking at the kid, you may not know for days that it's  
24 there.

25 Q. I guess for a lack of a better term, have you

1 ever had patients that had surprise skull fractures?

2 A. Oh, yeah. So I've taken care of babies where  
3 they were just super irritable, that's why somebody  
4 brought them to medical attention. They were just not  
5 able to be calmed down, they would just cry, cry, cry.  
6 And I examined them and I saw nothing on the outside and  
7 then we would get an x-ray and find out that they have  
8 dozens of fractures. And literally, I couldn't tell,  
9 even though this is what I do for a living. You know,  
10 holding the baby, I couldn't tell.

11 Q. Medically speaking, is there any merit to  
12 somebody being able to rule out a head injury without  
13 doing a CT scan or an x-ray?

14 A. No. We don't have x-ray vision. The only  
15 way I can see what's going on inside of the body is with  
16 an x-ray or a CT scan.

17 Q. How does -- how much more difficult is it to  
18 do an examination if the child has a lot of hair?

19 A. So baldies are easier to diagnose because you  
20 can actually sometimes see like a contour difference  
21 when you're looking at them. Because sometimes, not  
22 always, but sometimes there will be like soft-tissue  
23 swelling over a fracture.

24 So if you're looking at the kid you can see,  
25 sort of appreciate, maybe, a lumpiness. But if they

1 have a head of hair, it can be very, very difficult to  
2 appreciate. You can't see bruises. You may not be able  
3 to see soft-tissue swelling.

4 And our hands aren't particularly good at  
5 picking up, unless it's super squishy, over the spot.  
6 Like I can -- I call it the pediatrician's handshake, we  
7 always rub baby's heads because we're checking the soft  
8 spot. So I can rub a baby's head and not know there's a  
9 fracture in there because that's -- we're just not that  
10 tactile.

11 Q. Is there any sort of a medical standard of  
12 care regarding encountering a head injury like that?

13 A. So again, if you're worried about abuse of  
14 any kind, the standard of care is you're supposed to do  
15 the skeletal survey. What that does is it tells us if  
16 there's any fractures where those fractures are. And it  
17 can give us a guess as to how old they are depending on  
18 where they are on the body. You can't age skull  
19 fractures, but you can age other types of fractures.

20 Q. You told me that you'd had these surprises  
21 before. Do you have any idea how many times you've seen  
22 these unanticipated skull fractures?

23 A. I would say, in general, skull fractures are  
24 more often diagnosed on a radiology study than they are  
25 on clinical exam. So if the baby comes in with a big

1 soft squishy spot on their head, we are obviously  
2 thinking there's a concern of a skull fracture, but we  
3 can't know that because you can't feel it. All you feel  
4 is the soft squishy, which is actually the scalp that's  
5 not the skull.

6 So I would say it's more common that we find  
7 the skull fractures on an x-ray than by our clinical  
8 exam.

9 Q. Were you working at Primary Children's  
10 Hospital on April 20th of 2019?

11 A. I was.

12 Q. And do you recall seeing a patient named  
13 Everett Musch?

14 A. I do.

15 Q. What were the circumstances of his admission?

16 A. So I was on call for my team, the trauma team  
17 called me and said he'd been life flighted down from  
18 Billings because of a severe head injury and they were  
19 asking for me to come see him.

20 So as I recall, I got the call in the middle  
21 of the night, so the first thing the next morning, it  
22 was a weekend, I called my social worker and said, "We  
23 have to go do a consult in ICU."

24 Q. And what was the next thing you did in that  
25 case?

1 A. So before I see a patient I always review the  
2 entire medical record to see what we already know. So I  
3 can sometimes, not always, but sometimes see what  
4 happened before they got to us, because the outside  
5 records will be put into the chart.

6 I will talk to the trauma teams to find out  
7 what they're doing and what they have -- you know, what  
8 they've already done, what they're planning on doing.  
9 Is he going to need surgery, things like that.

10 I'll look at the CT scans and x-rays that  
11 have already been done, so I always look at those  
12 myself, not just read the report, but I look at the  
13 study to see the things.

14 And then after I've talked to all of the  
15 medical people then I go meet with the family that's  
16 available at the bedside.

17 Q. I'm going to step back just a little bit.  
18 How come you don't just rely on the medical notes of  
19 your reports?

20 A. So depending on what you do, like what you're  
21 training is, we fall into patterns where we think about  
22 things based on the lens we bring to it. My job is to  
23 think very broadly about all of the different things  
24 that could be causing what I'm seeing and I like to rely  
25 on my own history gathering, because I ask questions in

1 a very specific way so that I'm sure that the  
2 information that I'm getting is as accurate as it can  
3 be, as opposed to sort of the shorthand that we use when  
4 we -- when we do our jobs.

5 The other thing is that in medicine now,  
6 unfortunately, everything is digital and there's a lot  
7 of templates that people use. So when they document  
8 sometimes they just document based on a template and  
9 forget to change the normals to the abnormalities. So I  
10 find relying on information in the chart could actually  
11 cause me to have inaccurate information.

12 So I always tell a family, "I'm so sorry. I  
13 know you've answered these questions a thousand times,  
14 I've reviewed everything, but I want to hear you tell me  
15 personally and that's why I'm asking you again."

16 Q. How often do you encounter inconsistencies or  
17 just plain wrong information on the reports?

18 A. Every single patient has something inaccurate  
19 in their chart, every single one.

20 Q. I think before I got you off target here, we  
21 were just starting to talk about how you started your  
22 treatment of Everett. So you looked at all the scans  
23 and other reports, what did you do next?

24 A. So Jill was my social worker, she and I went  
25 and found the baby in the intensive care unit. I

1 introduced myself to mom and I explained to her, you  
2 know, "I'm a pediatrician that works with the Center for  
3 Safe and Healthy Families, our team is called when  
4 somebody is worried about an injury that your child has.  
5 The trauma team has called me and asked me to see your  
6 child, and I'd like to talk to you  
7 about it."

8 So Randy [sic] was extremely distressed.  
9 Obviously, her baby --

10 Q. I'll hold you up just a second here. Let's  
11 talk about a few things. You mentioned in ICU. What  
12 sort of patients go to the ICU part of the hospital?

13 A. Babies -- or any patient that requires a  
14 higher level of support than can be provided on what we  
15 call the floor. So babies that either need support  
16 breathing or need intensive monitoring or are at risk  
17 for a sudden change in status, meaning they could  
18 suddenly get worse, so they need a very high level of  
19 care.

20 Q. What exactly do you know about Everett's  
21 condition when you're going in to meet with mom?

22 A. So I know that he has a very severe brain  
23 injury and there's a discussion about whether or not  
24 he's going to need surgery to deal with that. So the  
25 neurosurgeons, as part of the trauma team, are what we

1 and got her to calm down a little bit.

2 We stepped outside of the baby's room because  
3 there was a lot of things going on, nursing was having  
4 to do a lot of monitoring of Everett.

5 So we sat right outside of the baby's room  
6 and I did my history that I talked about.

7 Q. And what is the first part of the history  
8 that you talk about?

9 A. I find it's helpful for people that are  
10 really stressed if we go back to the easy part which is,  
11 "Tell me about your pregnancy." So since he's only nine  
12 months old, we have only nine months of material to  
13 cover, so that's not hard. So I say, "Tell me about  
14 your pregnancy. Tell me about your delivery." So  
15 that's where we started.

16 Q. What did she tell you about?

17 A. Pregnancy and delivery were unremarkable. He  
18 was a smallish baby, he weighed about four pounds. But,  
19 you know, that's nothing earth-shattering.

20 Q. Did she identify any problems with the  
21 pregnancy?

22 A. No.

23 Q. Other than premature?

24 A. No.

25 Q. So what's your next line of inquiry?

1 call following along to see which direction is he going  
2 to go. Is he going to get worse enough that they need  
3 to operate or is he going to stabilize and it's not a  
4 surgical issue, it's a medical issue?

5 So I know that he's critically ill, but he's  
6 still breathing on his own, which is goodish.

7 Q. Now, when you're talking about critically  
8 ill, what does that mean?

9 A. So critical is -- there's definitions that  
10 the healthcare system uses to define your status. And  
11 critical is the highest level of seriousness. So it's  
12 one that tells us that you have a life-threatening or  
13 potentially life-threatening injury or medical condition  
14 of some kind and you need extraordinarily close  
15 monitoring.

16 Q. So you've got that information and you go  
17 talk to mom. What does Ryann look like when you first  
18 see her?

19 A. Ryann is so distressed, which is why I'm  
20 always thankful for my social worker because mom is just  
21 crying and having a hard time pulling it together to  
22 answer my questions.

23 So first, we have to help her get herself  
24 together because we're not trying to traumatize anybody,  
25 but I do need certain information. So we talk to her

1 A. So then I go through past medical history.  
2 Tell me about his general health, is he generally  
3 healthy, growing and developing normally, had all of his  
4 shots, things like that.

5 Q. What do you learn about his medical history?

6 A. Normal. Nothing really stood out in that.  
7 He was developing normally. You know, doing the things  
8 that I would expect a nine-month-old to do.

9 Q. And what's next?

10 A. So after we talked about that, then we did  
11 the Review of Systems. Well, I do -- I switch back and  
12 forth between developmental history -- I mean, I'm  
13 sorry, social history and Review of Systems. I don't  
14 remember which I asked next.

15 Tell me about who lives in your home, what do  
16 you do for a living, those types of things.

17 Q. What do you learn about the home that they  
18 live in?

19 A. So mom shared with me that she was living  
20 with her -- well, she had -- may I refer to my note?

21 MR. NIXON: Your Honor, may she please refer  
22 to her notes that will help her recollection of the  
23 event?

24 THE COURT: Mr. Snively?

25 MR. SNIVELY: I have no objection.



1 THE COURT: You may.

2 THE WITNESS: Thank you.

3 Q. (BY MR. NIXON) Please.

4 A. Okay. Mom shared with me that she works as a  
5 waitress and she visits her then-boyfriend in Red Lodge  
6 and stays with him when she is in Red Lodge, but they  
7 don't live together full time.

8 Q. And you mentioned you also kind of  
9 interchange. What was your next line of inquiry?

10 A. So then I ask the Review of Systems. "Tell  
11 me how the last couple of weeks have been for Everett.  
12 Has he had any illnesses or anything like that?" And  
13 she had shared that he had been vomiting recently.

14 Q. You'd mentioned earlier that you liked to ask  
15 questions about when was the last time that the baby was  
16 okay.

17 A. Uh-huh.

18 Q. Did you do that with Ryann?

19 A. I did. It was a little bit difficult,  
20 because the vomiting had been going on and they had  
21 sought medical care specifically because of the  
22 vomiting, but then something got very much dramatically  
23 worse the day that he was -- that he got sick enough  
24 that he needed to be life flighted down. So the story  
25 was kind of blurry about when was he last okay.

1 bit more about what the child fell from and what they  
2 fell to. So I said, "Can you show me like with your  
3 hand how high is the thing that we're talking about?"

4 And she, you know, leaned down and showed me  
5 it was a very low futon, so just like a cushion, very,  
6 very low. And then it would have been on to the floor  
7 which was just carpet.

8 Q. And you told us a little bit earlier about  
9 nonambulatory babies and bruises. Was Everett  
10 ambulatory?

11 A. No.

12 Q. What concern did you have when you heard  
13 about this bruise -- or bump, I should say, however she  
14 described it?

15 A. She described that he had like a red mark on  
16 his forehead. So babies definitely roll off of things,  
17 you know, that happens. We put babies on all sorts of  
18 different surfaces and they can roll off, particularly  
19 as a nine-month-old.

20 So she's describing a red mark that is not  
21 terribly remarkable to me. But it later developed a  
22 goose egg. A goose egg is more than I would expect from  
23 a fall off of such a low surface. And it also -- a fall  
24 from a very low surface like that shouldn't cause a head  
25 injury. I mean, babies literally fall off stuff that

1 Q. Did she give you a time when he was last  
2 okay?

3 A. She did. She described him as last normal on  
4 the evening of April 17th, which I documented as  
5 Wednesday.

6 Q. And did she also supply details about what  
7 the circumstances were?

8 A. Yes.

9 Q. What were those?

10 A. She had told me that they were in Red Lodge  
11 and at Nathan's house and that Everett had been put down  
12 to sleep on, like, a futon. And she and Nathan were in  
13 the other room, which I think was like a living room or  
14 something, and she heard a thud -- or Nathan heard  
15 gurgling and went to check on Everett. And then there  
16 was vomit and that's when the vomiting started is  
17 specifically related to the futon.

18 Q. Was there any trauma described to the baby?

19 A. So Ryann told me that she didn't see anything  
20 happen but she was told that the baby had fallen off of  
21 the futon.

22 Q. And was there anything remarkable about that  
23 explanation?

24 A. So I ask -- whenever there's a fall reported,  
25 one of the things that I ask people is tell me a little

1 low and sometimes even higher, like couches or beds and  
2 don't have head injuries.

3 Q. So what's the next thing that you discuss  
4 with Ryann?

5 A. So we had talked about the futon fall. And  
6 the vomiting is associated, in her head, with that,  
7 that's when the vomiting started.

8 The vomiting persisted to the point that she  
9 was worried that something was wrong with him and had  
10 told me, you know, he was vomiting a lot. He wasn't  
11 himself.

12 And at some point, because of the vomiting  
13 she decided to bring him, I think, to Beartooth Clinic  
14 is the name. Yeah, she took him to Beartooth Clinic.

15 She thought he had a low fever. She  
16 described it as 99.3, which is -- that actually can be  
17 normal in some people. So she felt like he's vomiting,  
18 he's got a fever, something is not right with my baby.  
19 That's why she brought him.

20 Q. Did you talk to her about how Everett  
21 normally acted?

22 A. Yeah. She said he's normally a super happy  
23 baby.

24 Q. Does any of this prompt any concerns for you?

25 A. So I'm concerned that I've got a baby who's

1 got vomiting and I know from already having seen his  
2 scans that he has two very significant skull fractures.  
3 So I'm concerned that this is something more than we've  
4 been made aware of.

5 Q. So in your practice, what are some of the  
6 things that you look for if there's a head injury?

7 A. So with head injuries, obviously, a head  
8 injury in a baby that's nonambulatory is even more  
9 concerning than just a bruise in a nonambulatory baby,  
10 so I'm thinking about, you know, I clearly have evidence  
11 of impact, because the only way you can break your skull  
12 is by impacting your skull. So I know he's got an  
13 impact injury.

14 I'm worried about how bad is his brain  
15 injury, so I know I'm going to have to do both a CT scan  
16 and an MRI. When you have a head injury in a baby, you  
17 sometimes will have bleeding in the backs of their eyes,  
18 so we need to have the eye doctors to come put the drops  
19 in that make the pupil really big so that they can see  
20 the entire back of the eye and they use a special camera  
21 to do that.

22 I know that he needs a skeletal survey,  
23 because I need to check all the bones in his body. And  
24 at the same time, I'm also doing, like, lab studies to  
25 make sure he doesn't have a bleeding disorder or

1 defects or bleeding disorders?

2 A. Yes. There was no history of anything that  
3 ran in the family. And there was no evidence on our  
4 medical evaluation that he had bleeding or bleeding  
5 disorders or problems with his bones.

6 Q. Do you articulate your concerns to Ryann  
7 about that?

8 A. After we talked about the extent of all the  
9 injuries that he had, we definitely -- because I show  
10 the family what I'm talking about. It's hard to  
11 visualize some of these injuries. So I ask them, "Do  
12 you want me to show you so that you can see what we're  
13 talking about?"

14 So when I showed her the fractures that he  
15 has of his skull and the brain injury that he had, I did  
16 say, "I am very worried about this. This does not make  
17 sense based on the things that he can do under his own  
18 power. I'm very concerned that somebody has hurt him."

19 Q. And what are you thinking at this point in  
20 time is required to actually create a skull fracture?

21 A. So by definition, if you have a skull  
22 fracture you have to have an impact. Either your head  
23 hits something or something hits your head. So he has  
24 two very large skull fractures. One is on the side of  
25 his head. And the very, very serious, bigger one is

1 something like that, though that wouldn't explain a  
2 broken skull.

3 Q. Can you tell me whether or not there's any  
4 explanation provided regarding how this skull might have  
5 been fractured?

6 A. The only history that was offered -- and I  
7 specifically ask the question, "Besides the things that  
8 we've talked about, have there been any other falls or  
9 bumps or drops that you can think of in the last couple  
10 of weeks?"

11 So car crashes -- you know, I go through  
12 every possible, like, "Can you think of anything besides  
13 what you just told me?"

14 And Ryann could only tell me about the futon  
15 event was the only thing that she was aware of.

16 Q. And based on your experience and education,  
17 had you formed an opinion as to whether that could be a  
18 plausible explanation for skull fractures?

19 A. So, yes, I did form an opinion.

20 Q. What was that?

21 A. Falls off of futons, particularly as  
22 described, definitely happen, but they should not cause  
23 the injuries that he has.

24 Q. I'm not sure if you mentioned this earlier,  
25 but had you checked with mom regarding any possible bone

1 actually on the back of his head.

2 So there are different types of fractures.  
3 The one in the back is easier to posit how it might have  
4 happened. The one on the side, I can just say is not  
5 inconsistent with a fall from a surface.

6 Q. You said the other one you might be able to  
7 figure out some mechanism. But can you tell me whether  
8 or not falling off a futon would be that mechanism?

9 A. No. Neither of the skull fractures could  
10 have happened from a fall off the futon. A fall off a  
11 futon may have happened, but it didn't cause the  
12 injuries that we're seeing.

13 Q. Have you seen a lot of skull fractures in  
14 children during the course of your practice?

15 A. Oh, yes. They're extremely common.

16 Q. How -- let's start with the one on the side  
17 of his head. What do you call that type of fracture?

18 A. So it's a complex linear. So that's got two  
19 parts to it. Complex means -- the opposite of complex  
20 is simple. So a simple linear skull fracture is just  
21 one line, so either a horizontal line or a vertical  
22 line.

23 Complex means it's got more than one branch.  
24 So his actually has a horizontal component and a  
25 vertical component. So it's one fracture that went a

1 couple of different directions.

2 Q. And you've had other patients with similar  
3 fractures?

4 A. Yes.

5 Q. What sort of trauma was involved with that  
6 fracture?

7 A. Either an --

8 MR. SNIVELY: Your Honor, I object to what  
9 other patients -- I think the question was what other  
10 patients had.

11 THE COURT: What's the objection? What's the  
12 basis?

13 MR. SNIVELY: It's not relevant what other  
14 patients had that what caused theirs.

15 THE COURT: Mr. Nixon.

16 MR. NIXON: And perhaps I can rephrase it a  
17 little bit. I believe it's relevant. I think we're  
18 basically looking to rely on our expert testimony in  
19 regards to medically what basically comes part and  
20 parcel with this type of severe fracture.

21 I'm not looking to talk to any individual.  
22 I'm looking to get an opinion as to generally what is  
23 required in the way of extreme force to cause a  
24 fracture.

25 THE COURT: Based on this witness's

1 child moving back and forth. But it's never purely back  
2 and forth, because babies' neck muscles aren't strong  
3 enough to support the weight of their head. That's why  
4 we support babies' heads.

5 So if a baby is being shaken, their head can  
6 move in an oscillatory way, forward and back and side to  
7 side in the way that shakes the brain within the skull  
8 and that can tear blood vessels that connect things and  
9 that's what causes bleeding around the brain.

10 Q. Was this in play in this particular injury?

11 A. It was. Everett had very severe bleeding  
12 around his brain, in addition to the fractures that he  
13 sustained.

14 Q. Let's talk about the other fracture now. You  
15 mentioned that he had a fracture in the back. How would  
16 you classify that fracture?

17 A. So the fracture in the back actually was a  
18 complex stellated skull fracture. So stellated means  
19 literally star, stellular. So it's a burst-type  
20 fracture. So there is a central portion of the fracture  
21 that's kind of smooshed in and then there's branches  
22 that go out in multiple different directions around  
23 that, which suggests a different type of impact.

24 Q. So based on your experience, what sort of  
25 force is necessary to create a fracture like this?

1 experience?

2 MR. NIXON: Based on her experience as a  
3 professor, as a pediatrician, as a trauma pediatrician.

4 THE COURT: Overruled. Go ahead.

5 THE WITNESS: So linear skull fractures  
6 typically happen from falls against -- or impacts  
7 against flat surfaces, so nothing pointy like a corner  
8 or an object.

9 When it's a complex one, that implies more  
10 force. So when you have more than just a simple line,  
11 you've got multiple lines, that typically requires a  
12 much higher force. So either a fall from a much higher  
13 height, a propulsive force, so sometimes people falling  
14 down stairs and the baby flies out of your arms, so you  
15 can imagine that is a high-force event, as compared to a  
16 low-height fall.

17 So when we see a complex skull fracture that  
18 suggests more trauma.

19 Q. (BY MR. NIXON) Do you know what an  
20 acceleration/rapid deceleration injury is?

21 A. Yes.

22 Q. What is that?

23 A. So in babies -- you probably have heard it  
24 called "shaken baby syndrome," the medical term for it  
25 is abusive head trauma. So it involves the head of a

1 A. Really intensive force. This is a very  
2 severe fracture. Of the fractures that I see, this is  
3 probably the worst type of fracture.

4 Q. And I think I understand what you're saying,  
5 but is it your opinion that this was the worst of the  
6 two injuries?

7 A. Oh, yes. This was the one that is my medical  
8 opinion that caused him to need to be life flighted  
9 down.

10 Q. What do you expect when you have a child with  
11 a stellate fracture like that?

12 A. So the brain injury underneath it, obviously,  
13 is the highest concern. Bones mend, but the brain  
14 doesn't heal quite as well as the rest of us does. So  
15 the injury that he sustained, my concern was what extent  
16 is the brain injury that occurred at the same time as  
17 that skull fracture.

18 Q. When you see something like that, what  
19 concerns do you have about some sort of permanent  
20 disability?

21 A. My concern at that time based on what I knew  
22 about Everett and how he was doing clinically and what I  
23 could see on his scans, was that he would most certainly  
24 have long-lasting effects. One of the things that I  
25 tell a family is that, "Things are pretty serious. We

1 don't know how bad they are and we may not know for  
2 days, weeks, months, years how bad this is going to be."

3 And we do some expectations setting. So the  
4 next 24, 48 hours are going to be kind of sketchy. They  
5 could go really badly or he might be stable and this is  
6 the worst of it and he's going to get better from here,  
7 but he is going to have effects from this.

8 Q. And based on your experience and your  
9 expertise, what sort of immediate consequences would  
10 there have been to Everett after that skull fracture?

11 A. The fracture in the back was so severe and  
12 the injury underlying it, that once he sustained that  
13 injury it would have been unambiguous something is wrong  
14 with him. He would have been clearly and persistently  
15 impacted by that injury. Something is wrong. And he  
16 would not have gotten better and then gotten worse after  
17 that injury. Once he had it, he had it and it was going  
18 to be obvious.

19 Q. Do you have an opinion as to whether the idea  
20 of a delayed effect on that injury is plausible?

21 A. I'm sorry?

22 Q. That was a terribly-asked question. Withdraw  
23 it, please.

24 Do you have an opinion on whether or not it  
25 would be medically possible for him not to show some

1 7:00 p.m., mom reports Nathan was in the bathroom with  
2 Everett when she heard him call out that Everett had  
3 stopped breathing. Nathan ran out naked into the room  
4 where mom was holding -- and runs out. Mom describes  
5 Everett as pale and limp, his lips were pale and he was  
6 breathing shallowly. She took Everett from Nathan and  
7 started CPR and Nathan called 911.

8 Q. Is it your opinion, then, that breathing  
9 would have -- that breathing issue would have stopped  
10 contemporaneously with the skull fracture?

11 A. Yeah. Particularly impacts in the back of  
12 your head, which is called your occipital lobe, so the  
13 occipital skull is the back of your skull and the brain  
14 that's underneath that is your occipital lobe, serious  
15 impact injuries to that can cause immediate sensation of  
16 breathing.

17 MR. NIXON: If I may, Your Honor, I'd just  
18 like the record to reflect that Dr. Laskey is cupping  
19 the back of her head on either side of her neck to show  
20 where the occipital lobe is located.

21 THE COURT: The record will reflect that  
22 description.

23 Q. (BY MR. NIXON) Now, would it be correct to  
24 refer to the other fracture as a parietal fracture?

25 A. Yeah. So if you put the palms of your hands

1 sort of injury after that skull fracture?

2 A. No. He absolutely -- I can't -- it was such  
3 a large, serious fracture, he could not have been in any  
4 way normal after he had that. It would have hurt. So  
5 if he was able to cry, he would have cried in a way that  
6 any caregiver knew something is badly wrong.

7 He may not have been able to cry, because it  
8 could have knocked him immediately unconscious. It  
9 could have impaired his ability to breathe. It wouldn't  
10 have surprised me if he was having seizures. It was a  
11 very, very severe injury.

12 Q. Now, did you talk with Ryann about the  
13 circumstances around Everett stopping breathing?

14 A. Yes.

15 Q. What did she tell you?

16 A. She described to me that day they had gone --  
17 "they" being Ryann, Everett and Nathan -- had gone to  
18 Redbox to get a video, and while they were doing that  
19 Everett threw up on mom. So when they went home to  
20 Nathan's place, mom told me that Nathan said, "I'll give  
21 him a shower," and so mom went about changing her  
22 clothes.

23 Nathan took Everett into the bathroom and  
24 while they were in the bathroom -- I'm just going to  
25 refer to my notes, so I'm accurate -- this is around

1 just over your ears and let your fingers wrap kind of  
2 around the skull, the parts that your hand are touching  
3 are, generally speaking, the parietal bones, which are  
4 the parts of your skull and then underneath that are the  
5 parietal lobes.

6 Q. What sort of impact do you in your medical  
7 opinion think that would have caused?

8 A. The occipital?

9 Q. The parietal fracture.

10 A. The parietal is the one that was a complex  
11 linear, so that could be an impact against a flat  
12 surface but with great force.

13 Q. And can you tell me based on your experience  
14 whether that would have necessarily been as debilitating  
15 as the other fracture?

16 A. It would not have been as debilitating. It  
17 was severe, but it wasn't the most severe of what he  
18 had. And his brain did sustain an injury from something  
19 that is more than these impacts. There's injury to his  
20 brain in places that aren't just isolated to where there  
21 are fractures.

22 Q. So we'll get back to you and Ryann again.

23 What is the next step as you conclude that conversation?

24 A. So after I take the history from whatever  
25 caregivers are present, I ask, "Is it all right if I

1 exam your child?"

2 And then with the help of nursing, because  
3 babies that are brought in having sustained a head  
4 injury are in what's called a papoose. So that's like a  
5 c-collar or a neck collar, but because it's a baby and  
6 their necks are, like, ridiculously short and you have  
7 to put a c-collar on them, so it's like a whole-body  
8 contraption that they're strapped into.

9 So it literally goes all the way down their  
10 back to hold everything perfectly in alignment. So I  
11 need a lot of help to do the exam. I have to have  
12 nursing help me take all that off while keeping him  
13 perfectly still, and then check his skin, do all the  
14 regular checkup things that the pediatrician would do.

15 MR. NIXON: With that answer, Judge, I'd like  
16 to publish State's Exhibit 15, previously admitted.

17 THE COURT: Yes, certainly.

18 Q. (BY MR. NIXON) Dr. Laskey, can you tell me  
19 what we're looking at in this picture?

20 A. Sure. So as part of my job I have to photo  
21 document or take pictures of the children that I see,  
22 the injuries that I find. Or if we don't see anything  
23 on the outside, I still photo document that this is the  
24 child say that I saw. So I took this picture and that's  
25 my hand and this is what Everett looked like when I came

1 consciousness is definitely impaired. We call it  
2 noxious stimuli. So you're trying to see, "Are you in  
3 there? Are you awake?"

4 So you do things like you make your knuckles  
5 and you rub it really hard on their breast bone. Or you  
6 can -- this sounds so mean, but it's how we assess your  
7 brain status, we pinch in like right under your collar  
8 bone to see if we can make you cry or respond. He  
9 really didn't do much. It took a lot to get him to even  
10 like (indicating).

11 Q. In your experience is that unusual for a head  
12 injury?

13 A. Well, not for a head injury. It tells me how  
14 serious the head injury is. We were actually quite  
15 lucky that he was still breathing on his own, because he  
16 was pretty impaired.

17 MR. NIXON: Let's take that down.

18 Q. (BY MR. NIXON) You talked about the collar  
19 that we just looked at. What's the next step in your  
20 evaluation?

21 A. So I look at all of his skin. He doesn't  
22 have anything notable on his skin. There was a bruise  
23 that was actually documented on his collar bone and so I  
24 always ask, you know, "Where did this come from?"

25 And nursing is actually the one that said,

1 into the ICU to see him.

2 Q. We talked earlier about hair. Everett have  
3 quite a bit of hair for a nine-month-old?

4 A. Gosh, he has a head of hair. Actually, I  
5 think I made the joke to Ryann that he needed a barrette  
6 because he had so much hair.

7 MR. NIXON: Would you please publish State's  
8 Exhibit 16.

9 Q. (BY MR. NIXON) And what are we looking at in  
10 this picture?

11 A. So this is the c-collar that I was telling  
12 you about that it holds his neck stable and keeps the  
13 rest of his spine in alignment until we can do what's  
14 called clearing the C-spine, which shows that he doesn't  
15 have a cervical spinal cord injury and we can't do that  
16 until we get the MRI. So this is just what his face  
17 looks like when I see him.

18 Q. Now, do you know if he is awake or asleep in  
19 this picture?

20 A. He's in a state of impaired consciousness.  
21 So this -- when I was examining him, normally a baby,  
22 obviously, should get mad at me for messing with him and  
23 so I usually make babies cry. No matter what I did to  
24 him, he really didn't do much.

25 So he's breathing on his own, but his

1 "Oh, neurosurgery did that."

2 And so neurosurgery did that when they were  
3 pinching him trying to get him to wake up. So we knew  
4 about that one and we said that was neurosurgery. He  
5 didn't have any other bruises anywhere on his body.

6 Q. Did you do any other observations of Everett  
7 at that point in time?

8 A. So after, you know, I listen to his heart and  
9 lungs and checked all of his skin and things like that,  
10 then I'm done with the physical exam. And then I go  
11 back and I sit down with Ryann and explain to her what  
12 all that I've seen and what I'm thinking and what else  
13 we need to.

14 Q. What do you say?

15 A. So I had the conversation with Ryann that  
16 Everett is critically ill, I'm very worried about him.  
17 You know, I try to give families good news, right?  
18 Because this is a horrible day to be absorbing  
19 everything.

20 So I specifically tell her, the good news is  
21 he's breathing on his own. The bad news is he's clearly  
22 got a brain injury and I don't know how serious it is  
23 yet, because all I have at this point is his CT scan.

24 So a CT scan is like the old tube TVs that we  
25 used to have. We were all happy with them and we could

1 see TV just fine, but when we got high definition we  
2 knew there was a difference, right?

3 So an MRI is what I need. That's my  
4 high-definition picture of the brain. So I have a  
5 general idea of what's going on, because I see it on the  
6 CT scan, but it only gives me a general idea.

7 It tells me he's got bleeding around his  
8 brain, he's got skull fractures in two different places.  
9 And he needs an MRI for me to see how deep the injury  
10 is, how bad is this injury and what's it going to mean  
11 for him going forward.

12 Q. And do you eventually get those tests?

13 A. Yes.

14 Q. And can you tell me whether or not you had  
15 the opportunity to confer with the treating doctors,  
16 like the neurologists?

17 A. Yes. When a child is admitted to the  
18 hospital and I'm doing what's called consulting on them,  
19 I continue to see them and talk to the other doctors  
20 involved in their care. And when tests are done like  
21 the eye exam that I ordered or the MRI is done, then  
22 I'll talk to the doctors that did it. And if there's  
23 images to review, I review those myself.

24 Q. What did you eventually learn about Everett's  
25 brain injury?

1 head and they have a lens and they look at it and it's  
2 mirrors and -- I can't use it.

3 What it does is it allows you to see all the  
4 way out to the very side, front of the eyeball and  
5 appreciate the entire thing. And if there's hemorrhages  
6 or bleeding in the back of the eye, they have a camera  
7 that they literally rest directly on your eyeball and it  
8 takes a picture of the back of the eye. It's called a  
9 RetCam.

10 Q. What did the RetCam images reveal?

11 A. He had extensive multi-layered, severe  
12 retinal hemorrhages. So the retina is the back of your  
13 eyeball where the image that you see is focused on, it's  
14 like a screen, and blood vessels run through that.

15 And there's many, many layers, and within  
16 those layers his blood vessels have ruptured and caused  
17 bleeding. So he had bleeding within the layers of the  
18 retina and he also had blood that had broken through and  
19 was in front of the retina and behind the retina.

20 So there was nothing normal in the back. And  
21 I believe it was only his right eye. His left eye did  
22 not have hemorrhages. He had blood everywhere in the  
23 back of his eye.

24 Q. Was there any consequences from that  
25 bleeding?

1 A. So his brain injury had more than just the  
2 bleeding around his brain. He had what's called  
3 cortical injury. So cortical means the brain matter  
4 itself is damaged, which is not surprising given what he  
5 looked like clinically. Bleeding around the brain is  
6 bad and it makes you have a headache, but generally if  
7 it's just bleeding around the brain. The kids are mad,  
8 they're yelling and they're crying, they hurt. They  
9 could be having seizures. But when their consciousness  
10 is impaired that tells me that the brain actually has  
11 been damaged and you could see that on the MRI.

12 Q. You talked about the necessity for pictures  
13 of his eye. I don't remember exactly what term that you  
14 used. Did you get those images, as well?

15 A. Yeah. So the pediatric ophthalmologists, the  
16 eye doctors, come and they put the dilating drops in and  
17 then they use a special piece of equipment that's  
18 different than the one you're probably familiar with,  
19 where the doctor takes the things off the wall and looks  
20 in your eye, when they use that, you can only see  
21 straight back in the eye. So your pupil, the black spot  
22 of your eye, is like a window and it allows you to see  
23 straight back, but not much more.

24 Ophthalmologists have something called an  
25 indirect ophthalmoscope, where they put a thing on their

1 A. So the part of your eye that -- we call it  
2 the macula, which is your visual hotspot -- that's where  
3 all the images are supposed to be focused if you're  
4 seeing correctly. If there's blood in front of that,  
5 then it's like pulling the shades down. You can't --  
6 the image can't get to that part of the retina, so  
7 you're functionally blind if there's bleeding in front  
8 of the macula.

9 So he has so much blood in the back of his  
10 right eye that he's functionally blind at that point in  
11 time in that eye. Now, it can go away. But sometimes  
12 it doesn't, because your body can only absorb, you know,  
13 blood that's in certain places.

14 They can't absorb -- sometimes you need  
15 surgery, sometimes it's never going to go away, it  
16 leaves staining. So it can impair your vision long  
17 term.

18 So he wasn't conscious enough for us to tell  
19 if he could see, but we can say that just based on where  
20 the blood is, if he were conscious he would not have  
21 been able to see out of that eye.

22 Q. Do you know whether there was any permanent  
23 consequences from that bleeding?

24 A. I believe he's had ongoing vision issues.

25 Q. And after you see all of this and you hear

1 about all of these injuries, can you tell me if you've  
2 formed an opinion as to whether you had an obligation to  
3 report this as a mandatory reporter?

4 A. I did.

5 Q. What did you do?

6 A. I believe it was already reported, but if it  
7 had not been I would have initiated the report. The  
8 findings that I was seeing were not consistent with  
9 accidental events or a medical condition.

10 Q. Earlier you told us that part of your job is  
11 to educate law enforcement, even though you're not a law  
12 enforcement officer. Did you reach out to law  
13 enforcement to let them know about your findings?

14 A. I did.

15 Q. Do you recall who you talked to?

16 A. If you told me his name, I would. I don't  
17 think I put it in my note.

18 Q. Do you recall what agency you talked to?

19 A. Red Lodge. Somebody in Red Lodge. How many  
20 people are there in Red Lodge? I don't think there are  
21 very many. Presumably a sheriff. I don't know.

22 Q. Do you recall what sort of information that  
23 you forwarded to the law enforcement in Red Lodge?

24 A. So whenever we -- so as part of my job, when  
25 I see a patient I have to write a note about my patient.

1 It's called a consult note. Because I'm saying that the  
2 things that I'm seeing are concerning for inflicted  
3 trauma, I reach out to the local law enforcement agency  
4 and ask for, "Who is the assigned detective?" And I  
5 reach out to the Child Protective Services and say, "Who  
6 is the assigned worker?"

7 And then when I have that, I send them a copy  
8 of my note. Because HIPAA, which protects your privacy  
9 specifically says that you are allowed to share  
10 information in the course of an ongoing investigation  
11 and so I share my notes so that they have my  
12 documentation about my concerns and my findings.

13 Q. And do you recall if you created a PowerPoint  
14 to help educate law enforcement?

15 A. I did.

16 Q. Do you recall if you were also asked to  
17 create a PowerPoint to help educate on the retinal  
18 hemorrhaging?

19 A. I did.

20 Q. Do you believe that the use of this  
21 PowerPoint will help educate the jury as to how to view  
22 and assess the pictures that are going to be offered of  
23 the 3D Scan and the retinal images?

24 A. I find me talking about things that I saw  
25 much more difficult to understand than seeing what I'm

1 talking about.

2 MR. NIXON: Judge, I would ask permission to  
3 show State's Demonstrative 2.

4 THE COURT: Mr. Snively.

5 MR. SNIVELY: No objection.

6 THE COURT: Without objection, you may show  
7 State's Demonstrative 2.

8 Q. (BY MR. NIXON) Dr. Laskey, what are we  
9 looking at here?

10 A. When you do a CT scan, there are hundreds and  
11 hundreds of images that are taken by a computer and they  
12 do what's called a reformat. So reformat is literally a  
13 computer algorithm that takes every single cut, so every  
14 single image that they take at different layers and  
15 builds it back into a 3D model so that you can see it in  
16 space.

17 So as a doctor, I can look at a CT scan which  
18 is two-dimensional and know what I'm seeing. But a  
19 three-dimensional image is often much easier to see how  
20 a fracture looks. So in this case, this is a screenshot  
21 of the rotating 3D image so that you can see the  
22 fracture that I was telling you about that's on the  
23 left. So this is the complex linear skull fracture that  
24 is on the parietal bone on the left.

25 MR. NIXON: If I may, Judge -- I'm sorry.

1 Our laser pointer doesn't seem to want to work very well  
2 on the TV.

3 Q. (BY MR. NIXON) Are you referring to this  
4 right here?

5 A. Yes, that's the fracture. So that's  
6 literally a break in the skull itself. The line that's  
7 to the right of that, that's a squiggly line, that's  
8 called a suture. And a suture is normal connection  
9 between the plates of the skull. So when a baby is  
10 born, their skull isn't fused because you need for it to  
11 collapse down a little bit to come out of the birth  
12 canal and you then need it to grow as the brain grows.

13 So once the brain has finished growing in  
14 volume, the sutures start to knit closed. So those --  
15 the squiggly lines, there's a squiggly line on the left  
16 of the screen towards the front, that's a suture, and  
17 then there's a suture in the back and there's a suture  
18 that goes right down the middle.

19 But the lines that are in the middle of the  
20 screen, those are the fractures. So you can see there's  
21 a vertical component and a horizontal component. And  
22 the horizontal component wraps all the way up around the  
23 top of the head and around the back of the back of the  
24 head.

25 MR. NIXON: Next slide, please.

1 THE WITNESS: If you hit F5.  
 2 MS. PRATT: I don't have that.  
 3 THE WITNESS: Oh, okay. Tech support from  
 4 the witness stand.  
 5 Q. (BY MR. NIXON) What are we looking at in this  
 6 slide?  
 7 A. So this is -- I should mention first, that  
 8 the name that's up in the top, right corner, you'll see  
 9 it says ZZZPC Carda, that's this patient's trauma name.  
 10 So when a patient is transported emergently, we give  
 11 them a trauma name as soon as they hit our system,  
 12 because that allows us to -- it's like "Jane Doe."  
 13 It allows us to start putting orders in and  
 14 doing things before we have the patient registered. So  
 15 ZZZPC means trauma Primary Children's. And then they  
 16 have like a random word generator that alphabetically  
 17 assigns you the next random word that they choose.  
 18 So I know that ZZZPC Carda is Everett because  
 19 that's documented in my note and that's the name that he  
 20 was given before we had him registered.  
 21 So this is the same 3D recon, but I rotated  
 22 it so that looking straight on from the back. So you  
 23 can see the top of his cervical center spine at the  
 24 bottom of it. And you can see the squiggly lines that I  
 25 talked about that are sutures that are sort of a

1 triangle in the back meeting and then going forward with  
 2 the suture down the center of the skull. And you can  
 3 see the large stellate fracture on just to the right of  
 4 the midline.  
 5 Q. You have a note here that says, "This appears  
 6 to be a separate impact site."  
 7 A. Yes.  
 8 Q. What do you mean by that?  
 9 A. So the two fractures don't connect in any  
 10 way. So there's -- there are fractures that you can get  
 11 from a single impact that are in two different places,  
 12 but they don't look anything like this. They're totally  
 13 different.  
 14 This very clearly is a separate and distinct  
 15 fracture from the one that's on the side. So there's no  
 16 connection. There's no plausible -- there's no  
 17 plausible mechanism trauma of -- any kind of trauma that  
 18 could cause both of these with one impact.  
 19 MR. NIXON: If I can approach?  
 20 Q. (BY MR. NIXON) Can you tell me whether or  
 21 not this is the suture that you're talking about, the  
 22 squiggly line?  
 23 A. Yes. Squiggly lines are sutures. The one  
 24 that goes up the middle is also a suture.  
 25 Q. Can you tell me whether or not this -- is

1 this the first fracture that we looked at?  
 2 A. Yes. This is the first fracture and it  
 3 actually goes far enough back that it actually leaves  
 4 the parietal bone, goes over the suture and enters the  
 5 occipital bone.  
 6 THE COURT: And I'm going to have the record  
 7 reflect that Mr. Nixon is pointing at a mark about 10  
 8 o'clock on the picture of the skull. Go ahead.  
 9 Q. (BY MR. NIXON) What significance does a  
 10 fracture crossing the suture line have for you?  
 11 A. That also has to do with force of impact. So  
 12 typically, fractures that happen from what we call  
 13 routine household falls, so falls downstairs, falls off  
 14 high surfaces, will remain within one bone of the skull,  
 15 so just the parietal bone.  
 16 If it crosses the suture line, that suggests  
 17 a substantially higher force to actually involve more  
 18 than one bone of the skull.  
 19 MR. NIXON: Next slide, please.  
 20 Q. (BY MR. NIXON) What are we looking at in this  
 21 picture?  
 22 A. So when I have the 3D reconstruction on the  
 23 computer, I can rotate it around the axis of the spine  
 24 or in a circle, up and down, this allows us to  
 25 appreciate the fracture that was in the occipital bone.

1 So the back, right side of his head is so severe that it  
 2 actually travels all the way under the base of his skull  
 3 almost to where it connects with the spinal column.  
 4 Q. And what does that indicate when you see a  
 5 fracture like that?  
 6 A. I -- I can't even -- the right occipital  
 7 skull fracture is such a severe skull fracture I cannot  
 8 think of any plausible accidental mechanism for this.  
 9 MR. NIXON: Next slide, please.  
 10 THE WITNESS: This is -- it's, again, just  
 11 rotating a little bit more, so now you can see the right  
 12 side of his head a little bit more.  
 13 And you can see there's like a central  
 14 pushed-in part of the fracture that's sort of -- almost  
 15 got like a circular component to it and then the  
 16 branches coming off of that. That indicates a point of  
 17 impact, so something different than a flat surface.  
 18 You can't get this from a flat surface. You  
 19 have to have this by having something impacting -- you  
 20 either impacting into or something impacting into you  
 21 that's raised and pointed in some way.  
 22 MR. NIXON: Next slide, please.  
 23 Q. (BY MR. NIXON) What are we looking at in  
 24 this is slide?  
 25 A. This is the very top of the head. So his



1 nose is down in this picture and the back of his head is  
2 up. And this is allowing you to see the suture, so the  
3 squiggly line straight down the middle is a suture. And  
4 the squiggly line at the bottom -- the bottom third of  
5 the skull -- that's another suture.

6 The one that's right in the middle, so it  
7 goes, you know, right at 3 o'clock, that is part of one  
8 of the branches of the parietal fracture. And it shows  
9 you how high it goes, it goes all the way up to the very  
10 top of his head.

11 MR. NIXON: Can we see the next slide,  
12 please.

13 THE WITNESS: So obviously this is just  
14 rotating it a little bit more and now you can see his  
15 eye sockets, his nose, his sutures are still there.

16 The reason that I showed this picture is that  
17 you can see the component that we just looked at, that  
18 went all the way up to the top is actually lifting off.  
19 So it's no longer in alignment with the rest of the  
20 skull, it's actually lifting up.

21 So it could either be lifting up because the  
22 brain is swelling under it or the other part could be  
23 pushed down because of the impact. I can't tell the  
24 difference just by looking at this.

25 MR. NIXON: Next slide, please.

1 it's very hard to see his optic nerve in this. It would  
2 actually be just inside from 9 o'clock, is where his  
3 optic nerve is. And his nose would be in, you know, to  
4 the left of that.

5 There's nothing normal about this retina.  
6 You can see that there's just blood, blood spots of  
7 different intensities. So some darker and some are  
8 lighter. That has to do with what layer they're in, so  
9 how deep they are or shallow they are when you're  
10 looking at it.

11 So this is what is called "too numerous to  
12 count" is how the ophthalmologists describe it. So  
13 too-numerous-to-count multi-layered retina hemorrhages  
14 in all four quadrants, so dividing the eyeball into  
15 four, to the periphery.

16 MR. NIXON: Next image, please.

17 Q. (BY MR. NIXON) What are we looking at in this  
18 photo?

19 A. So same eye. When they take the picture they  
20 actually move the eyeball from the outside to move  
21 different parts into focus. Because the retina wraps  
22 all the around to the back of your eye and attaches just  
23 behind your iris, so the colored part of your eye,  
24 that's how much retina you have. And they can see all  
25 the way out to that edge by moving the eyeball around.

1 Q. (BY MR. NIXON) What are we looking at in this  
2 particular image?

3 A. So the back of the eye, like I told you, is  
4 the retina. And the retina should have blood vessels  
5 that run in it, but blood should be in blood vessels.  
6 There shouldn't be blobs of blood anywhere other than  
7 straight, pretty clean blood vessels.

8 You also see when you look at the back of the  
9 eye, you look at what's called the optic nerve. The  
10 optic nerve is a bright yellow or white circle that is  
11 -- it's not dead center, it's actually towards your  
12 nose. And the blood vessels run out like a spider web  
13 from that.

14 Your optic nerve is where all of the messages  
15 from the retina get gathered and then sent back to the  
16 brain on that nerve connection. So in this picture the  
17 blue arrow is the optic nerve and the red arrows are  
18 just some examples of vascular and that is a totally  
19 normal eye. This is not Everett's eye. That is just a  
20 normal eye.

21 MR. NIXON: Next image, please.

22 Q. (BY MR. NIXON) What are we looking at here?

23 A. So this is from Everett's RetCam. So "OD"  
24 stands for Latin that I don't know, but it's the right  
25 eye. So this is a picture of Everett's right eye and

1 So what they're demonstrating is that there's retinal  
2 hemorrhages everywhere not just in the very back of the  
3 eye.

4 MR. NIXON: Next image, please.

5 Q. (BY MR. NIXON) What are we looking at here?

6 A. So the same eye but you can see where the  
7 optic nerve is, which is now up at 2 o'clock, they've  
8 moved the eyeball around to take pictures of sort of the  
9 other side of the eye. And they're showing that there's  
10 such extensive retinal hemorrhages they aren't able to  
11 find any normal retina in this patient. There's  
12 actually 19 pictures of the backs of his eyes. These  
13 are just representative.

14 MR. NIXON: And next image, please.

15 Q. (BY MR. NIXON) Dr. Laskey, what are we  
16 looking at here?

17 A. That is just to give you a reference point of  
18 what a normal skull of a similar-aged child should look  
19 like. So again, the squiggly lines are totally normal.  
20 Those are sutures. The line that's horizontal in this  
21 that goes from about 9 o'clock straight across, that's  
22 actually a different suture, it's a temporal suture.  
23 That's a suture also. No fractures on this child.

24 MR. NIXON: Next image, please.

25 THE WITNESS: So again, just rotating it so

1 you can see the different sutures.  
 2 Q. (BY MR. NIXON) Is this a normal image of the  
 3 skull?  
 4 A. Yes, this is normal.  
 5 MR. NIXON: Next image, please.  
 6 THE WITNESS: And again, you can see the  
 7 lines that have the squiggles in them, so you can see  
 8 the temporal suture that goes sort of horizontal and  
 9 then the suture in the front and then there's the suture  
 10 in the back.  
 11 MR. NIXON: If I may approach, Your Honor?  
 12 THE COURT: You may.  
 13 Q. (BY MR. NIXON) Dr. Laskey, I'm approaching  
 14 with what is marked as State's Exhibits 50, 51, 52, 53,  
 15 54, and 55. Can I please have you take a second and  
 16 look at those images.  
 17 A. (Witness complies.) Yes, sir.  
 18 Q. And do you recognize what those images are  
 19 of?  
 20 A. I do.  
 21 Q. And what are they?  
 22 A. These are the screen captures of the 3D  
 23 recons that we just looked at without the annotation.  
 24 Q. And are those true and accurate depictions of  
 25 that 3D imaging?

1 A. Yes. And they have the patient's identifying  
 2 information at the top, right corner.  
 3 MR. NIXON: If I may approach, Your Honor,  
 4 with State's Exhibit 56, 57 and 58.  
 5 THE COURT: Yes.  
 6 Q. (BY MR. NIXON) Do you recognize those images?  
 7 A. Yes.  
 8 Q. And what are we looking at there?  
 9 A. These are representative of the RetCam images  
 10 that we just looked at.  
 11 Q. And those are true and accurate of those  
 12 RetCam images?  
 13 A. Yes, sir.  
 14 MR. NIXON: Your Honor, I would move for  
 15 introduction of State's Exhibits 50 through 58.  
 16 THE COURT: Mr. Snively?  
 17 MR. SNIVELY: No objection.  
 18 THE COURT: Without objection, State's  
 19 Exhibits 50 through 58 are admitted.  
 20 MR. NIXON: I believe the Court already has a  
 21 copy.  
 22 (Wherein, State's Exhibit Nos.  
 23 50 through 58 were received.)  
 24 Q. (BY MR. NIXON) Before we start looking at  
 25 some of these images, I believe you said you talked with

1 Red Lodge Police. Did you make any requests of them as  
 2 far as asking for information?  
 3 A. Yeah. Obviously, as a doctor, I can't go to  
 4 people's houses and look at the things that are being  
 5 described to me. So I had asked specifically for a  
 6 picture of the futon, because I wanted to better  
 7 understand sort of the size and dimensions that we were  
 8 talking about with that.  
 9 And then I also, because of the history of  
 10 him, Everett, suddenly changing his status from normal  
 11 to not breathing in the bathroom and the type of skull  
 12 fracture that he had, I asked for pictures of things in  
 13 the bathroom to see if there was something that could  
 14 have caused this type of injury.  
 15 MR. NIXON: Your Honor, I would like to  
 16 publish what was previously introduced as State's  
 17 Exhibit 4.  
 18 THE COURT: You may.  
 19 Q. (BY MR. NIXON) Dr. Laskey, do you recognize  
 20 this photograph?  
 21 A. Yes.  
 22 Q. What is it?  
 23 A. It's a picture of the futon that the baby was  
 24 reportedly placed on to sleep.  
 25 Q. And it's hard to say, but how high off the

1 ground does this appear to be?  
 2 A. There's actually another picture that I was  
 3 provided that made it very clear. It's really very low.  
 4 Q. How about we look at State's Exhibit 5,  
 5 please, which was previously introduced.  
 6 A. So again, this is very low. Both Ryann had  
 7 described to me and then law enforcement reported to me  
 8 that this was -- gosh, I want to say like a foot, maybe,  
 9 off the floor. This was very -- this is a very thin  
 10 futon mattress like on just a wood platform.  
 11 Q. After looking at these photographs, what were  
 12 you thinking?  
 13 MR. SNIVELY: Your Honor, I object to what  
 14 she's thinking. If she has a medical opinion, that's  
 15 fine.  
 16 THE COURT: Sustained.  
 17 MR. NIXON: Your Honor, I'm going to withdraw  
 18 that question, please.  
 19 THE COURT: Okay.  
 20 Q. (BY MR. NIXON) Diagnostically what importance  
 21 does this -- do these images have for you?  
 22 A. They help me understand the context of the  
 23 reported fall.  
 24 Q. Okay. Based on your expertise and training,  
 25 do these images provide any sort of believability for

1 the story that you've heard about the futon?

2 A. So I can't say whether or not Everett did or  
3 did not fall off of the futon. He may well have. What  
4 I can say is that it is my medical opinion that if he  
5 did fall off the futon, it would not have resulted in  
6 any of the injuries that we're seeing.

7 Q. Earlier we had talked about Everett going in  
8 to see, I guess, a physician assistant or doctor at  
9 Beartooth Clinic on the 18th. Did you review those  
10 records?

11 A. I did.

12 Q. And based on your experience and training,  
13 did you notice anything that concerned you?

14 A. My concern is that there was a report of a  
15 bump on his head and a history of vomiting that was  
16 persistent enough that mom was specifically stating that  
17 was her concern and it was associated with this fall  
18 from the futon and there was not any imaging that was  
19 done at that time.

20 Q. In reviewing the records associated with  
21 that, what, if anything, did you notice that might be  
22 concerning to you regarding a head injury?

23 A. I'm sorry?

24 Q. Okay. What, if any, symptoms concerned you  
25 about a head injury?

1 A. A change in appetite when you've got a pukey  
2 kid definitely could be a number of different things.  
3 But again, it's how much of a change in appetite. Is he  
4 even taking a bottle, is he going to be able to stay  
5 hydrated or is something more seriously wrong with him  
6 and we need to do more?

7 Q. Can you tell me whether a change in energy or  
8 having less energy is important?

9 A. I mean, yes, it's all part of the bigger  
10 picture. How sick is this child?

11 Q. Earlier in this trial we heard testimony  
12 regarding mother, Ryann, saying that the baby reacted  
13 strongly to having his hair washed and her touching the  
14 side of his head. Do you assess any importance on that?

15 A. So actually, a quite common story for  
16 bringing a child to the medical attention and finding a  
17 skull fracture is babies with lots of hair, so you don't  
18 see anything, but you're washing their hair, if you  
19 think about what you do when you wash hair, you kind of  
20 vigorously rub the scalp, babies -- you might feel a  
21 soft, squishy spot or the baby might respond in a way  
22 that suggests that they hurt.

23 That's often one of the reasons that they  
24 come to medical attention, we do an x-ray and we find a  
25 skull fracture. That's a very common history.

1 A. So we have a patient whose specific  
2 presenting complaint -- what we call the chief complaint  
3 -- the reason they came to medical attention is  
4 vomiting. He's vomiting, vomiting, vomiting.

5 Mom is saying, "Something is wrong with him.  
6 He's vomiting, something is not right." That worries me  
7 because that could be an indicator of a brain injury.

8 Q. Can you tell me in your expert opinion are  
9 you concerned if a patient has behavioral changes at the  
10 same time?

11 A. So behavioral changes in infants are often  
12 harder to assess than in an older child or adult. So if  
13 the parent is telling you he's not eating, he's not  
14 acting himself, something's off or just not right,  
15 that's hard to put your finger on medically, but it  
16 should cause you to be concerned about how sick is this  
17 patient?

18 Like what else do I need to be thinking  
19 about? Is this just he feels puny because he's sick,  
20 like has the flu or something, or is something more  
21 seriously wrong with him and what else do I need to do  
22 to figure that out?

23 Q. And can you tell me what, if any, importance  
24 a change in appetite would have in conjunction with  
25 those two things?

1 Q. Also, earlier in this trial we heard  
2 Physician Assistant Doug Whitehead say that he could  
3 positively eliminate the possibility of a skull fracture  
4 by visual and tactile examination. Based on your  
5 experience and expertise, do you believe that's  
6 possible?

7 A. That's not possible. You can sometimes find  
8 a skull fracture on exam and say, "I'm pretty sure  
9 there's a skull fracture in there, we should get an  
10 x-ray." But you can't rule out a skull fracture without  
11 getting an x-ray. There's no way that you could do  
12 that.

13 Q. Earlier in your testimony, you talked about  
14 the priority being trying to rule out what could harm  
15 the baby most. Do you have an expert opinion as to  
16 whether that was done in this examination?

17 A. No. I believe that he had symptoms and  
18 findings that would suggest that he was re-injured after  
19 an initial injury event and failing to identify the  
20 first injury event led to the access of an individual to  
21 cause a second event.

22 Q. Okay. So based on what you just said, based  
23 on your experience and training, do you have a medical  
24 opinion as to when the less serious parietal fracture  
25 occurred?

1 A. Yes.  
 2 Q. What is that?  
 3 A. On or about Wednesday when the symptoms  
 4 started, which I am saying the symptoms that started are  
 5 the vomiting. So the vomiting started on Wednesday and  
 6 the reported fall happened on Wednesday. I believe  
 7 something happened on Wednesday.  
 8 Q. Are there any other reasons that you think  
 9 that's the case?  
 10 A. He wasn't normal after the vomiting started.  
 11 He was ill and persistently ill and then became  
 12 critically ill acutely on the day that he was brought to  
 13 medical attention, for Beartooth Clinic requiring life  
 14 flight down.  
 15 Q. Can you tell me whether or not that all  
 16 relates back to the talk that you had regarding when he  
 17 was last well?  
 18 A. Yes.  
 19 Q. And we may have touched on this earlier, how  
 20 quickly did the baby decompensate after the second  
 21 fracture?  
 22 A. Immediately, from what the history is, is  
 23 he's fine when he goes into the bathroom, he's in  
 24 extremis, which is the medical phrase for you need  
 25 life-sustaining measures to keep you alive at that

1 point. He required CPR and 911.  
 2 Q. And you mentioned earlier that you keep up to  
 3 date on as much medical literature as you can, are your  
 4 findings consistent with what you see in published  
 5 medical literature?  
 6 A. Yes.  
 7 Q. And is your testimony here today to the  
 8 highest degree of reasonable medical certainty?  
 9 A. Yes.  
 10 MR. NIXON: If I may have a moment, Your  
 11 Honor?  
 12 THE COURT: Yes.  
 13 MR. NIXON: I'd like to lodge Demonstrative  
 14 2.  
 15 THE COURT: Yes. Thank you.  
 16 MR. NIXON: Your Honor, I would like to go  
 17 ahead and publish part of the PowerPoint next to State's  
 18 Exhibits 50, 51, and 52.  
 19 THE COURT: All right.  
 20 MR. NIXON: State's Exhibit 55. Please  
 21 publish that.  
 22 Q. (BY MR. NIXON) So these are images that we've  
 23 seen separately in your demonstrative and State's  
 24 Exhibit 55 was introduced. What are we looking at here,  
 25 Dr. Laskey?

1 A. This is a composite of the normal on the  
 2 left, so not this patient. And then Everett's image on  
 3 the right that shows the difference of the fractures.  
 4 MR. NIXON: I'd like permission to publish  
 5 State's Exhibit 54 next to the --  
 6 THE COURT: Yes, you may.  
 7 MR. NIXON: -- demonstrative regular images.  
 8 Q. (BY MR. NIXON) So what are we looking at  
 9 here?  
 10 A. Again, this is normal patient on the left and  
 11 Everett's image on the right, depicting both of the  
 12 fractures.  
 13 MR. NIXON: Your Honor, I'd like permission  
 14 to publish State's 52.  
 15 THE COURT: Yes, granted.  
 16 Q. (BY MR. NIXON) This is next to the normal  
 17 skull image from the demonstrative. What are we looking  
 18 at here?  
 19 A. Again, on the left, normal, and on the right  
 20 is Everett.  
 21 Q. Dr. Laskey, I also would like you to take a  
 22 look at a few other images that were previously  
 23 introduced into testimony to see if you can offer some  
 24 insight.  
 25 MR. NIXON: Your Honor, may I publish

1 previously introduced State's Exhibit 7?  
 2 THE COURT: Yes.  
 3 Q. (BY MR. NIXON) So what are we looking in  
 4 that paragraph?  
 5 A. That -- I didn't take this, but it says PICU,  
 6 so that presumably means it was taken at Primary  
 7 Children's PICU, pediatric intensive care unit,  
 8 because I believe that was the only ICU he was in. And  
 9 this is showing -- on his head they have what's called  
 10 EEG leads. They're assessing for seizures, so they put  
 11 electrodes all over the scalp and then they have to put  
 12 like a cap on it to from keep everything from falling  
 13 off. So this is Everett in his bed with his EEG cap on.  
 14 MR. NIXON: Please publish State's Exhibit  
 15 10.  
 16 THE WITNESS: So you can see the things on  
 17 his forehead, those are EEG leads. So they use like  
 18 this glue stuff to -- it's almost like rubber cement  
 19 that puts it on his forehead, but it's actually all over  
 20 his scalp. The more hair a kid has the harder it is to  
 21 keep those on.  
 22 It just gets their hair all gunked up. So  
 23 that's why they have to have the cap on because things  
 24 don't stick very well.  
 25 He has a tube in his nose, because he -- it's

1 to drain his stomach. So your stomach always makes acid  
2 and if you're not being fed on a regular basis that acid  
3 can cause ulcers. So we give you medicine to suppress  
4 the acid, but we can't feed him because we don't know  
5 how bad his brain injury is.

6 And if you have a very severe brain injury  
7 you can't protect your airway, so that acid or food  
8 could come up your esophagus and go down your windpipe  
9 and cause severe pneumonia. So they put a tube down to  
10 both give him some nutrition very slowly but also to  
11 drain out stuff.

12 MR. NIXON: May I publish State's Exhibit 13?

13 THE COURT: Yes.

14 Q. (BY MR. NIXON) What are we looking at here in  
15 this photograph?

16 A. The mess that the EEG techs make with the  
17 goop that his hair is all disgusting because the glue is  
18 just everywhere and those are all the leads.

19 Q. Referring to your final report, what was the  
20 final rundown of all of the injuries that were  
21 identified from -- I guess that Everett had?

22 A. May I refer to it?

23 Q. Please.

24 A. So after I had all of these studies done, so  
25 his eye exam, his MRI, his skeletal survey, everything,

1 these potentially life-threatening injuries?

2 A. Yes.

3 Q. Based on your experience and training, are  
4 these injuries with a significant potential for  
5 life-long consequences?

6 A. Yes. So he survived the injuries through  
7 medical intervention, right?

8 So he had to have extensive medical  
9 intervention and support in order to survive the  
10 injuries. But unambiguously these are life-changing  
11 injuries. Because while he can look pretty good as far  
12 as a baby goes -- you know, we don't expect much of  
13 babies at nine months. So he could look pretty good  
14 when he goes home, but the fact is that we know on his  
15 MRI that his brain has been damaged in a way that our  
16 bodies can't fix.

17 So you can resorb blood that's not where it's  
18 supposed to be, the blood will go away. He may grow out  
19 of the seizure disorder. But there are parts of his  
20 brain that are so damaged that they won't work the way  
21 they were supposed to.

22 So we may not know what that means until he  
23 has to use that part of his brain. So sometimes we know  
24 soon, because they don't walk on time or they don't talk  
25 on time. But sometimes we don't know until they go to

1 I went back and do what's kind of like a summary of  
2 everything that we know up to that point.

3 And so at this point when I saw him on the  
4 25th of April, I first saw him on the 20th, I've got  
5 documented that he's got extensive, multi-layered  
6 retinal hemorrhages in both eyes. I only have images --  
7 for whatever reason they weren't able to capture images  
8 of his left eye, so I only personally reviewed the right  
9 eye. But the ophthalmologist saw in both eyes.

10 His MRI shows that he has brain injury to the  
11 actual brain tissue itself. So it's more than just the  
12 bleeding around the brain, it's what we call the  
13 parenchyma, which is the body of the brain. So that is  
14 deep injury that you can see on the MRI that suggests  
15 that he's going to have some form of impairment, that we  
16 just can't tell yet how bad that's going to be.

17 He's also -- the reason they were doing the  
18 EEGs is because he was having seizures, which again is  
19 an indicator of the depth of injury, so he was having  
20 seizures that required medicine to control.

21 And then, obviously, he had the two very  
22 severe skull fractures. So that is the totality of the  
23 injuries that we were able to identify on his  
24 evaluation.

25 Q. Based on your experience and training, were

1 school and we want them to sit all day and pay attention  
2 and learn and not fight with people and things like  
3 that.

4 So one of the things we tell families is  
5 you're going to have to keep seeing doctors about this  
6 for a very long time, because there's a chance that  
7 we're not going to know the extent of this injury until  
8 we need him to do more and more and more with his brain  
9 and those parts aren't available.

10 Q. Based on what you just testified to, begs one  
11 more question, based on your experience and training,  
12 had Everett not been treated at the ER here in Red Lodge  
13 and subsequently in Primary Children's, would he have  
14 died?

15 A. I think there's a very good chance -- he  
16 required intensive intervention. This potentially could  
17 have killed him had immediate care not been sought.

18 MR. NIXON: Your Honor, I don't have any  
19 further questions at this point in time.

20 THE COURT: All right. So here's what I  
21 think we're going to do.

22 Mr. Snively, I'm just going to take a short  
23 break before your cross. Give the jury a chance to  
24 stretch and freshen themselves. But I'm going to make  
25 it short because we want to keep moving.

1 So I'm going to say ten minutes. I want to  
2 give you a chance to go to the restroom if you need to  
3 and stretch your legs and then we'll get right back to  
4 it.  
5 And I'll just rely on the bailiff to let me  
6 know when you're ready. It's not as long as your 15, so  
7 during this -- hold on, don't leave. I've got to tell  
8 you not to talk about the substance of the case among  
9 yourselves or with other people or in any way form or  
10 express an opinion on the case.  
11 We're in recess.  
12 (Wherein, a recess was taken.)  
13 THE BAILIFF: All rise.  
14 THE COURT: Please be seated. We are back in  
15 court, DC 19-17, State v. Polakoff.  
16 Counsel for the State is present.  
17 Counsel for the defendant is present. The  
18 defendant is present.  
19 The jury is not present yet.  
20 Counsel, any reason we cannot bring the jury  
21 in at this time?  
22 MR. NIXON: No, Your Honor, please do.  
23 THE COURT: Mr. Snively.  
24 MR. SNIVELY: No, Your Honor.  
25 THE COURT: Please, Mr. Bailiff, bring the

1 Q. Doctor, you know that it was due to vomiting  
2 and diarrhea, correct?  
3 A. I don't know that, sir. I --  
4 Q. You didn't see that in the record?  
5 A. I believe there was a history of a loose  
6 stool.  
7 Q. Did you see in the record where the intake,  
8 which has already been admitted by Ryann and she gave  
9 the intake, said throwing up and diarrhea? You didn't  
10 see that?  
11 A. Sir, you'd have to refresh my memory by  
12 providing me the documentation.  
13 Q. I'm sorry?  
14 A. Could you please provide me the  
15 documentation? I didn't review it prior to coming  
16 today.  
17 Q. I'm going to hand you the first page of that  
18 record.  
19 MR. SNIVELY: With the Court's permission, if  
20 I may approach?  
21 THE COURT: Yes, you may.  
22 Q. (BY MR. SNIVELY) Take a moment and just look  
23 at that.  
24 A. Thank you.  
25 Q. Have you seen that document before?

1 jury in.  
2 (Wherein, the jury is present.)  
3 THE COURT: Okay, be seated. Thanks.  
4 The jury has returned to the jury box.  
5 Mr. Nixon, Mr. Spojka, do you stipulate that  
6 the jury and alternate are present?  
7 MR. NIXON: We do, Your Honor.  
8 THE COURT: Mr. Snively.  
9 MR. SNIVELY: Yes, Your Honor.  
10 THE COURT: All right. Mr. Snively, do you  
11 wish to cross?  
12 MR. SNIVELY: I do, Your Honor.

#### **CROSS EXAMINATION**

14 **BY MR. SNIVELY:**

15 Q. Doctor, I want to direct your attention to  
16 April 18th of 2019. And you testified that you had  
17 reviewed Beartooth Clinic reports from that date; is  
18 that correct?  
19 A. I believe so, yes.  
20 Q. And you stated that the main complaint was  
21 vomiting. Do you remember saying that on direct?  
22 A. Is that -- I thought that the -- I don't know  
23 the dates specifically without having it in front of me,  
24 but I do believe that the visit to Beartooth prior to  
25 requiring the EMS was due to vomiting.

1 A. I have.  
2 Q. And what does that say the presenting  
3 complaint is?  
4 A. It says throwing up slash diarrhea.  
5 Q. And do you have any --  
6 MR. SNIVELY: If I may I retrieve that, Your  
7 Honor?  
8 THE COURT: Yes.  
9 Q. (BY MR. SNIVELY) Do you have any reason to  
10 doubt that that's Ryann who provided them that  
11 information?  
12 A. I don't know who provided them that  
13 information. As I understand it, both Nathan and Ryann  
14 were at the Beartooth Clinic that day.  
15 Q. But Ryann already, from sitting there, has  
16 admitted to the jury that she provided that information.  
17 You have no reason to question that, do you?  
18 A. I do not.  
19 Q. And, in fact, throughout the medical records,  
20 until she talks to you, there's consistent reference to  
21 diarrhea, isn't there?  
22 A. There's a history of a loose stool that Ryann  
23 gave to me.  
24 Q. Does that say "loose stool" on the record?  
25 A. No, sir, it does not.

1 Q. I mean, does it say anywhere else in the  
2 record loose stool versus diarrhea?  
3 A. No, sir.  
4 Q. All right. In fact, when you asked her about  
5 the history, she did not tell you about diarrhea being  
6 an issue, did she?  
7 A. That is correct.  
8 Q. In fact, you did not know about diarrhea  
9 until 2021, correct?  
10 A. That is correct.  
11 Q. And so that information she didn't disclose  
12 to you even though there are other places in the medical  
13 records that that was disclosed?  
14 A. As I recall, she mentioned a loose stool.  
15 Q. Doctor, you've testified under oath regarding  
16 what she told you, correct?  
17 A. Yes, sir.  
18 Q. And you testified that she did not tell you  
19 anything about diarrhea.  
20 A. That is correct, sir.  
21 Q. Correct? And diarrhea and vomiting, do you  
22 agree, medically points you towards flu, stomach issues?  
23 A. Vomiting and diarrhea cause you to think of  
24 viral illnesses, yes.  
25 Q. That's the significance of diarrhea, isn't

1 doctor, was -- in his medical records, as I recall,  
2 commented on the bump on the forehead. I don't recall  
3 without reviewing the records contemporaneously whether  
4 or not there's documentation of a fall.  
5 MR. SNIVELY: If I may, Judge, approach?  
6 THE COURT: You may.  
7 THE WITNESS: Thank you.  
8 THE COURT: What did you just hand her?  
9 MR. SNIVELY: I handed her the records from  
10 Beartooth Clinic for April 18th.  
11 THE COURT: In order to refresh her memory?  
12 MR. SNIVELY: Yes.  
13 MR. NIXON: Your Honor, may I take a look at  
14 what's being handed to the witness, as well --  
15 THE COURT: Sure.  
16 MR. NIXON: -- to see exactly what record she  
17 has?  
18 THE COURT: Just one second, Doctor.  
19 Mr. Nixon.  
20 MR. NIXON: I just want to make sure we're on  
21 the same page. I don't have any reason to think she  
22 shouldn't be able to review it.  
23 May I approach?  
24 THE COURT: Come on up.  
25 MR. NIXON: Thank you.

1 it?  
2 A. Yes, sir.  
3 Q. And you didn't have that information from  
4 Ryann on February 20th, 21, 23 --  
5 A. April.  
6 Q. I'm sorry. Yes. April, from the 20th when  
7 you said you got the call, and then the 21st when you  
8 started reviewing things, you did not have that  
9 information, did you?  
10 A. That's correct.  
11 Q. Dr. Whitehead testified in this trial that he  
12 -- well, first of all, do you agree that his records --  
13 Beartooth Clinic records show that there never was a  
14 presenting issue with a head injury or concussion or  
15 anything?  
16 MR. NIXON: Your Honor, I'm going to object.  
17 That misstates the evidence. I believe the record is  
18 replete with mention of a bruise on the forehead.  
19 THE COURT: What was your statement?  
20 MR. SNIVELY: That there was not a complaint  
21 about a concussion or a head injury. I'm going to get  
22 to the --  
23 THE COURT: Okay. I'll overrule that based  
24 on the...  
25 THE WITNESS: So Mr. Whitehead is not a

1 THE WITNESS: May I answer the question about  
2 history of a fall?  
3 Q. (BY MR. SNIVELY) No. I didn't ask you about  
4 a history of a fall. I asked you is there a complaint  
5 of a possible concussion?  
6 A. I don't see those words in here.  
7 Q. All right.  
8 MR. SNIVELY: And I'll take those records  
9 back from you, please.  
10 THE WITNESS: Okay.  
11 Q. (BY MR. SNIVELY) Did you also see in those  
12 records that Nathan is the one that asked the doctor to  
13 look at the mark on Everett's forehead?  
14 A. This feels like a game of memory. If you'd  
15 like me to testify what it says, I should probably keep  
16 it since it's not my documentation.  
17 Q. Doctor, you said you reviewed this in  
18 preparation for your testimony.  
19 A. No, actually, I did not say that.  
20 THE COURT: Hold on. Hold on. One at a  
21 time.  
22 MR. SNIVELY: Sorry, Judge.  
23 THE WITNESS: I believe I said I didn't  
24 review that in preparation for my testimony, which is I  
25 why asked you to provide it to me to if you want me to

1 answer questions about it.

2 MR. SNIVELY: And I apologize, I  
3 misunderstood. I thought you had reviewed these.

4 THE WITNESS: Contemporaneous to my care of  
5 Everett, which was in 2019. I've seen hundreds of  
6 patients since then.

7 MR. SNIVELY: All right.

8 Q. (BY MR. SNIVELY) So it's your testimony  
9 today you don't recall exactly what's in the Beartooth  
10 Clinic records and what PA Whitehead -- his impressions  
11 were and were not; is that correct?

12 A. Not to the specific degree to what you're  
13 asking me to answer questions.

14 Q. And were you aware that Ryann had told PA  
15 Whitehead that Everett had been improving during the day  
16 on the 18th?

17 A. I believe that is accurate, yes.

18 Q. And again, that would be consistent with a  
19 viral issue, correct?

20 A. Vomiting can wax and wane for a number of  
21 reasons.

22 Q. The complaint was diarrhea and vomiting and  
23 that they said that had improved, correct?

24 A. That's a statement not a question. What was  
25 the question?

1 Q. Is that a correct statement?

2 A. That they had improved over the course of the  
3 day? Yes.

4 Q. And were you aware that PA Whitehead had  
5 performed -- put his hands on Everett's head and felt  
6 his skull and did that -- did you know he had done that?

7 A. I did not know what he did.

8 Q. And if there was a fracture and somebody is  
9 pushing on that part of the skull, you would expect a  
10 reaction from the child, correct?

11 A. I would.

12 Q. Your testimony -- make sure I understood your  
13 testimony, is that if a child nine months or younger has  
14 a bruise, is it your opinion that the child either has a  
15 bleeding disorder or there's been abuse?

16 A. No.

17 Q. Okay. I mean, there's the other explanation  
18 that something happened that he -- a red mark could be  
19 from his head was accidentally hit on the counter or hit  
20 a toy or something like that. I mean, there are  
21 innocent explanations for a red mark on a nine-month-old  
22 child, correct?

23 A. That's correct.

24 Q. And you don't have any reason to dispute that  
25 it was a red mark that PA Whitehead had been told about

1 and examined on his forehead, correct?

2 A. That's correct.

3 Q. In fact, you used the term "goose egg" on  
4 your direct. Do you remember saying that term?

5 A. Yes, sir.

6 Q. That's not a term that you've used  
7 previously, is it?

8 A. I don't recall, sir.

9 Q. I'm sorry?

10 A. I don't recall. When you say "used  
11 previously," like ever? In this case? I don't know  
12 what we're talking about.

13 Q. In this case, ma'am.

14 A. If you're talking about my previous  
15 testimony, I don't recall.

16 Q. Do you want to look at your testimony to see?

17 A. Sir, I'm not disputing you. Whether I used  
18 the word today, but didn't use it on a different day, I  
19 don't recall.

20 Q. All right. And, in fact, would it surprise  
21 you that Ryann told the jury that she didn't use that  
22 term until after she'd been in Salt Lake, had been  
23 interviewed by the Salt Lake Police and had returned to  
24 Montana and was interviewed by the Red Lodge Police,  
25 that that term she did not use at any point during that

1 time period?

2 A. I don't know what Ryann testified to.

3 Q. I asked would that surprise you that that's  
4 been her testimony to this jury?

5 A. I don't feel surprised, you told me a fact.

6 Q. So this idea that you today have testified  
7 that she told you about a goose egg, would be contrary  
8 to what she testified to the jury, correct?

9 A. May I refer to what I documented in my note?

10 Q. No. I'm asking you that would be contrary to  
11 what you testified to, not what your notes are.

12 MR. NIXON: Your Honor, I'm going to object.  
13 That's badgering. She's asking the opportunity to see  
14 what she did get contemporaneously.

15 THE COURT: I think it's confusing. Let's  
16 just take a step and ask a specific question. Okay?

17 MR. SNIVELY: All right.

18 THE COURT: Exactly on what you want to ask  
19 so I know whether you're asking about her testimony  
20 today or something in her records.

21 It could be just me, but I want to make sure  
22 that we're clear on what the question is. Okay?

23 Go ahead.

24 Q. (BY MR. SNIVELY) Doctor, you've previously  
25 testified that you medically cannot state how either of



1 these injuries were caused to Everett. Is that still a  
 2 correct statement?  
 3 A. That is correct. I was not present.  
 4 Q. And it's your opinion that the injuries would  
 5 not have happened in silence, correct?  
 6 A. That is correct.  
 7 Q. Yet, Ryann has continued in her statement  
 8 that there was not a noise during the shower. And she  
 9 told you that, correct?  
 10 A. That is correct.  
 11 Q. And that she says there was talking and  
 12 babbling going on during the shower, correct?  
 13 A. Yes.  
 14 Q. And again, based on your testimony that would  
 15 be consistent with the babbling of where you said  
 16 Everett should have been at nine months?  
 17 A. Yes.  
 18 Q. And she has admitted to you that she was  
 19 within very close proximity of the shower?  
 20 A. Yes.  
 21 Q. And you testified that a skull fracture can  
 22 exist for several days before it's noticed, correct?  
 23 A. Yes.  
 24 Q. And, in fact, there are cases where it's gone  
 25 more than a week before they realized that they have a

1 fracture?  
 2 A. Yes.  
 3 Q. And if there's not an allegation of child  
 4 abuse made to a medical provider, there's no reason for  
 5 a medical provider on their own to do a skeletal imaging  
 6 of the child, is there?  
 7 A. That's incorrect.  
 8 Q. That's incorrect?  
 9 A. People don't come in and say, "I think my  
 10 child is abused," and then I do something.  
 11 Q. Let me ask. If the provider doesn't believe  
 12 there's child abuse, there's not a reason to do that  
 13 imaging?  
 14 A. That's right. You have to make the decision  
 15 that I am worried about abuse in order to do the  
 16 evaluation for abuse.  
 17 Q. And you are not a neurologist, correct?  
 18 A. That's correct.  
 19 Q. You're a pediatrician?  
 20 A. Yes, sir.  
 21 Q. And you're not a radiologist?  
 22 A. No, sir.  
 23 Q. And therefore, based on your medical  
 24 training, you cannot age either of these skull  
 25 fractures, can you?

1 A. Skull fractures can't be aged by either a  
 2 neurologist or a radiologist. It's not a medical thing.  
 3 Q. So there's no way medically to determine  
 4 which fracture was when or any of that information from  
 5 a medical standpoint?  
 6 A. From looking at an image, no. There's  
 7 clinical correlation that needs to be applied.  
 8 Q. You've testified that there's a possibility  
 9 of long-term effects, that over time is going to tell us  
 10 what those are. Have you seen Everett since he was  
 11 discharged from Salt Lake?  
 12 A. No, sir.  
 13 Q. So you don't do any of the follow-up  
 14 treatment of him; is that correct?  
 15 A. There's rehabilitation specialists that do  
 16 that.  
 17 Q. And you've not followed his records to see  
 18 where he is on any of that, correct?  
 19 A. I believe I've been provided them for prior  
 20 testimony.  
 21 Q. And he is -- and your opinion is that school  
 22 age and school time will be a significant marker for  
 23 where he is?  
 24 A. If he's not already showing developmental  
 25 issues then, yes, that is often a time of definition of

1 the extent of injury.  
 2 Q. And you were shown a picture of Everett, that  
 3 he had the -- and I forget the term for the tube in his  
 4 nose when he was on the PICU unit. He would have been  
 5 sedated at that point with that tube, correct?  
 6 A. No. We don't actually sedate patients with  
 7 brain injury unless we're breathing for them, because we  
 8 want to see what their level of consciousness is on  
 9 their own. So he was not sedated.  
 10 Q. In the images of the left eye --  
 11 A. Right eye.  
 12 Q. No. The right eye are the ones that you  
 13 testified to?  
 14 A. Oh, I apologize, sir.  
 15 Q. The ones on the left eye, you've relied on  
 16 the other doctors' summaries and information as to what  
 17 that is, correct?  
 18 A. Yes, sir.  
 19 Q. You've not personally looked at those?  
 20 A. I have not seen them. They weren't  
 21 available.  
 22 Q. They would have been done at the same time as  
 23 the right eye ones that you testified to, right?  
 24 A. If the camera was working and/or the patient  
 25 was tolerating the exam.

1 Q. But that exam would have been done while  
 2 Everett was in Salt Lake City, correct?  
 3 A. Yes, sir.  
 4 Q. You've also acknowledged that the red mark on  
 5 Everett's forehead would not have been associated with  
 6 either of these fractures that we've talked about here  
 7 today, correct?  
 8 A. Yes. It's in a totally different location.  
 9 Q. Doctor, medically you cannot say when either  
 10 injury occurred?  
 11 A. Specifically, no.  
 12 Q. So you testifying that one of these injuries  
 13 happened on April 17th is not a medical opinion, is it?  
 14 A. It is a medical opinion. It's based on my  
 15 synthesis of the information that's available to me,  
 16 which includes the history.  
 17 Q. Doctor -- okay. You have previously  
 18 testified you can't date either of these injuries?  
 19 A. That's correct.  
 20 Q. If you can't date the injury, you can't give  
 21 a medical opinion as to when they occurred, can you?  
 22 A. Incorrect. I can give a medical opinion  
 23 based on the synthesis of the information --  
 24 Q. But medically --  
 25 THE COURT: Go ahead and finish it.

1 THE WITNESS: I can determine it based on a  
 2 synthesis of the information that I'm provided. You  
 3 triangulate, you can't look at an x-ray and say -- on a  
 4 skull fracture and say, "This happened on this day at  
 5 this time." That's not medically possible.  
 6 Q. And, Doctor, it's medically possible -- in  
 7 the information that you have it's medically possible  
 8 that these two injuries occurred at the same time, one  
 9 after the other?  
 10 A. That is possible, yes.  
 11 Q. And it is possible that they could be weeks  
 12 apart, correct?  
 13 A. I would disagree with that assertion.  
 14 Q. You just earlier said that you agreed that a  
 15 skull fracture could be -- could go a week before being  
 16 noticed?  
 17 A. Yes, I did say that, sir.  
 18 Q. So it is possible that one of these fractures  
 19 could have been in existence for a week prior to April  
 20 19th of 2019?  
 21 A. I disagree with that statement.  
 22 Q. But medically, that is possible. I mean the  
 23 literature supports that, correct?  
 24 A. You can have a skull fracture, but it would  
 25 not have been asymptomatic and not known to anyone,

1 particularly given the extent of that skull fracture.  
 2 Q. But a child could have lived with a skull  
 3 fracture for that period of time?  
 4 A. The skull fractures that go without being  
 5 identified for a period of time, as long as a week, are  
 6 simple linear, parietal skull fractures that happen from  
 7 simple household falls.  
 8 Q. And you believe the information that you were  
 9 getting from Ryann was not complete about the history of  
 10 what had been going on, correct?  
 11 A. I'm sorry?  
 12 Q. When Ryann gave you the history of what  
 13 transpired the Wednesday, Thursday and Friday, you did  
 14 not believe you were getting a complete history of what  
 15 had transpired, correct?  
 16 A. I believe that people in the proximity of  
 17 Everett when either of these events happened would have  
 18 heard something, yes.  
 19 Q. And medically, there's nothing about either  
 20 injury that would point to a specific person, is there,  
 21 from a medical standpoint?  
 22 A. I can't determine who did what to whom.  
 23 Q. And you can't medically say how either injury  
 24 was inflicted, correct?  
 25 A. Again, I was not present. I can postulate

1 based on the injuries that I see what a possible  
 2 mechanism is.  
 3 Q. But medically you cannot answer that  
 4 question?  
 5 A. That is correct, sir.  
 6 Q. And have Everett's -- well, let me withdraw  
 7 that question.  
 8 There was not bruising witnessed on Everett  
 9 that was consistent with somebody squeezing some part of  
 10 his body, correct?  
 11 A. Well, the bruising on his shoulder from  
 12 neurosurgery pinching him, so I documented that. And  
 13 then my testimony is that there was no additional  
 14 bruising on his body. So there was no other bruising.  
 15 Q. And my question would be if somebody had held  
 16 him and slammed him, that would have created a bruise?  
 17 A. No, that's not correct, sir.  
 18 Q. It could have created a bruise?  
 19 A. Certainly, you could have a bruise, but you  
 20 don't have to have a bruise to have had an injury like  
 21 that.  
 22 Q. But it's not unusual to see a bruise that  
 23 then would match up with somebody's hand or something on  
 24 a child, correct?  
 25 A. It's actually more common not to have an

1 associated bruise.  
 2 Q. But it exists?  
 3 A. What exists?  
 4 Q. That there would be bruises that would match  
 5 up?  
 6 A. Not often, no.  
 7 Q. And, Doctor, you previously have stated that  
 8 there are two separate impacts, correct?  
 9 A. Yes, sir.  
 10 Q. The timing of those impacts, whether they  
 11 happened in minutes, hours or days of each other, you're  
 12 not able to medically determine, correct?  
 13 A. That is correct.  
 14 MR. SNIVELY: I don't have any other  
 15 questions, Judge.  
 16 THE COURT: All right. Any redirect?  
 17 MR. NIXON: Please, Your Honor.  
 18 **REDIRECT EXAMINATION**  
 19 **BY MR. NIXON:**  
 20 Q. Let's talk a little bit about medical  
 21 reports. How much do you rely on the veracity of  
 22 reports in medical notes?  
 23 A. So medical records contain useful  
 24 information, obviously, that's why we do them. However,  
 25 there's known common errors in medical documentation

1 which is why you should not copy and paste, for example,  
 2 from prior notes or rely solely on previous notes as the  
 3 source of the information when you're making diagnostic  
 4 decisions.  
 5 Q. Can you tell me whether or not when these  
 6 appointments take place is there somebody like Stacy  
 7 taking every word down?  
 8 A. Oh, God, no. That would make my life a lot  
 9 easier.  
 10 Q. And I believe you earlier testified that  
 11 every medical record had mistakes. Can you tell me  
 12 whether or not you identified any mistakes made in this  
 13 particular series of reports?  
 14 A. Well, I mean, the issue is that unfortunately  
 15 with the invention of electronic medical records copy  
 16 and paste is a huge issue. People take what is written  
 17 in one note, copy it, and put it in as, quote, "the  
 18 history" in their note.  
 19 And when that happens it propagates. So  
 20 somebody says "history of fall" and that becomes the  
 21 history that is throughout. But nobody goes back to  
 22 say, "How do we know about the fall?" Or "What is known  
 23 about the fall?"  
 24 So, you know, what is accurate versus  
 25 inaccurate in the medical record of this patient I know

1 because of the way I do my job. I never cut and paste  
 2 and I always take the history primarily from the family,  
 3 caregiver that's present as the way that I document the  
 4 history that I'm provided.  
 5 Q. We heard a little bit about you and Mr.  
 6 Snively talking about PA Whitehead's record. Do you  
 7 know who Whitehead identified as the father of Everett?  
 8 A. I think he identified Nathan as the father,  
 9 and Nathan is not the father of Everett.  
 10 Q. Do you know if there's ever any mistakes made  
 11 in that report about the child's age?  
 12 A. I think there was actually a typo about him  
 13 being older than he really was, as I recall.  
 14 Q. And do you know if Whitehead may have relied  
 15 on that error in the age estimation?  
 16 MR. SNIVELY: Your Honor, I object.  
 17 Whitehead already testified about what he had relied on.  
 18 THE COURT: Sustained. Speculative.  
 19 Go ahead.  
 20 Q. (BY MR. NIXON) Now, we did hear testimony  
 21 from PA Whitehead that there was one instance of a loose  
 22 stool, which was referred to as diarrhea. As a  
 23 pediatrician, how important is one instance of loose  
 24 stool?  
 25 A. So there is a distinction between loose

1 stools and diarrhea and doctors get picky about poop.  
 2 The fact is that diarrhea is -- everybody has loose  
 3 stools at some point or other based on what you're  
 4 eating. It has nothing to do with illness. It has  
 5 nothing to with whether or not you have a medical  
 6 condition. It's what you ate.  
 7 Diarrhea is specifically a symptom that you  
 8 can have associated with different things that could go  
 9 wrong with your gut. So there's -- vomiting and  
 10 diarrhea are literally part of an abbreviation that we  
 11 used to use when we hand wrote our notes. And it would  
 12 say "N" as in "Nancy," slash "V" as in "Victor," slash  
 13 "D" as in "Delta." "Nausea, vomiting, diarrhea." You  
 14 literally learn the three together.  
 15 So it's so common that people say vomiting  
 16 and diarrhea, it's almost a reflex. Which is why I  
 17 always go back and say, "Tell me about this diarrhea."  
 18 And they will be like, "Well, it wasn't  
 19 diarrhea, it was a loose stool. It was kind of yellowy  
 20 and green and different than normal." That's not  
 21 diarrhea. And one time is also not diarrhea, generally  
 22 speaking. That's why I asked the question so  
 23 specifically.  
 24 Q. After the diarrhea debate, how has your  
 25 previously-stated opinions changed?

1 A. They are neither here nor there. If he had  
2 diarrhea it doesn't change the fact that he has two  
3 massive skull fractures. They have nothing to do with  
4 his diarrhea. So if he had diarrhea, it's still doesn't  
5 change the fact that I have two massive skull fractures  
6 with significant brain injury, life-threatening  
7 presentation, bleeding in the backs of his eyes. If he  
8 had diarrhea, he had diarrhea and something awful  
9 happened to him.

10 Q. Listening to you and Mr. Snively going back  
11 and forth, can you tell me whether or not it's fair to  
12 say that you can't look at any given test in a vacuum?

13 A. If you do, you're doing medicine wrong.  
14 Everything has to be interpreted in the context of the  
15 other information available. If I look at one lab study  
16 or one x-ray and I failed to consider what the history  
17 is that surrounds that, the age of the patient, the  
18 other what we call comorbidities, so other things that  
19 are going on with the patient, then you're literally --  
20 it's like taking one page out of the book and trying to  
21 decide how the book ends. That's not possible. You  
22 have to interpret everything in a context.

23 Q. Can you tell me whether or not that's why  
24 you, for lack of a better term, cast such a broad net  
25 when you get intake information initially?

1 parietal fracture was sustained on the 17th of April,  
2 2019, based on your talk with Ryann, do you know who was  
3 with Everett when he last felt good?

4 A. Nathan.

5 MR. SNIVELY: Your Honor --

6 THE COURT: Go ahead. I think she answered  
7 the question.

8 Q. (BY MR. NIXON) Please, answer.

9 A. Nathan.

10 Q. And is it your medical opinion based on your  
11 expertise that a child that suffered an occipital  
12 fracture like that would have been almost immediately  
13 debilitated?

14 A. Yes.

15 Q. Can you tell me whether or not you believe it  
16 is a medical possibility that a child could have gone on  
17 with that injury unnoticed?

18 A. No.

19 Q. And in the course of interviewing Ryann while  
20 making your diagnosis, did she tell you who Everett was  
21 alone with when he stopped breathing?

22 A. Yes.

23 Q. Who was that?

24 A. Nathan.

25 MR. NIXON: No further questions.

1 A. Yes. Because I'm trying to think very  
2 broadly about the problem. What else could be going on  
3 with this patient?

4 It would be horrible if I missed something,  
5 because I didn't think about what other medical things  
6 cause these things, what are family history that causes  
7 these things.

8 Q. There was also some cross-examination  
9 testimony regarding how long somebody could have a skull  
10 fracture. In your experience and in your opinion, could  
11 any child have suffered a parietal fracture like Everett  
12 did and not exhibit some symptoms?

13 A. No. The parietal skull fractures that I was  
14 talking about that sometimes take a week to be  
15 discovered by a caregiver when the swelling happens or  
16 when they start to feel something going on, those are  
17 very isolated, simple linear parietal skull fractures  
18 that happen when a kid topples over from a standing  
19 position on a tile floor and they just crack their head.

20 That's a very different kind of skull  
21 fracture than the kind Everett had. Everett's was  
22 significant and would not have been in the same  
23 presentation where you could go like a week and not have  
24 any idea that something was going on.

25 Q. You've talk about how you believe that that

1 THE COURT: Anything else?

2 MR. SNIVELY: No.

3 THE COURT: May this witness be excused?

4 MR. NIXON: Please, Your Honor.

5 THE COURT: Mr. Snively?

6 MR. SNIVELY: Yes, Your Honor.

7 THE COURT: Okay. Doctor, you are excused  
8 from your subpoena.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: Don't discuss your testimony with  
11 anyone else, the questions you were asked or the answers  
12 that you gave.

13 THE WITNESS: Thank you, sir.

14 THE COURT: The next witness.

15 MR. NIXON: Your Honor, at this point in time  
16 the State rests.

17 THE COURT: Okay. All right. So that was  
18 close of evidence for the State. We'll go ahead and  
19 take our lunch.

20 And help me here, I think that means -- it's  
21 10 after 12, so about 1:25.

22 So I've got to admonish you again not to  
23 discuss the case in any way or access any information or  
24 form or express any opinion on the case.

25 We'll be in recess until 1:25. Have a good

1 lunch.  
 2 (Wherein, the jury is not  
 3 present.)  
 4 THE COURT: Be seated, please.  
 5 The State has rested. The jury is out of the  
 6 room. Counsel remains, as well as the defendant.  
 7 Any issues we need to take up at this time?  
 8 MR. NIXON: Nothing from the State, Your  
 9 Honor.  
 10 THE COURT: Mr. Snively?  
 11 MR. SNIVELY: Judge, the defense would move  
 12 for a directed verdict as to Count I and Alternate Count  
 13 I.  
 14 THE COURT: Say again?  
 15 MR. SNIVELY: I'm sorry?  
 16 THE COURT: As to Count I.  
 17 MR. SNIVELY: And as to Count I and the  
 18 alternate Count I.  
 19 THE COURT: All right.  
 20 MR. SNIVELY: And we would argue that the  
 21 testimony is such that even in the light most favorable  
 22 to the State this should not go to the jury and based on  
 23 PA Whitehead's testimony and his examination of Everett  
 24 on the 18th of April of 2019 excludes the possibility of  
 25 that count being proven by the State, let alone being

1 proven beyond a reasonable doubt by the State.  
 2 I realize that Dr. Laskey disagrees with that  
 3 opinion, but he's the medical personnel who examined him  
 4 on that date, saw him on that date and made those  
 5 decisions and the jury heard that decision.  
 6 I believe that as to that count that should  
 7 be dismissed and a directed verdict for those reasons.  
 8 And as to Count II, we would ask for a  
 9 directed verdict in that the State has failed to prove  
 10 that Nathan is the perpetrator of either of the skull  
 11 fractures. And for that reason, we should receive a  
 12 directed verdict as to that one, as well. And that same  
 13 argument would apply to Count I.  
 14 THE COURT: Oh, okay. Mr. Nixon.  
 15 MR. NIXON: Your Honor, I'll go ahead and  
 16 address the easiest of the three charges initially. And  
 17 that would be the Alternative Count I, which is a bodily  
 18 injury.  
 19 The testimony is absolutely full of  
 20 references to everybody seeing this bruise or bump or  
 21 goose egg or whatever you want to call it, based on each  
 22 witness. We, in fact, see Mr. Polakoff talking about  
 23 the baby having a bruise. That is bodily injury. It's  
 24 a low standard.  
 25 We don't have to prove on behalf of the State

1 that there was any more significant injury. We have a  
 2 established, one, that Mr. Polakoff is over 18; we've  
 3 established, two, that Everett Musch, now Self, was  
 4 under 36 months of age.  
 5 And that bump, which by all accounts happened  
 6 while he was alone with the defendant, it constitutes  
 7 bodily injury. It's a very low bar.  
 8 Additionally, we've just heard the testimony  
 9 of two doctors, neither of who thinks that bump was the  
 10 cause -- I should say, a fall off a low futon could have  
 11 caused even the bump, much less the more serious  
 12 injuries.  
 13 The defendant is basically asking us to go  
 14 ahead and rely upon the testimony of the least  
 15 experienced medical witness that we've heard in this  
 16 trial, which his testimony has been at this point in  
 17 time contradicted by Dr. Fouts and by Dr. Laskey, and to  
 18 grant a directed verdict on that theory alone.  
 19 What we have now is a very experienced  
 20 pediatrician who has just provided the Court testimony  
 21 about her theory that, in fact, this serious skull  
 22 fracture on the parietal bone of the infant happened on  
 23 April 17th.  
 24 As far as the 19th, there is absolutely no  
 25 evidence that this boy did not suffer two extremely

1 severe skull fractures. There is absolutely no evidence  
 2 that these skull fractures could have been sustained by  
 3 rolling off a ground-level futon. There's absolutely no  
 4 evidence, and this is from the defendant, as well, that  
 5 he was not alone with the baby when he stopped  
 6 breathing.  
 7 There is testimony from the two doctors, Dr.  
 8 Fouts and Dr. Laskey, that the occipital skull fracture  
 9 would have been immediately debilitating. So what we  
 10 have is a baby suffering from two severe skull  
 11 fractures. We have heard the testimony that in all  
 12 medical likelihood the first skull fracture occurred on  
 13 the 17th, when he was alone with the defendant. And  
 14 that the second skull fracture, which occurred two days  
 15 later, occurred when he was alone with the defendant.  
 16 Based on that short analysis, it's not  
 17 appropriate to grant defendant's motion as to either  
 18 Count I, Alternative Count I or Count II.  
 19 THE COURT: Okay. Thank you. All right.  
 20 The standard, as counsel is well aware, for a  
 21 motion -- directed verdict, but what we now call a  
 22 Motion to Dismiss for Insufficient Evidence, same thing,  
 23 the Court has to view the evidence at this juncture --  
 24 this is, I guess, the one time when we don't have the  
 25 burden essentially on the State. I have to view this

1 evidence -- well, let me make sure I'm clear about that,  
2 in the sense that I have to view the evidence in the  
3 light most favorable to the prosecution in order to  
4 grant your motion, Mr. Snively, as you're aware.

5 So essentially, viewing the evidence in that  
6 light, I must find that there's not substantial evidence  
7 upon which a rational trier of fact could find the  
8 essential elements of the crime beyond a reasonable  
9 doubt.

10 So it's not my job to determine whether  
11 there's been proof beyond a reasonable doubt, simply  
12 whether or not there is evidence that taken in the light  
13 most favorable to the State would allow a reasonable  
14 juror to find that there could be proof beyond a  
15 reasonable doubt.

16 In reviewing your motion, first, the  
17 Alternate Count I, I do agree that bodily injury is a  
18 low bar and that it was met in this case.

19 I will say as to Count I, alleging the  
20 serious bodily injury, I definitely had concerns based  
21 on the arguments you made, Mr. Snively regarding PA  
22 Whitehead's testimony.

23 However, with regards to establishing the  
24 evidence that could be construed as serious bodily  
25 injury, I find that the testimony provided by Dr. Laskey

1 jury to determine whether or not Mr. Polakoff did commit  
2 this.

3 Evidence provided to the Court does put Mr.  
4 Polakoff in direct contact with the child at the time  
5 that other evidence indicates the injuries could have  
6 been inflicted and also alone with the child at the  
7 time.

8 And based on the standard I have before me,  
9 that's sufficient to go to the jury. So I deny your  
10 motions on those grounds, Mr. Snively.

11 Okay. So let's talk about -- I do intend to  
12 give counsel a lunch break at some point.

13 Mr. Snively, you're ready to go with your  
14 case right after lunch?

15 MR. SNIVELY: We will be. I need to make  
16 sure that Al Stuber is still available to be re-called.  
17 He would be the first witness.

18 THE COURT: Okay. And then what about -- can  
19 you give me a ball park? Do you anticipate calling  
20 other witnesses, as well?

21 MR. SNIVELY: Judge, we're going to talk  
22 about that during the lunch break. But I would  
23 anticipate at least one more witness.

24 THE COURT: Okay. I'm just trying to get a  
25 time frame for us.

1 does, however, provide that information to the jury that  
2 taken in the light most favorable to the State would  
3 constitute serious bodily injury. She did testify that  
4 the symptoms present very likely resulted from injury --  
5 the serious injury. And also testified to the mechanism  
6 of injury and to specific injuries. And certainly  
7 testified that those could have been done separately.

8 That the one on -- the earlier injury would  
9 not necessarily have been debilitating, but was serious  
10 bodily injury. So I do find that that element has been  
11 met and I find that element has been met for Count II,  
12 as well. Regarding the information that has been  
13 offered here establishing that evidence provided could  
14 -- the reasonable juror taking that evidence in the  
15 light most favorable to the State could find that  
16 serious bodily injury was caused.

17 With regard to your secondary motions,  
18 essentially the failure to identify this defendant as  
19 the individual who did it, clearly there's no direct  
20 evidence that Mr. Polakoff caused these injuries. No  
21 one saw or testified that they saw Mr. Polakoff harming  
22 the child through direct evidence.

23 However, I do find that circumstantial  
24 evidence has been provided that taken in the light most  
25 favorable to the State it does provide enough for the

1 MR. SNIVELY: In addition to him.

2 THE COURT: Of course.

3 MR. SNIVELY: Through Al Stuber we'll play a  
4 video that I think is about 20 minutes long.

5 THE COURT: Okay.

6 MR. SNIVELY: Certainly we've talked about  
7 the defendant's mother's testimony would be fairly  
8 short, because we're not going into her occupation and  
9 things.

10 THE COURT: Sure.

11 MR. SNIVELY: Her part would be much shorter.

12 THE COURT: Okay. I'm going to go ahead and  
13 address at this time, since you're about to start your  
14 case, Mr. Polakoff's right to remain silent or his right  
15 to testify.

16 Mr. Polakoff, just to kind of talk directly  
17 to you --

18 Obviously, Mr. Snively, if you get nervous,  
19 stop me.

20 But, in essence, I'm not asking you anything  
21 or what your decision is going to be, Mr. Polakoff. I  
22 want to make sure that you understand that it is your  
23 right. We've talked a lot in this trial about the right  
24 to remain silent.

25 And if you choose to do that, the Court will

1 instruct the jury they can't in any way hold that  
2 against you or consider it. However, you also have the  
3 corresponding right to testify, if you wish.

4 You certainly need to make this decision and  
5 in consultation with your lawyer and consider that. But  
6 ultimately, as Mr. Snively will tell you, it is your  
7 decision.

8 I just want to make sure you do understand if  
9 you do determine to testify there are no further  
10 protections as the defendant. You are a witness in the  
11 case subject to the same cross-examination as other  
12 parties are. So it's not a situation where you're able  
13 to take -- it's subject to the Rules of Evidence and  
14 what is relevant and what the Court determines is  
15 appropriate. If you do take the stand, you'll be open  
16 to full cross-examination like everybody else. So you  
17 have to know that.

18 So do you understand that there can be pros  
19 and cons to that decision, Mr. Polakoff?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: All right. I'm not asking you to  
22 make that decision now. But having this conversation  
23 with you now allows -- I think that as the case is  
24 presented by Mr. Snively, we can simply make that  
25 inquiry at that time and then we don't have to go

1 verdict then that says "not guilty" as to Count I, and  
2 nothing else on the first page, there has to be an entry  
3 on the second one.

4 The other note says if your verdict is  
5 guilty, after the Count I, it says you need not go no  
6 further. Your verdict is not guilty you must proceed to  
7 Alternate Count I. And that other note I think is  
8 confusing to the jury.

9 THE COURT: All right. I'm -- like I said,  
10 let's talk jury instructions and I'll certainly listen  
11 to that. I'm going to take a look at it, too.

12 But I'm not foreclosing, Mr. Snively. I just  
13 want to look at it myself and then I'll give you every  
14 chance to talk about it and we'll go on the record with  
15 instructions.

16 And so the jury's coming back at 1:25, right?  
17 Yeah.

18 MR. SPOJA: The State doesn't disagree with  
19 Mr. Snively on that verdict form. I went back and  
20 looked at again, it is confusing. I intended to redact  
21 or excise that first note and I just didn't get it done.  
22 I'll do that over lunch.

23 THE COURT: If you're messing -- I mean,  
24 clarify -- if you are changing Count I verdict form, I  
25 also noticed that in the court heading itself it doesn't

1 through this again.

2 So you've had adequate time and I'm sure  
3 you're going to talk about it a bit more now, but you've  
4 been able to discuss the pros and cons, the rights and  
5 risks of testifying or not in this case?

6 THE DEFENDANT: I have, Your Honor.

7 THE COURT: Okay. Any questions about that?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: The last thing before I let you  
10 all go here, is jury instructions. It does appear that  
11 you're going to need those ready.

12 Have you had a chance to look at the changes  
13 made by Mr. Spojka to the elements instructions?

14 MR. SNIVELY: Judge, I'm looking at those  
15 three right now.

16 THE COURT: Let's do this. What we're going  
17 to do is we're going to recess, but you guys are going  
18 to have a short lunch because I want to talk about jury  
19 instructions well before the jury gets back.

20 MR. SNIVELY: Judge, it looks like the  
21 corrections were made. The verdict form on page 1  
22 instructs the jury to not -- or to enter your verdict to  
23 one, but not more than one of the offenses below. And I  
24 think that note is wrong, in that if Count I is not  
25 guilty, unless the Court's going to just accept a

1 specifically say "Count I" or "Alternate Count I," it  
2 does down below, but it doesn't in the court heading.  
3 Just take a look.

4 MR. SPOJA: Okay.

5 THE COURT: Just so there's no question that  
6 they know they've got the one for Count I, and Alternate  
7 Count I, as well as Count II. Okay?

8 MR. SPOJA: I'll double check. I'll fix it.

9 THE COURT: Yeah, take a look.

10 Counsel, I'd like you in chambers at 1:00.

11 Okay?

12 And then we can have a discussion off the  
13 record briefly about any other issues on the  
14 instructions and then go on the record with anything  
15 else you need to do prior to you starting your case.

16 I do recognize, depending on your case, I'm  
17 not going to make any final decision on instructions,  
18 okay, Mr. Snively?

19 MR. SNIVELY: Thank you, judge.

20 THE COURT: We'll be in recess.

21 (Wherein, a recess was taken.)

22 THE BAILIFF: All rise.

23 THE COURT: Please be seated. Thank you.

24 We're back on the record. State v. Polakoff,

25 DC 19-17.

1 Counsel for the State is present.  
 2 Counsel for the defendant is present. The  
 3 defendant is present.  
 4 The jury is not present.  
 5 The State has rested. The defense is about  
 6 to begin its case in chief.  
 7 Are you ready to proceed with that, Mr.  
 8 Snively?  
 9 MR. SNIVELY: I am, Your Honor.  
 10 THE COURT: Any reason the jury should not be  
 11 brought in at this time?  
 12 MR. NIXON: No, Your Honor.  
 13 THE COURT: Mr. Snively?  
 14 MR. SNIVELY: No, Your Honor.  
 15 THE COURT: Okay. Please bring them.  
 16 (Wherein, the jury is present.)  
 17 THE COURT: Please be seated. Thanks.  
 18 Mr. Nixon, do you stipulate that the jury and  
 19 alternate are present?  
 20 MR. NIXON: The State so stipulates.  
 21 THE COURT: Mr. Snively.  
 22 MR. SNIVELY: Yes, Your Honor.  
 23 THE COURT: All right. The State has rested  
 24 its case.  
 25 Mr. Snively, are you prepared to start the

1 A. Yes.  
 2 Q. And I'm going to bring that up and I'm going  
 3 to stop it.  
 4 MR. NIXON: The State will stipulate to the  
 5 introduction of it if you would like to go ahead and  
 6 play it for the jury.  
 7 MR. SNIVELY: We'll mark it as Defendant's  
 8 Exhibit A for the record, but I would like to bring it  
 9 up and stop it and ask him a couple of questions.  
 10 THE COURT: All right. So Defense Exhibit A.  
 11 Do we have anything physical?  
 12 MR. SNIVELY: I do not have it in the  
 13 courtroom. I'll provide it to the clerks at the next  
 14 break.  
 15 THE COURT: Mr. Nixon, are you satisfied that  
 16 Defendant's Exhibit A?  
 17 MR. NIXON: The State is aware of what it is  
 18 and the State doesn't object to the admission.  
 19 THE COURT: Very good. You may publish.  
 20 MR. NIXON: Your Honor, may Detective Mahoney  
 21 come before the bar area and assist Mr. Snively?  
 22 THE COURT: Yes, I would appreciate it.  
 23 (Pause.)  
 24 MR. SNIVELY: I had it up this morning before  
 25 we started.

1 defense case?  
 2 MR. SNIVELY: I am, Your Honor.  
 3 THE COURT: Please call your first witness.  
 4 MR. SNIVELY: We would call Al Stuber.  
 5 **ALAN STUBER,**  
 6 WITNESS HEREIN, BEING FIRST  
 7 DULY SWORN ON OATH WAS  
 8 EXAMINED AND TESTIFIED  
 9 AS FOLLOWS:  
 10 --oOo--  
 11 THE COURT: Take the witness chair again, please  
 12 **DIRECT EXAMINATION**  
 13 **BY MR. SNIVELY:**  
 14 Q. Sir, just for the record, you're Al Stuber,  
 15 you previously testified in this case; is that correct?  
 16 A. Yes.  
 17 Q. And as part of your investigation, you  
 18 obtained a video from Beartooth Clinic; is that correct?  
 19 A. Yes.  
 20 MR. NIXON: Objection, leading.  
 21 THE COURT: Overruled. Go ahead.  
 22 MR. SNIVELY: I didn't hear what it was.  
 23 Q. (BY MR. SNIVELY) Did you obtain a video?  
 24 A. Of -- yeah, the interview?  
 25 Q. No. Of the waiting area?

1 THE COURT: I believe you. All right. Mr.  
 2 Snively, it only works if you push it and it goes.  
 3 That's all I want to know.  
 4 Mr. Snively, take a deep breath and let's go.  
 5 Q. (BY MR. SNIVELY) Do you recognize that? Is  
 6 that the video we just referenced?  
 7 A. Yes.  
 8 Q. And can you identify who Ryann is in this  
 9 video, please?  
 10 MR. SNIVELY: With the Court's permission,  
 11 can he walk to the screen and point on the screen?  
 12 THE COURT: You bet.  
 13 THE WITNESS: (Indicating.)  
 14 Q. (BY MR. SNIVELY) So he's pointing to the lady  
 15 on the left part of the screen, the furthest up.  
 16 Stay right there. Would you also point to  
 17 Nathan Polakoff, if he's in that picture.  
 18 A. (Witness complies.) Right there.  
 19 MR. SNIVELY: He's just pointed to the man to  
 20 the left of Ryann.  
 21 Q. (BY MR. SNIVELY) Do you see Everett in that  
 22 picture?  
 23 A. Yes.  
 24 Q. Could you point to him, as well, or describe  
 25 where he's at.



1 A. He's being held by Mr. Polakoff.  
 2 MR. SNIVELY: Thank you.  
 3 Judge, I would like to publish the exhibit to  
 4 the jury.  
 5 THE COURT: Okay.  
 6 (Wherein, the exhibit was  
 7 published to the jury.)  
 8 Q. (BY MR. SNIVELY) Sir, do you see the date  
 9 stamp at the upper left --  
 10 A. I would have to get closer. I see it.  
 11 MR. NIXON: The State would stipulate that it  
 12 says 4-18, 2019.  
 13 Q. (BY MR. SNIVELY) Does that sound like the  
 14 date of that video?  
 15 A. Yes.  
 16 MR. SNIVELY: I don't have any other  
 17 questions for the witness.  
 18 THE COURT: Mr. Nixon.  
 19 MR. NIXON: Just a few, please.

**CROSS EXAMINATION**

20 **BY MR. NIXON:**  
 21 Q. Hello again, Al.  
 22 A. Hi.  
 23 Q. Now, as the investigator in this case, do you  
 24 recognize anything of any significance in this video?  
 25

1 A. Just the fact that the parents went to the  
 2 hospital like they said.  
 3 Q. Did you see anything that would be helpful  
 4 for your investigation on this video?  
 5 A. No.  
 6 Q. Do you see anything other than a very small  
 7 image of the three individuals in the video?  
 8 A. That's all I saw.  
 9 Q. Does this video have anything to do with the  
 10 19th when the skull fracture occurred?  
 11 A. Actually, it was part of their story that the  
 12 baby was sick and they took the baby in on the 18th and  
 13 so it confirms their story that they took him to the  
 14 hospital, as far as relating this to the 19th.  
 15 Q. Does this video show anything other than  
 16 Nathan holding a baby while baby's mother tries to check  
 17 in the clinic?  
 18 A. That's all it shows, yes.  
 19 Q. Can you tell who carries the baby in or does  
 20 the video start after the three individuals are already  
 21 inside?  
 22 A. I didn't see that part. It may have. I  
 23 think it started right when they were just standing  
 24 there at the corner, but I'm not sure. I would have to  
 25 view it again.

1 Q. That's all right. Did you happen to see Doug  
 2 Whitehead in the video?  
 3 A. Yes, I did.  
 4 Q. Did you see what appeared to be Nathan and  
 5 Doug greeting each other?  
 6 A. Yes. They were, I believe -- they're in the  
 7 -- like in the walkway there.  
 8 Q. Ultimately, did you recognize anything in  
 9 this video of importance to your investigation?  
 10 A. No, I didn't see anything.  
 11 MR. NIXON: No further questions.  
 12 THE COURT: Any redirect?  
 13 MR. SNIVELY: May I have just a moment?  
 14 I have no other questions.  
 15 THE COURT: May this witness be excused?  
 16 MR. SNIVELY: Yes, Your Honor.  
 17 THE COURT: At this time you are excused from  
 18 your subpoena. Don't discuss your testimony, the  
 19 questions you were asked or the answers you gave. But  
 20 you are released and you're free to come and go.  
 21 THE COURT: Your next witness, Mr. Snively.  
 22 MR. SNIVELY: Diane Goedde.

**DIANE GOEDDE,**

23  
 24 WITNESS HEREIN, BEING FIRST  
 25 DULY SWORN ON OATH WAS

1 EXAMINED AND TESTIFIED  
 2 AS FOLLOWS:  
 3 --oOo--  
 4 THE COURT: Please take the witness chair.  
 5 MR. NIXON: Your Honor, I can just inquire if  
 6 Mr. Snively is going to use this or we're going to take  
 7 it done.  
 8 MR. SNIVELY: We're going to use it. I can  
 9 drop that picture if we want. I'm not going to lose  
 10 that video. I'm afraid to lose my connection and not be  
 11 able to get it connected again.  
 12 MR. NIXON: I don't want to mess with that.  
 13 THE COURT: I'm going to ask you to remove  
 14 your mask while you testify. It's for the jury to  
 15 completely view a witness. As soon as you're done you  
 16 can put it back on.  
 17 THE WITNESS: Okay.

**DIRECT EXAMINATION**

18 **BY MR. SNIVELY:**  
 19 Q. Will you please state and spell your name.  
 20 A. Diane Goedde, G-o-o-e-d-d-e.  
 21 Q. And you live here in Red Lodge?  
 22 A. Yes, I do.  
 23 Q. And your Nathan's mother; is that correct?  
 24 A. Yes, I am.  
 25

1 Q. I want to direct your attention to April 18th  
2 of 2019. Do you remember on that date, did you see  
3 Ryann, Everett and Nate?  
4 A. Yes, I did.  
5 Q. Where was it that you saw them?  
6 A. In my home.  
7 Q. And do you remember about what time of day it  
8 was that you saw them at your home?  
9 A. I believe it was in the afternoon.  
10 Q. Do you remember where they had been before  
11 they came to see you?  
12 A. They said they had taken Everett to the  
13 clinic.  
14 Q. And during the time that they were at your  
15 house, did you have occasion to hold Everett?  
16 A. Yes, I did.  
17 Q. And while you were holding him, did you --  
18 could you tell the jury what your observation of Everett  
19 was?  
20 A. He seemed -- he looked like an ill baby, just  
21 not -- his eyes weren't bright. He just was cuddling up  
22 against me, not really moving around much. He would  
23 smile every once in awhile, but it wasn't like Everett  
24 usually would present.  
25 Q. Did Ryann convey to you what they had learned

1 fair and accurate reproduction of that voicemail or a  
2 copy of that voicemail?  
3 A. It was the exact voicemail that was on my  
4 phone.  
5 MR. SNIVELY: Judge, I at this time would ask  
6 to introduce Exhibit 2.  
7 MR. NIXON: No objection.  
8 THE COURT: We'll call it B. I'll just use  
9 letters for you.  
10 MR. SNIVELY: Oh, I'm sorry.  
11 THE COURT: That's quite all right.  
12 Without objection, B is admitted. Do you  
13 want to publish or I'm sorry I thought --  
14 (Wherein, Defendant's Exhibit B  
15 was received.)  
16 (Wherein, Defendant's Exhibit B  
17 was published to the jury.)  
18 Q. (BY MR. SNIVELY) And hearing that voicemail,  
19 is that what you heard on your phone on the evening of  
20 April 20th of 2019?  
21 A. Yes, sir.  
22 Q. And approximately what time did that  
23 voicemail come to your phone?  
24 A. I believe it was after 11 o'clock.  
25 Q. And what did you do after you listened to

1 at their doctor visit?  
2 A. That --  
3 Q. I'm not asking what was said, but they did  
4 convey that information to you, right?  
5 A. Yes.  
6 Q. And based on what information you had heard  
7 from them, as a mother, were your observations of  
8 Everett consistent with what they had told you?  
9 A. Yes.  
10 Q. And you have no memory or do you have a  
11 memory of Ryann and Everett taking a bath at your house  
12 that evening?  
13 A. Not that evening, no.  
14 Q. They had done that on another occasion?  
15 A. Yes, they had.  
16 Q. I want to direct your attention to April 20th  
17 of, again, 2019, and did you receive a voice message on  
18 your cell phone from Ryann's mother?  
19 A. Yes.  
20 Q. And did you know who Ryann's mother was prior  
21 to receiving that voicemail?  
22 A. Yes.  
23 Q. Did you preserve that voicemail?  
24 A. Yes, I did.  
25 Q. And a copy that you provided to me is that a

1 this that voicemail?  
2 A. I spoke with Nathan.  
3 MR. SNIVELY: Your Honor, I don't have any  
4 other questions.  
5 THE COURT: Mr. Nixon, any cross?  
6 MR. NIXON: Yes, just a moment, please.  
7 **CROSS EXAMINATION**  
8 **BY MR. NIXON:**  
9 Q. Ms. Goedde, let's start out, I certainly  
10 don't blame you, but you're not a very impartial witness  
11 in this matter, are you?  
12 A. No, that's my son.  
13 Q. Certainly, that does cloud how you see  
14 things, doesn't it?  
15 A. It could possibly. I can't -- I'm just  
16 telling you the truth.  
17 Q. Where did you think that Nathan was going  
18 that evening?  
19 A. Which evening?  
20 Q. I'm sorry. The evening of the 20th?  
21 A. He was heading to Salt Lake. He had called  
22 and said that's where he was heading. He wanted to go  
23 down there and be with Ryann and Everett.  
24 Q. And we just listened to a voicemail and it's  
25 fair to say that, if anything, Kathy Kolpin is very much

1 on the side of Nathan and Ry in that call, isn't she?  
 2 A. Yes.  
 3 Q. She's certainly not blaming Nathan, is she?  
 4 A. No.  
 5 Q. She's certainly not thinking that at that  
 6 time Nathan did anything wrong?  
 7 A. No.  
 8 Q. And she's not thinking that Ryann did  
 9 anything wrong, is she?  
 10 A. As far as I understood it, no.  
 11 Q. Now, did you have subsequent communication  
 12 with either Kathy Kolpin or Jay Lawhon?  
 13 A. I didn't with Jay. Kathy had emails or  
 14 texts.  
 15 Q. Her position changed dramatically, didn't it?  
 16 A. Yes, it did. She became very aggressive with  
 17 her texts.  
 18 Q. She very much no longer sided with Nate, did  
 19 she?  
 20 A. No.  
 21 Q. Kind of like your testimony here today, would  
 22 you agree with me that maybe mothers or grandmothers  
 23 aren't very impartial if they think someone is hurting  
 24 their loved one?  
 25 A. I would imagine, yes.

1 Q. You had a flurry of calls with Nathan and  
 2 texts and calls with Nathan that evening, didn't you?  
 3 A. I believe so, yes. It was during the middle  
 4 of the night and I was woken up many times. I couldn't  
 5 tell you exactly how many.  
 6 Q. You mentioned you talked to him. What did  
 7 you talk about?  
 8 A. He was frantic. He said -- I mean, I had  
 9 told him what Kathy's voicemail had said and he was  
 10 like, "I don't know what to do. I don't know what to  
 11 do. I want to be there. I just don't know what to do."  
 12 Q. Was he seemingly worried about being  
 13 arrested?  
 14 A. He said that they had told him that that was  
 15 what could have happened. And actually, I told him to  
 16 return to Red Lodge because if something did happen, I  
 17 wanted him with family and friends.  
 18 Q. And so he left and never made another attempt  
 19 to see Everett, did he?  
 20 A. No, we were told we could not do that.  
 21 MR. NIXON: No further questions.  
 22 THE COURT: Any redirect?  
 23 **REDIRECT EXAMINATION**  
 24 **BY MR. SNIVELY:**  
 25 Q. Mr. Nixon has suggested that you were not

1 testifying truthfully here today?  
 2 MR. NIXON: Objection, Your Honor. I in no  
 3 way suggested that.  
 4 THE COURT: That objection is sustained.  
 5 That's not what Mr. Nixon was doing. You can go ahead  
 6 and address anything you think you need cleared up.  
 7 Q. (BY MR. SNIVELY) You have tried to provide an  
 8 accurate recollection to this jury concerning the  
 9 questions you've been asked here today, haven't you?  
 10 A. Yes, sir.  
 11 Q. And there's no doubt that that voicemail is  
 12 the same voicemail that you received on your phone that  
 13 evening, is there?  
 14 A. No. Absolutely. I still have that on my  
 15 phone.  
 16 MR. SNIVELY: Thank you. I don't have any  
 17 other questions.  
 18 THE COURT: Mr. Nixon?  
 19 MR. NIXON: No, thank you, Judge.  
 20 THE COURT: May this witness be excused?  
 21 MR. NIXON: Please, Your Honor.  
 22 MR. SNIVELY: Yes.  
 23 THE COURT: You are released from your  
 24 subpoena. Don't discuss your testimony with anyone  
 25 else, the questions that you were asked or the answers

1 that you provided. But you're released from your  
 2 subpoena, so you can come or you can stay.  
 3 THE COURT: Next witness, Mr. Snively.  
 4 MR. SNIVELY: Judge, can we take about a  
 5 two-minute break for us to step out of the room for a  
 6 second, please?  
 7 THE COURT: Yes.  
 8 The jury is invited to stand, stretch your  
 9 legs, your back.  
 10 (Pause.)  
 11 THE COURT: Let's be seated.  
 12 Let the record reflect that Mr. Snively and  
 13 Mr. Polakoff have returned to the courtroom.  
 14 Mr. Snively.  
 15 MR. SNIVELY: Thank you, Your Honor, for  
 16 allowing us that time.  
 17 The defense rests.  
 18 THE COURT: Okay. All right. So I'll ask  
 19 the State if you anticipate rebuttal?  
 20 MR. NIXON: No, Your Honor.  
 21 THE COURT: Okay. So that ends the evidence  
 22 portion of the trial, all the evidence that you will  
 23 consider has been in. So what we're going to do is --  
 24 it's good timing for once. We'll take a break.  
 25 We have to deal with just a couple of matters

1 and then what we'll do is we'll bring you back, I'll  
 2 instruct you on the law and read these to you. But  
 3 again, you will get the written instructions to take  
 4 with you.  
 5 And then the parties will have an opportunity  
 6 to argue their closing arguments.  
 7 So we'll be in recess.  
 8 During this recess, again, even now, don't  
 9 talk about the case in substance, certainly don't try to  
 10 access any information and don't form or express any  
 11 opinion until the case is submitted to you. That's  
 12 going to be real soon.  
 13 Until I say, "go deliberate" that's the  
 14 instructions. We'll be in recess.  
 15 (Wherein, the jury is not  
 16 present.)  
 17 THE COURT: Please be seated. The jury has  
 18 left the courtroom.  
 19 Counsel, we need to do a final conversation  
 20 with regard to jury instructions. So we need to do that  
 21 on the record and then we'll be able to go forward.  
 22 Do we have the changes we talked about in  
 23 chambers?  
 24 MR. NIXON: Your Honor, I just sent Ms. Pratt  
 25 down to see if she can retrieve those from Bob. I

1 anticipate we will settle those while he prepares.  
 2 THE COURT: Here's what we'll do. I want to  
 3 give you a chance for a quick break, as well. I'll give  
 4 you a break. Why don't counsel -- not very much, five,  
 5 ten minutes. Just enough to take a bit of a rest and  
 6 then we can meet in chambers, go on the record with jury  
 7 instructions and then, hopefully, we can get the jury  
 8 back up for summations. Okay?  
 9 MR. SNIVELY: Yes.  
 10 THE COURT: We'll be in recess here.  
 11 We'll see counsel in chambers right around 2:30.  
 12 (Wherein, a recess was taken.)  
 13 (Wherein, the following took  
 14 place in chambers.)  
 15 THE COURT: We're in chambers.  
 16 Counsel for the State is present.  
 17 Counsel for the defendant is present. The  
 18 defendant is presented.  
 19 We're going to settle jury instructions after  
 20 the close of evidence.  
 21 Just as we entered here, I received a note  
 22 from one of the jurors, which the note will be lodged in  
 23 the file, indicates that this -- well, I'll simply read  
 24 it. "When we were asked if we knew a witness, Diane  
 25 Goedde, I said, yes, as I used to work with her in my

1 job at the Yellowstone -- YCAO. She's a psych nurse and  
 2 I handled insanities. I assumed she'd be an expert  
 3 witness. Now I just found out that she's the  
 4 defendant's mom. I am looking at this differently now  
 5 as I am emotional, I believe I will still be fair. Jo  
 6 Anne Herem."  
 7 Who, I believe, is seat No. 1.  
 8 MR. NIXON: Yes, Your Honor.  
 9 THE COURT: What the Court is going to do is  
 10 ask the bailiff to get Ms. Goedde [sic], bring her into  
 11 chambers and just talk to her. Essentially allow the  
 12 parties to do a little bit of voir dire and we can get  
 13 determine whether this is something that will be impact  
 14 her ability to serve and we'll go from there.  
 15 Mr. Nixon, do you have a problem with that?  
 16 MR. NIXON: I don't, Your Honor. I guess the  
 17 only thing I think if she is to serve in -- from what I  
 18 read I don't have any reason to doubt that she can  
 19 continue to be a fair and impartial juror, but I think  
 20 she probably does need to be instructed that she not  
 21 mention where Ms. Goedde works.  
 22 THE COURT: Yes. How about you, Mr. Snively?  
 23 Do you have -- do you have a problem with the  
 24 Court's proposed procedure to do a little voir dire with  
 25 her?

1 MR. SNIVELY: No, I don't have a problem with  
 2 having the individual voir dire with her to see where  
 3 she is.  
 4 THE COURT: All right.  
 5 MR. SNIVELY: I do question, though, whether  
 6 the Court can -- I think we get into a strange area  
 7 about the Court instructing her and she can't consider  
 8 how she knows her in deliberation. Or are you just  
 9 asking for an instruction that she can't tell the other  
 10 jurors that she's a nurse?  
 11 MR. NIXON: Please don't -- I would say,  
 12 "Please don't tell the other jurors how you know Ms.  
 13 Goedde." I don't think it would be any more than that.  
 14 I don't anticipate it should be relevant.  
 15 We've had all the discussions about all of  
 16 the witnesses. I don't think it should be relevant that  
 17 they discuss how they know each other, because at voir  
 18 dire I believe we had basically assurances from all of  
 19 the witnesses [sic] that they could put aside what they  
 20 knew about the various different witnesses.  
 21 THE COURT: There's no question, in essence,  
 22 all the Court would do is if I determine that Ms. Goedde  
 23 [sic] is able to continue to serve, all I would do is  
 24 reiterate the case can only be decided on evidence that  
 25 came from the box and that doesn't include the

1 information that you have.  
 2 MR. SNIVELY: Judge, you said Ms. Goedde.  
 3 It's Ms. Herem.  
 4 THE COURT: Oh, thank you for that. Thank  
 5 you for that correction. No, no, I appreciate that. I  
 6 was looking at the name of the witness, Mr. Polakoff's  
 7 mom.  
 8 MR. NIXON: I guess I would note, too, that  
 9 my recollection from Mr. Herem is she knew a lot of the  
 10 witnesses and always indicated that she wouldn't have an  
 11 issue putting aside that personal relationship or  
 12 knowledge of them. So I have every reason to believe  
 13 that she can be a fair juror as she says she can.  
 14 THE COURT: Well, I certainly don't take from  
 15 this that she needs to be removed, but I do think we  
 16 need to have that conversation to make sure, because  
 17 it's definitely better sooner than later.  
 18 All right. I will have that -- do that soon,  
 19 but let's go ahead and go into the instructions.  
 20 And we did have an off-the-record discussion  
 21 that the defendant was present at that in order to  
 22 facilitate this and it's my understanding we have -- I'm  
 23 not sure we have any issues now as I think the  
 24 defendant's concerns have been met through stipulation  
 25 of the State.

1 So I'm not -- you each know you're free to  
 2 put on the record whatever you want. I will say I have  
 3 already given State's 1 through 5, so I don't think we  
 4 need to address those. And it's not my intent to reread  
 5 those unless either of the parties wants me to reread  
 6 those when I charge the jury.  
 7 MR. NIXON: I don't make that request on  
 8 behalf of the State.  
 9 MR. SNIVELY: The defense doesn't want you to  
 10 reread.  
 11 THE COURT: Okay. I'm just going to walk on  
 12 through these and then we'll deal with these as we get  
 13 to them. As for 6, unanimous verdict. The Court's  
 14 going to give that as 6.  
 15 Correct, Mr. Snively? No objection?  
 16 MR. SNIVELY: That's correct.  
 17 THE COURT: As for 7, direct and  
 18 circumstantial, any objection?  
 19 MR. SNIVELY: No, sir.  
 20 THE COURT: I'll give that as No. 7.  
 21 8, believability and weight, no objection?  
 22 MR. SNIVELY: That's correct.  
 23 THE COURT: And I give that as 8. Statement,  
 24 admission, confession. I think that's necessary. Any  
 25 objection?

1 MR. SNIVELY: No.  
 2 THE COURT: That's Offered 9, State's Exhibit  
 3 Offered 9, I'll give that as 9.  
 4 Right not to testify. Clearly, we need that  
 5 now, do you agree?  
 6 MR. SNIVELY: Yes.  
 7 THE COURT: I'll give that as 10.  
 8 Expert witness is State's proffered 11. Any  
 9 objection?  
 10 MR. SNIVELY: No.  
 11 THE COURT: I'll give that as 11.  
 12 The circumstantial -- CJI-1117, susceptible  
 13 to two interpretations. And this is essentially a  
 14 circumstantial case, I think it's appropriate. Any  
 15 objection?  
 16 MR. SNIVELY: No.  
 17 THE COURT: The Court will give State's  
 18 Offered 12 as No. 12.  
 19 13 is essentially definition of Count I. Any  
 20 issue there?  
 21 MR. SNIVELY: No.  
 22 THE COURT: So the Court will give State's 13  
 23 as 13.  
 24 State's Proffered 14 is causal relationship  
 25 between conduct and result. Any objection?

1 MR. SNIVELY: No.  
 2 THE COURT: 14 will be given. State's 14  
 3 will be given as 14.  
 4 15, discussion was had by counsel about  
 5 dealing with 15 in that it could be confusing as to  
 6 Count II and cause some misunderstanding of the proof  
 7 necessary to prove Count II.  
 8 MR. NIXON: Your Honor, the State withdraws  
 9 that Proposed Instruction 15.  
 10 THE COURT: Okay. We do need one, though?  
 11 What do you offer instead?  
 12 MR. NIXON: I do have in it's place, I  
 13 haven't numbered them, but I propose that they be  
 14 State's Exhibit 15A and State's Exhibit 15B. The first  
 15 one is in reference to Counts I and II. 15B is in  
 16 Alternative Count I.  
 17 THE COURT: Does that alleviate the concern,  
 18 Mr. Snively?  
 19 MR. SNIVELY: Yes.  
 20 THE COURT: Okay. So I'm going to give  
 21 State's Offered 15A.  
 22 MR. NIXON: Yes.  
 23 THE COURT: And that's going to be Court's  
 24 15.  
 25 State's Offered 15B, I will give and that's

1 going to be 16.  
 2 I'll give you guys a packet so you can refer  
 3 to them in closing by number if you need to.  
 4 Issues in assault on a minor, Count I, any  
 5 objection to State's Offered 16?  
 6 MR. SNIVELY: No, Your Honor.  
 7 THE COURT: I think I'm at 17, aren't I?  
 8 MR. NIXON: Yes, Your Honor.  
 9 THE COURT: Then to the alternate count,  
 10 that's State's Offered Instruction 17. Any objection,  
 11 Mr. Snively?  
 12 MR. SNIVELY: No, Your Honor.  
 13 THE COURT: That will be given as 18, I  
 14 believe. Issues for Count II, that's State's Proposed  
 15 18. Any objection?  
 16 MR. SNIVELY: No, Your Honor.  
 17 THE COURT: That will be given as Instruction  
 18 No. 19.  
 19 Definition of serious bodily injury, that is  
 20 State's 19. Any objection?  
 21 MR. SNIVELY: No.  
 22 THE COURT: So that will be given as 20.  
 23 Definition of bodily injury, that's State's  
 24 Proposed 20. Any objection?  
 25 MR. SNIVELY: No, Your Honor.

1 THE COURT: That will be Instruction 21.  
 2 Voluntary act is State's Offered 21. Any objection?  
 3 MR. SNIVELY: No, Your Honor.  
 4 THE COURT: That will be given as 22.  
 5 Knowingly, State's Offered 22. Any  
 6 objection?  
 7 MR. SNIVELY: No, Your Honor.  
 8 THE COURT: That will be given as 23.  
 9 Purposely is State's offered 23. Any  
 10 objection?  
 11 MR. SNIVELY: Judge, I'm not sure why that's  
 12 highlighted. I think the instruction shouldn't be  
 13 highlighted. At least on my copy the "cause a result,"  
 14 is highlighted.  
 15 MR. NIXON: I don't have a problem not  
 16 highlighting.  
 17 THE COURT: Yeah. I don't know that it's a  
 18 real issue, but we can certainly fix the highlight. But  
 19 as far as...  
 20 MR. NIXON: Is the language okay?  
 21 MR. SNIVELY: Yeah, I don't object to the  
 22 instruction. It's just the..  
 23 THE COURT: What we'll do is before we bring  
 24 the jury in, maybe you hand this to Mr. Spoja to fix.  
 25 MR. NIXON: Absolutely. They wouldn't see

1 these for a while anyway, correct?  
 2 THE COURT: That's true. If I need to, I can  
 3 read them.  
 4 MR. SNIVELY: That's fine.  
 5 MR. NIXON: And I absolutely stipulate that  
 6 we should not give them a highlighted version.  
 7 MR. SNIVELY: That's my only point.  
 8 THE COURT: You bet.  
 9 MR. SNIVELY: You certainly can proceed.  
 10 MR. NIXON: That's State's 23 given as 24; is  
 11 that right?  
 12 THE COURT: Yes.  
 13 MR. SNIVELY: Substitute that one page.  
 14 THE COURT: Before it goes to the jury room?  
 15 MR. SNIVELY: Correct.  
 16 THE COURT: Mental state inference and that  
 17 is State's Offered 24. Any objection?  
 18 MR. SNIVELY: No.  
 19 THE COURT: It will be given as 25.  
 20 State's Offered -- well, State's Offered 25  
 21 is precautionary only. Do you guys agree, it shouldn't  
 22 be given unless we need to?  
 23 That's the Norquay instruction.  
 24 MR. NIXON: Agreed.  
 25 THE COURT: We had issues regarding the

1 verdict form.  
 2 MR. NIXON: So the easy one, Your Honor, is  
 3 the one that the Count II is now added to the caption.  
 4 THE COURT: Okay. At Mr. Snively's request,  
 5 I think it's appropriate to remove the note that was  
 6 initially in parentheses and just include the language  
 7 that was already at the bottom so that the jury will be  
 8 instructed if guilty to move on to the Count II, if not  
 9 guilty, move to the Alternative Count I.  
 10 Have you reviewed the new verdict form, Mr.  
 11 Snively?  
 12 MR. SNIVELY: I have, Your Honor. I have no  
 13 objections.  
 14 THE COURT: All right. You made notes on  
 15 which one had the highlighted one?  
 16 MR. NIXON: Yes.  
 17 THE COURT: Very good. We should be good. I  
 18 should be able to instruct the jury then. Any other  
 19 comments you want to make about the jury instructions?  
 20 MR. NIXON: Nothing from the State, Your  
 21 Honor.  
 22 THE COURT: All right. I think I'll ask the  
 23 bailiff, then, to have Ms. Herem come up.  
 24 (Pause.)  
 25 THE COURT: We are on the record still.

1 Defense counsel is here. So is the State's  
 2 counsel. And the defendant is present.  
 3 Ms. Herem, you had provided a note to the --  
 4 MS. HEREM: I had to get it off my chest.  
 5 THE COURT: And that's why you're here and I  
 6 appreciate that.  
 7 MS. HEREM: I feel so much better.  
 8 THE COURT: So the Court has reviewed the  
 9 note and shared it with counsel for the State and  
 10 counsel for the defendant. So what we're going to do is  
 11 just ask you a few questions, kind of like when we were  
 12 doing jury selection, just talk about your state of mind  
 13 right now. Okay?  
 14 MS. HEREM: Sure.  
 15 THE COURT: Go ahead, Mr. Nixon, if you have  
 16 any questions.

**VOIR DIRE EXAMINATION**

17 **MR. NIXON:**  
 18 Q. Thank you for letting us know. Obviously, at  
 19 this point in time it's very important for both parties  
 20 to make sure we have very fair and vested jurors.  
 21 A. Right.  
 22 Q. My recollection is that you knew quite a few  
 23 people that were going to be testifying?  
 24 A. Yes.  
 25

1 Q. And you were able to put things aside. And I  
 2 read your note, just so you know, and I see that you  
 3 think you can still be a fair and impartial juror. Do  
 4 you think that?  
 5 A. I really do. Can I talk about her?  
 6 Q. Would you, please.  
 7 A. Well, when I found out that Diane Goedde was  
 8 here in the role of the defendant's mother, I'm  
 9 surprised I didn't fall off my chair. I thought she was  
 10 going to be called as an expert witness maybe. I had no  
 11 idea.  
 12 So when we were dismissed and were walking  
 13 down the stairs it really hit me. And you know, I can  
 14 see her teary-eyed and stuff like that and just as a  
 15 mom, you know, it was hard for me. Because you know, I  
 16 know her not real well, but through the course of  
 17 working with her. So I can still be fair, I know that,  
 18 but I felt like I couldn't not tell you guys.  
 19 Q. I very much appreciate that. I probably have  
 20 kind of a similar -- I've had, you know, DI hearings as  
 21 well, where she has been my expert, so I understand.  
 22 Do you think it's fair to say that this is  
 23 probably emotional for both sides and it's not going to  
 24 be emotions that end up making your decision in this?  
 25 A. I don't think my emotion will have anything

1 to do with it. It's just that I -- you know, coming  
 2 down the stairs like that, I immediately just felt like,  
 3 you know, if I'm this emotional I better tell these  
 4 guys. I don't think I will be unfair because of that  
 5 situation. No, I already made up my mind I'm going to  
 6 be fair.  
 7 MR. NIXON: I think the fact that, Judge,  
 8 that Ms. Herem is willing to at least put everything on  
 9 the table and let us know that she will still be fair  
 10 that satisfies the State.  
 11 THE COURT: Okay. Mr. Snively, you can  
 12 question the juror, if you wish.

**VOIR DIRE EXAMINATION**

14 **BY MR. SNIVELY:**  
 15 Q. I guess what I want to clarify, and maybe you  
 16 said it and I just didn't pick up on it, is the  
 17 emotional part was you realizing that she was there as a  
 18 mother instead of an expert?  
 19 A. Yeah, that's just it. You know, sometimes we  
 20 would sit in sanity hearings in Yellowstone County and,  
 21 you know, these poor families of the person being  
 22 examined, you just got to feel for them. And so all of  
 23 a sudden here is Diane not as the expert witness but as  
 24 a regular family, a mom, you know, and I just felt for  
 25 her strongly.

1 MR. SNIVELY: Okay. Thank you.  
 2 MS. HEREM: I mean, I intend to be fair, I  
 3 just want to guarantee you of that.  
 4 THE COURT: Do you have an objection to Ms.  
 5 Herem remaining on the jury, Mr. Snively?  
 6 MR. SNIVELY: No.  
 7 THE COURT: Okay. And I'll just -- you are  
 8 able to apply the presumption of innocence, follow the  
 9 directive of the Court and follow the rule of the law as  
 10 I give it to you; is that right?  
 11 MS. HEREM: Yes, I've had a little bit of  
 12 time now to think about this and I see within myself  
 13 that really has made no difference to me from, you know,  
 14 the testimony we've heard.  
 15 THE COURT: All right. So with that, despite  
 16 this change that you brought to our attention, do you  
 17 feel like you're in the same frame of mind when you  
 18 promised both counsel that you could base this case  
 19 solely on the evidence?  
 20 MS. HEREM: Yes, I feel I'm in the same frame  
 21 of mind.  
 22 THE COURT: All right. The only thing I'll  
 23 add is, it's sound like this will matter at all, but  
 24 essentially what Ms. Goedde does isn't part of the  
 25 evidence necessarily, so it's really not part of it.

1 MS. HEREM: Right. Yeah.  
 2 THE COURT: So I'll just ask that the  
 3 information that you apply the law to is just what comes  
 4 from the witness box and not other prior associations  
 5 with her, what she did for a living or anything. Okay?  
 6 MS. HEREM: Yeah.  
 7 THE COURT: All right. Anything else either  
 8 party -- Mr. Nixon, you didn't specifically say, but  
 9 from your questioning it sounded like you don't object.  
 10 MR. NIXON: The State has no objection.  
 11 THE COURT: Okay. And then I'd ask, I'm sure  
 12 you didn't, but there's no reason to tell the other  
 13 jurors why you had to come up here or anything like  
 14 that.  
 15 MS. HEREM: Okay. Even in deliberation?  
 16 THE COURT: Yeah.  
 17 MS. HEREM: Okay. Yeah, I can just skip it.  
 18 THE COURT: Yeah. For example, if somebody  
 19 came up to you on the street or something and you're  
 20 supposed to come to me, don't tell the other jurors if  
 21 somebody was given you grief as a juror, anything like  
 22 that, so that we can make sure that the jurors only  
 23 deliberate on just the facts.  
 24 MS. HEREM: I'm just sure that they're all  
 25 going to be very curious, but I'll just be myself and

1 but that's up to counsel. I'll give you up to an hour.  
 2 And, Mr. Snively, do you have any basis for  
 3 your closing the time, how long will it be?  
 4 MR. SNIVELY: Judge, a half hour.  
 5 THE COURT: Okay. Just trying to look ahead.  
 6 Do you need a minute or two to prepare?  
 7 MR. SNIVELY: If I could, Judge.  
 8 THE COURT: What does that mean? Just a  
 9 couple or do you need more than that?  
 10 MR. SNIVELY: No, I think just a couple is  
 11 sufficient.  
 12 THE COURT: Okay. How about 3:10, we'll call  
 13 in the jury?  
 14 All right. We're in recess.  
 15 (Wherein, a recess was taken.)  
 16 (Wherein, the following took  
 17 place in open court.)  
 18 THE BAILIFF: All rise.  
 19 THE COURT: Please be seated. Thank you.  
 20 We're back on the record, DC 19-17, State  
 21 versus Polakoff.  
 22 Counsel for the State is present.  
 23 Counsel for the defendant is present. The  
 24 defendant is present.  
 25 The jury is not present.

1 say nothing.  
 2 THE COURT: You can just tell them that there  
 3 was an issue that arose that the Court had a couple of  
 4 questions of you from voir dire and it's a nonissue now.  
 5 Okay?  
 6 MS. HEREM: Sure.  
 7 THE COURT: And just blame it on me.  
 8 MS. HEREM: Okay.  
 9 THE COURT: You can return to the jury room.  
 10 MS. HEREM: Thank you, everyone.  
 11 THE COURT: Thank you.  
 12 (Wherein, Juror Herem exists  
 13 chambers.)  
 14 THE COURT: Anything else while we're still  
 15 on the record here? Anything you need to talk about?  
 16 MR. NIXON: I can't think of anything right  
 17 now, Your Honor.  
 18 THE COURT: Is Mr. Spoja closing?  
 19 MR. NIXON: Yes.  
 20 THE COURT: Any idea how long?  
 21 MR. NIXON: I don't know. I don't believe  
 22 very long.  
 23 THE COURT: Well, I'll give you up to an  
 24 hour, but I don't know given that they've been out there  
 25 a long time that it would be a good idea to do too long,

1 The evidence has been closed. We have  
 2 settled jury instructions. We're ready for closing  
 3 arguments.  
 4 Is the State ready for closing?  
 5 MR. NIXON: Yes. The State is prepared,  
 6 Your Honor.  
 7 THE COURT: Mr. Snively.  
 8 MR. SNIVELY: Yes, Your Honor.  
 9 THE COURT: Any reason not to bring the jury  
 10 in?  
 11 MR. SNIVELY: No, sir.  
 12 THE COURT: Please bring the jury in.  
 13 (Wherein, the jury is present.)  
 14 THE COURT: Okay. Please be seated.  
 15 Does the State stipulate that the jury and  
 16 the alternate are present?  
 17 MR. NIXON: Yes, Your Honor.  
 18 THE COURT: And, Mr. Snively?  
 19 MR. SNIVELY: Yes, Your Honor.  
 20 THE COURT: All right. This is now,  
 21 essentially, the final stretch. It's the time when I  
 22 instruct you as to the law that you will apply in your  
 23 deliberations and then counsel will have the opportunity  
 24 to argue the law.  
 25 If you recall at the beginning of this case,



1 I did read you some instructions. You will get those in  
2 writing, I'm not going to reread those to you because  
3 you'll have them and you already have been instructed by  
4 me. So I will give you the rest of the law that you  
5 need to apply.

6 And once again, you'll get a copy of all of  
7 this to take with you to the jury room.

8 (Wherein, the jury instructions  
9 were read.)

10 THE COURT: All right. That is the law that  
11 is applicable to this case. That law is intended to  
12 provide you all the legal definitions required to reach  
13 a verdict on these offenses.

14 And again, that includes the instructions  
15 read at the beginning, although not reread and to  
16 reiterate, you will receive a copy of these instructions  
17 to take with you to the jury room.

18 Now is the time for the final arguments in  
19 the case. I'll just remind you the attorneys are not  
20 witnesses. The statements of counsel during this trial  
21 are not evidence, statements of counsel in this argument  
22 is not evidence, but counsel may seek to persuade the  
23 way you think about the evidence that was introduced  
24 during trial through these closing arguments.

25 Is the State ready to proceed?

1 tried to keep him hydrated and comfortable. Ryann told  
2 you that they went to the defendant's parents' house to  
3 do laundry. And that while there, she wanted to clean  
4 Everett up some more. He had, apparently, vomited on  
5 himself again.

6 You heard that while Everett had previously  
7 loved his bath time and had not been a problem to wash  
8 his hair, that night he was and he acted like it hurt.

9 We now know, after listening to Dr. Laskey,  
10 that that's a common thing when she sees little kiddos  
11 in her clinic that they later find out there's a skull  
12 fracture through the use of an x-ray. That the  
13 caregivers had initially brought them in with that being  
14 one of the presenting problems, that they couldn't --  
15 that he was acting like it hurt when they washed his  
16 hair.

17 Now, that evening, the 18th, we heard that  
18 Everett was still feeling poorly and that he was  
19 continuing to throw up, was continuing to just not be  
20 himself. And that continued on into the morning of the  
21 19th -- into the day of the 19th. Still didn't feel  
22 well, threw up a few more times.

23 Ryann told you how -- she told you how things  
24 went throughout that day. And then in that evening,  
25 that Everett threw up on her and she was going to clean

1 MR. SPOJA: Yes, Your Honor. Just one  
2 moment, Your Honor.

3 Until the evening hours of April 17th of  
4 2019, Everett Musch has a happy, healthy nine-month-old  
5 baby boy.

6 That evening, he began vomiting and ended up  
7 with a red mark on his forehead. This mark later  
8 developed into a bump and from there it progressed.

9 On the 18th, we saw that it was something  
10 more than a bump. Everett continued to throw up, as he  
11 started the moment that he was alone with Nathan. He  
12 continued to throw up, this worried his mother.

13 Worried her enough that she brought him,  
14 along with the defendant, the next morning to the  
15 Beartooth Billings Clinic where he was seen by Doug  
16 Whitehead.

17 Now, PA Whitehead examined Everett, told  
18 Ryann that Everett had the flu. Apparently, did not see  
19 an injury, even after the red mark had been pointed out  
20 by the defendant himself, according to his own  
21 admission. We now know after we heard the testimony of  
22 Dr. Laskey that PA Whitehead missed the injury to  
23 Everett.

24 After seeing PA Whitehead, Ryann and the  
25 defendant took Everett back home, back to Nathan's home,

1 him up and she needed to change herself, but the  
2 defendant offered to help out, offered to take him into  
3 the shower and clean him up, and she agreed.

4 While they were in the shower, Ryann changed  
5 her clothes, was picking up some toys and various other  
6 things, and she told you that at some point that the  
7 defendant called out that Everett wasn't breathing. And  
8 she came rushing into the bathroom, seconds after she  
9 heard this, took Everett, and she told you that she  
10 began doing the CPR that she learned how to do by  
11 watching Grey's Anatomy. Why is that important?

12 Well, the defendant had presented himself to  
13 Ryann and her family as someone with medical training,  
14 that he'd been a basic EMT and had worked -- had been --  
15 well, we heard Jennifer talk that he was an EMT at Red  
16 Lodge Mountain.

17 Despite having that qualification, it was  
18 only after Ryann told Nathan, the defendant, to call 911  
19 that he called 911. And then after being on the phone a  
20 few moments, it was only then that he decided, "Oh,  
21 Ryann, let me take over." And he put Ryann on the phone  
22 and he took over apparently performing CPR.

23 A few moments later, law enforcement arrived.  
24 You got to watch the video with the rest of us. Nathan  
25 is handing Sergeant Grieshop what Sergeant Grieshop

1 thought was a dead baby. He was limp, lifeless body.  
2 And it struck Officer Grieshop that he was being handed  
3 what he thought was a lifeless child.

4 You heard Officer Grieshop note that he  
5 thought it was strange that he didn't get wet as a  
6 result of taking Everett out of the defendant's arms,  
7 the defendant didn't appear to be wet. It didn't strike  
8 him as what he would have expected to that type of call.

9 Now, a few moments later, folks from Red  
10 Lodge Fire and Rescue appeared. All of this -- I think  
11 the statement was that it was 11 minutes from dispatch  
12 to arrival at the hospital. I think we heard that from  
13 Amy Hyfield.

14 Ms. Hyfield told you about what kind of  
15 condition Everett was in and what they did to get him to  
16 the hospital alive. You heard about him seizing before  
17 they ever left the house, seizing while in the ambulance  
18 and then finally getting him into the hospital where he  
19 could receive the care he needed.

20 We heard Dr. Fouts testify about what they  
21 did, the measures they took to keep Everett breathing.

22 One of the most striking things that you  
23 heard Dr. Fouts talk about was how they normally do  
24 radiology, how they normally do CT scans, x-rays, things  
25 like that. That they look at them and he saw the things

1 that were obvious, but that normally when it's after  
2 hours like that, they send them off to the -- ERad  
3 [sic], I think was the name of the place that reads them  
4 after hours -- and that normally he gets a report. That  
5 this time the radiologist who read the films called him.  
6 It was that big of a deal. Called him and told him,  
7 "You've got two serious skull fractures here. Have you  
8 contacted law enforcement?"

9 Law enforcement had been contacted again.  
10 The investigation began. You heard Officer Grieshop  
11 talk about what he was able to do on the night shift  
12 with, frankly, fairly limited abilities to do  
13 investigations while operating on the night shift in Red  
14 Lodge, having to accomplish a multitude of other duties,  
15 as well.

16 And that he did what he could and then when  
17 Officer Stuber came on the next morning, he briefed him  
18 as to what had happened and what he was facing.

19 After that, the next morning, you heard from  
20 Officer Stuber about what he did the next day, including  
21 interviewing the defendant. Recall watching that video.  
22 Recall how the defendant behaved throughout. Recall the  
23 things that strike you all as odd.

24 Having a photograph of his bedroom to  
25 apparently bolster the story about Everett rolling off

1 the futon as being the source of an injury.

2 Now, remember, Officer Stuber told you that  
3 that photograph was taken at shortly after 11:00 p.m.  
4 the night that Everett was injured, while Ryann and  
5 Everett are in the hospital at Beartooth Billings Clinic  
6 awaiting transport to Salt Lake Children's Primary  
7 Hospital.

8 Why do that? If your goal is to go pick up  
9 some things that this gravely-injured baby needs and his  
10 mom need to go for what is going to be an extended --  
11 likely extended period of time in another state trying  
12 to save the boy's life, why stop and take a picture of  
13 the bed, the bedroom, this futon that none of the  
14 medical professionals think this roll off the bed,  
15 assuming it happened, actually caused any injury to  
16 Everett?

17 Why stop and take the time to take that  
18 picture?

19 We got to hear a little bit about what  
20 Everett suffered. Based on the examination and the  
21 treatment in Salt Lake, combined with the medical  
22 records from here, everything that the doctors were  
23 sharing from here, and based upon the history as  
24 provided to Dr. Laskey.

25 She told you that, "Yeah, I take in the

1 information from the medical records, but I also ask  
2 these questions myself because I ask them a specific  
3 way." And that she does that when she's examining these  
4 cases when she's been called in to consult on a child  
5 abuse case.

6 And based upon her training and experience,  
7 based upon the findings that she's made, everything that  
8 she's seen in the medical records, everything that has  
9 been done in Salt Lake, synthesized with the history as  
10 provided to her, she tells you that it is her medical  
11 opinion that Everett suffered the parietal skull  
12 fracture Wednesday, Wednesday evening when he was all of  
13 sudden no longer well.

14 Do you remember that's one of the questions  
15 that she asks parents to start with, "Tell me the last  
16 time your baby was well."

17 Now, let's focus on the elements that the  
18 State has to prove. Four basic elements here. You've  
19 got them right in front of you. Let's look at the first  
20 one. Serious bodily injury.

21 Dr. Laskey told you that in her opinion --  
22 just like I said, in her opinion, the skull fracture --  
23 the parietal skull fracture took place on April 17th,  
24 2019.

25 Who was alone with Everett when that

1 happened? The defendant was.

2 The State has to prove that he acted  
3 purposely or knowingly. Well, that gets a little  
4 trickier. We'll talk about that one a little bit later.

5 The other two things that we have to prove is  
6 at the time of the offense, Everett was under 36 months  
7 of age. No question, he's nine months.

8 At the time of the offense, the defendant was  
9 18 years of age or older. Well, you heard from Officer  
10 Stuber what the defendant's birth date was, well over  
11 the age of 18.

12 Lest there be any doubt that there was  
13 serious bodily injury to the defendant, let's remember  
14 where he went. Pediatric intensive care unit at  
15 Children's Primary Hospital in Salt Lake City. Dr.  
16 Laskey told you that without the -- I don't remember the  
17 exact words that she used -- but the medical  
18 intervention, he would likely have died.

19 Recall that prior to being alone with the  
20 defendant, he was a happy, healthy boy. After being  
21 alone with the defendant, Dr. Laskey told you about this  
22 injury here, being the one to his parietal bone, the  
23 parietal side of his skull, that this one would have  
24 occurred on Wednesday the 17th. Again, who was the only  
25 one alone with Everett that night? The defendant.

1 Dr. Laskey told you about the severity of  
2 that and what it would take for that to happen. That  
3 it's not just a fall, not just a fall, not a household  
4 fall. That there had to be a point that was at the  
5 center of that fracture.

6 Again, serious bodily injury, serious  
7 impairment, disfigurement or protracted loss or  
8 impairment of the function or process of bodily member  
9 or organ, includes serious mental illness or impairment.

10 I don't think there's any question that  
11 Everett suffered serious bodily injury. You saw the  
12 pictures. At a very minimum before he was injured, he  
13 was a happy, healthy baby boy. He didn't have crossed  
14 eyes.

15 After he's injured, the most obvious thing,  
16 if you were to see him right now or see him after he's  
17 gotten back from Salt Lake City, his eyes. He will  
18 always have problems with his vision and with his eyes.  
19 Dr. Laskey again told you that.

20 She told you that it's really hard with  
21 children of his age to determine what the full extent of  
22 his injuries are going to be, what they are. Some of  
23 that stuff will only appear after he gets to be school  
24 age and we start -- as a society, we start asking kids  
25 to do more things that are a little bit more difficult

1 Now, there's an alternate count, assault on a  
2 minor causing only bodily injury. The bodily injury is  
3 less severe. The Court gave you instructions on what  
4 the difference is between serious bodily injury and  
5 bodily injury.

6 Bodily injury -- well, there's -- they pretty  
7 much mean what they say. But bodily injury is basically  
8 pain. There's no question that that occurred.

9 But this is alternate count. You don't need  
10 to focus on that until after you've gone through and  
11 made your decisions on the Count I itself.

12 Count II is, again, a separate incident  
13 causing serious bodily injury. In this case, we've got  
14 on the 19th, again, no question, Everett is less than 36  
15 months of age, he's nine months. Nine months old all  
16 day long. And the defendant, again, date of birth puts  
17 him well over 18. And there was serious bodily injury  
18 to Everett on the 19th. The defendant again acted  
19 purposely or knowingly. And we'll come to that in a  
20 moment.

21 So recall this injury, the stellar fracture  
22 of the occipital bone. That's the star-shaped fracture.  
23 Much like the spider web -- the fractures you'll see of  
24 your windshield when you catch a rock. That's a  
25 stellate fracture.

1 to do that they have to use their brain to do. He's got  
2 a long road to hoe.

3 Purposely or knowingly. Two definitions, the  
4 Court gave them to you.

5 "A person acts knowingly when the person is  
6 aware there exists the high probability the person's  
7 conduct will cause a specific result."

8 And purposely, "When it's a person's  
9 conscious object to cause such a result."

10 This is where you're going to have to do your  
11 thinking. There's a lot to this instruction. It's kind  
12 of meaty. But basically, you can really distill it down  
13 to, what does it mean?

14 The purpose and knowledge ordinarily may not  
15 be proved directly, sure. Because we can't -- we're not  
16 mind readers. We don't expect you to be mind readers.

17 But you can infer his state of mind,  
18 including purpose or knowledge, from his acts and all  
19 other facts and circumstances which indicate his state  
20 of mind.

21 Think about all the evidence that you heard.  
22 Think about everything that you heard come from the  
23 defendant's own mouth while you watched the interview  
24 conducted by Officer Stuber.

25 I, myself, lost count of how many

1 different --  
2 MR. SNIVELY: Your Honor, I object to the  
3 personal argument.

4 MR. SPOJA: May I respond, Your Honor?

5 THE COURT: Overruled. Go ahead.

6 MR. SPOJA: Thank you.

7 I, myself, lost count of how many different  
8 directions the defendant pointed as to who caused this  
9 injury. Ask yourself were any of those credible? Were  
10 any of those reasonable?

11 Even including this futon fall. If you were  
12 listening during the first few minutes of that  
13 interview, the defendant talked about the whole futon  
14 incident. He told Officer Stuber that when he got in  
15 there that Everett fell off the futon backwards and  
16 somehow ended up with a mark on his forehead. How does  
17 that make sense?

18 Pay attention. I'm sure you all took great  
19 notes. What did he have to say about all of those  
20 different things, all of those red herrings that he was  
21 sending the way of Officer Stuber?

22 At the end of the day, the only things -- the  
23 only commonalities really between the two injuries are  
24 who was alone with Everett when Everett got hurt. It's  
25 the defendant.

1 As far as the purpose and knowledge, Dr.  
2 Laskey told you, there is no way that this was  
3 accidental. These fractures were not caused by  
4 household falls. She described the amount of force  
5 required as being similar to falling off the roof of a  
6 two-story house. There's no way that these were  
7 accidental.

8 Finally, I think -- strike that.

9 At the end of the day one of the things that  
10 also comes to you from the defendant's own mouth through  
11 his interview with Officer Stuber and it tells you a  
12 little bit about the purpose and knowledge, when the  
13 defendant is saying, "I want to know who did this and  
14 why."

15 At one point he said -- I want to make sure I  
16 get this right -- "It sounds like someone was trying to  
17 kill him."

18 That should be about all you need to know  
19 about the mental state of the defendant.

20 Thank you very much.

21 THE COURT: Thank you, Mr. Spoja.

22 Mr. Snively.

23 MR. SNIVELY: Ladies and gentlemen of the  
24 jury, this is my last opportunity to talk to you.

25 Again, I want to talk to you -- the State has

1 stood up here and told you, you don't need to consider  
2 anything else. It's the fact that somebody tried to  
3 kill Everett, that's all you need to know.

4 You all agreed early on and have all taken an  
5 oath to serve as jurors and hold the State to their  
6 burden. The defendant has the presumption of innocence.  
7 The State has to prove all of those things beyond a  
8 reasonable doubt.

9 Those things being the elements that the  
10 judge has instructed you on and he's going to give you  
11 that instruction, the set of instructions to take back  
12 with you.

13 So let's take a few minutes and talk about  
14 what the evidence is that you have here. As I told you  
15 early on, the State's trying to get you wound up  
16 emotionally and because of these pictures of this poor  
17 baby in Pediatric ICU, you should convict. That's all  
18 you need to see. That's not what the law says.

19 We have to look at these elements. We have  
20 to see if the State can prove it and see what the State  
21 has not proven in this case. And that's really your job  
22 at this point, is to look at that.

23 Let's look at the 17th of April. You have  
24 testimony from Ryann saying that she is there  
25 immediately. There's no time. She's right there when

1 she hears the noise. Nathan had first told her, "I  
2 think he's gurgling, I'm going to go check on him."

3 She agrees, "Yeah, go check on him."

4 The idea of a red mark from falling off the  
5 futon as PA Whitehead told you, sure, that can happen.  
6 And what he saw the next day, matched. It made sense to  
7 PA Whitehead. He's the medical person who saw him less  
8 than 24 hours after that.

9 Because the testimony before you is that  
10 Ryann gets to Red Lodge sometime around 8:00. You know,  
11 there have been various times, but around 8 o'clock.  
12 The doctor's appointment, everyone has agreed, was at 5  
13 o'clock on the 18th.

14 But what you also need to look at is what  
15 Ryann tells the intake person as to why she is there.  
16 And she admitted, finally, that she's told them that it  
17 was throwing up and diarrhea. That was the reason that  
18 she was at the clinic on the 18th of April of 2019. Her  
19 intake says nothing about a mark, nothing about a  
20 concussion.

21 You heard her say from that chair that, "Oh,  
22 he had a goose egg." When I questioned her, she  
23 admitted it that goose egg never came up until after  
24 she'd seen PA Whitehead, after she'd been interviewed by  
25 is Salt Lake City Police, after she'd been interviewed

1 by the Red Lodge Police. The goose egg came out  
2 somewhere after all of those interviews and after all of  
3 that time. That's where that came about.

4 You also saw PA Whitehead tell you,  
5 absolutely not. That's not what he was told and was  
6 absolutely not what he saw on Everett on the 18th of  
7 April.

8 What the evidence is, is the vomiting and  
9 diarrhea, which Whitehead said went towards a viral  
10 flu-type thing. He had an x-ray of the stomach done to  
11 make sure there wasn't intestinal issues that needed be  
12 addressed. That came out clean.

13 You also heard Ryann say, well, he was with  
14 us in the x-ray and I'm asking him to x-ray his head and  
15 do all this stuff with his head. Whitehead wasn't even  
16 there. He told you that, "I'm not there. I'm doing  
17 other things. I see the results electronically. I'm  
18 not in there."

19 The other thing is his -- so they do all of  
20 that and then Nathan is the one that says, "Oh, PA  
21 Whitehead, would you look at this mark on Everett's  
22 forehead?"

23 And so Whitehead does an examination. He  
24 explained to you what he did, put both of his hands on  
25 Everett's skull, felt, pushed. There was no fluid

1 It's not Ryann saying there is a fracture or not a  
2 fracture. You have a trained medical person saying,  
3 "It's not there. It's not there."

4 Dr. Laskey didn't see him on the 18th to make  
5 those determinations. They go from there to see Nate's  
6 mom. You hear her say that nothing was out of the  
7 ordinary. It matched what Whitehead had told them.  
8 Based on her being a mother that it seemed reasonable to  
9 her that the baby had the flu and acted as she described  
10 to you. They go home.

11 And what is Ryann's testimony -- or to back  
12 up to the 17th, Ryann's testimony is that she gives  
13 Everett a bottle on the 17th, after the red mark on his  
14 head and he settles right back down and goes to sleep.  
15 Sleeps the entire night. That's her saying that, slept  
16 the entire night.

17 The next day, the 18th, there's a few  
18 episodes of vomiting, some diarrhea. The decision is  
19 made to go to the clinic. They make that appointment  
20 for 5 o'clock. But they also tell Whitehead, he's  
21 gotten better. He has improved. They tell Whitehead  
22 that during that appointment.

23 And they had been giving him Pedialyte to  
24 keep him hydrated. Whitehead said he appeared hydrated,  
25 appeared normal. You heard the testimony of whether

1 underneath that mark. There was no -- Whitehead's  
2 conclusion is there's no skull fracture. There's  
3 nothing.

4 Everett doesn't react at all to a grown man  
5 putting his hands on his head and squeezing around,  
6 moving around. He doesn't react. And you know that  
7 from Whitehead's testimony.

8 That's the testimony that you have. You have  
9 Whitehead's medical opinion that there was not a skull  
10 fracture on the 17th.

11 The only person who tells you the 17th comes  
12 into play is Laskey. Who also tells you, "I can't date  
13 the injuries. I don't know what order that they  
14 happened in. I don't know if they're minutes, days, or  
15 hours apart. I don't know any of that information.  
16 Medically, it's impossible to know that."

17 Medically, she's not qualified to tell you  
18 when the injuries happened. She admits that. She's  
19 previously under oath said that same thing. She  
20 acknowledged that.

21 That's the evidence that you have is  
22 Whitehead telling you, "I grabbed his skull, felt it,  
23 did an exam of it. There was no fracture." That's the  
24 evidence that you have.

25 It's not Nate saying there was no fracture.

1 there was a fever or not a fever. Again, not a big  
2 difference there. It's apparently what they consider a  
3 borderline temperature for an infant of that age.

4 That's the information. And Ryann saying  
5 that he's gotten better. You also have the video that  
6 was played today of them in the waiting area of the  
7 clinic prior to seeing Whitehead. And what you see  
8 there is that Ryann is the one who gave all the intake  
9 information. She eventually admitted that, yeah,  
10 throwing up and diarrhea would have come from her, not  
11 somebody else.

12 It doesn't say anything about, "I'm worried  
13 about a concussion or a head injury," or anything like  
14 that. That's nowhere in that documentation that several  
15 witnesses have told you.

16 Nathan is holding the baby. You saw it, very  
17 appropriately, walking around with the baby. Later on  
18 goes and sits at the couch, continues to hold the baby.  
19 Ryann never, during that segment of time, never says or  
20 never takes the baby back saying, "I'm going to hold my  
21 baby," that's supposedly is so sick at that point, by  
22 her testimony. It doesn't add up.

23 Just does not add up in the instinctual sense  
24 that you would just let Nathan sit there with the baby  
25 if your son was so seriously hurt as she tried to

1 convince you so hard of.

2 But yet, never used those terms. Never said  
3 that to the PA or medical staff at the clinic and never  
4 brought up the idea of a goose egg and everything until  
5 some point after all of her interviews.

6 That's the evidence that you have on the  
7 18th. And Whitehead's statement alone that there was no  
8 skull fracture creates reasonable doubt as to Count I.

9 Add to that Dr. Fouts saying, "I don't know  
10 when these injuries occurred. It could have been  
11 simultaneously, could have been days apart, I don't  
12 know." He medically can't do it, can't put that  
13 determination together.

14 Dr. Laskey also says a similar thing. She  
15 says it's different -- she said, "It could be minutes,  
16 it could be hours, could be days apart." They don't  
17 know when they happened.

18 So what you as jurors need to do is see what  
19 the evidence is that you have. And Whitehead's  
20 testimony by itself creates the reasonable doubt. The  
21 defense suggests to you it goes beyond reasonable doubt.  
22 Whitehead has established for you that there was not a  
23 skull fracture on the 17th.

24 And he testified, he told you why and all of  
25 that. Laskey makes a big thing about, "Well, he's the

1 That's exactly what she says happened. She  
2 says she did not hear anything in the shower and was  
3 silent, other than the talking and babbling and then  
4 Nathan says he stopped breathing and comes out of the  
5 shower with Everett.

6 Dr. Laskey tells you these injuries don't  
7 happen in silence. Medically impossible that they would  
8 have happened in silence. Yet, that's what Ryann is  
9 trying to convince you of. These all happened in  
10 silence. "I don't know anything. I didn't hear  
11 anything."

12 Again, that shows you reasonable doubt as to  
13 her version of what happened. There's not evidence of  
14 what happened. No doctor stood here or sat here in the  
15 witness stand and told you how the injury was inflicted,  
16 how it wasn't inflicted.

17 And when we look at the shower, Mr. Stuber  
18 told you basically it was two-foot-by-two-foot shower,  
19 so like that wide and that long (indicating). For a man  
20 to stand in the shower with a baby in a two-foot piece  
21 and be able to get any force behind anything is  
22 impossible in a two-by-two-piece shower. There's not  
23 enough room.

24 You've seen the pictures of Everett, of the  
25 size he would have been on that day. Holding him in

1 least qualified." He's a medically-qualified person,  
2 though, and he saw Everett on that day to do that.

3 The three of them sleep again in the futon on  
4 the night of the 18th. There's no additional vomiting.

5 The next morning, on Friday, they decide to  
6 get some air, they go out. Apparently, there's an  
7 incident of vomiting there and then they come back that  
8 evening. Nathan --

9 Well, on Thursday, Ryann agrees Nathan had  
10 showered with Everett on Thursday, as well.

11 Friday, they come back, Nathan says, "Look,  
12 I'll shower with Everett again. You can clean yourself  
13 up, I'll shower the baby off of the vomit that was on  
14 him."

15 They get in the shower. What's important,  
16 members of the jury, is where is Ryann? Where is Ryann?

17 You've got the pictures, because Mr. Stuber  
18 did not measure anything in this apartment or cabin.  
19 You can see from the pictures, she's steps, literally a  
20 couple of steps from that bathroom. She tells you the  
21 door is ajar. She tells you, "What I heard was Nathan  
22 talking and Everett babbling." Consistent with what the  
23 people have told you a nine-year-old [sic] would be  
24 doing is babbling. They don't have their words yet.  
25 But they would be babbling.

1 your arms in a shower that small, there's barely room  
2 for you -- for Nathan and that baby in that shower.

3 But the State has decided that there's some  
4 great acceleration of force, acceleration and stopping  
5 of force in that shower. Use your common sense. That  
6 small of a space, that confined of space, there's not  
7 room to generate the kind of force the State is trying  
8 to convince you occurred in the shower.

9 This had to have happened somewhere else.  
10 Who knows where.

11 Ryann has never told you. She claims there's  
12 nothing going on in the shower out of the ordinary,  
13 which would match the physical evidence that it's  
14 impossible to have created the force that the doctors  
15 talked about in that shower with Nathan and Everett in  
16 there together.

17 The idea of what happened after and with law  
18 enforcement and Grieshop saying, "I don't think it was  
19 appropriate. He wasn't wet." Again, look at the  
20 exhibit of the car camera that was played. Nathan's  
21 hair is wet in that video and you see it when they first  
22 open the door and he's first there.

23 You also see as the time goes, Nathan is down  
24 on his knees with Everett, while Grieshop is doing that  
25 CPR and monitoring Everett during that time. Nathan is

1 there helping him.

2 You also see that he has a pair of boxer  
3 shorts on at the beginning of that. Obviously, later in  
4 the video when he gets ready to go to the hospital, he's  
5 put other clothing on, but that's what he had.

6 The idea that Grieshop thought he should have  
7 been splashed with a whole bunch of water when he's  
8 given this baby, doesn't make sense. I mean, they had  
9 the baby down on a blanket and different things, the  
10 baby would have dried off during that process.

11 This whole idea of that this baby should have  
12 been dripping wet and Nathan should have been dripping  
13 wet, isn't there. He is wet. Look at his hair. The  
14 other thing is Ryann says they came out of there naked  
15 from the shower. How do most of us take a shower?  
16 Naked. You know, she supports that.

17 But the State has tried now to turn it into,  
18 well, that's some big thing that's missing. It's not  
19 missing. It's there. There's a reasonable explanation  
20 of it. The State just doesn't like that explanation.

21 They go to the hospital. Dr. Fouts says  
22 Nathan was acting appropriately, interacted  
23 appropriately with him, was obviously concerned. Ryann  
24 was obviously concerned.

25 I mean, at the hospital they find out that

1 in Utah. If I'm going to get arrested, I'd rather be in  
2 Red Lodge where I know people."

3 And like she said, "Where there was family to  
4 support you then someplace where you don't know  
5 anybody."

6 The decision to turn around is easily  
7 explained. And it's reasonable when you look at all the  
8 evidence that's before you. He did intend to go. He  
9 told Stuber he intended to go and he went clear to the  
10 southwest corner of Wyoming, in essence, through almost  
11 all of Wyoming.

12 He did what he said he was going to do until  
13 the idea of being arrested came up and as his mom said  
14 she said, "You should come back." You know, whether  
15 it's right or wrong, that's the reason that there was  
16 the change of plans and he came back.

17 You know, you hear Kathy on that voicemail,  
18 which is Defense Exhibit B, telling you that they're  
19 railroading her daughter. They're forcing it.

20 It ties into what Ryann told you was, "They  
21 kept forcing me until I said it was Nate and then they  
22 left me alone. That's why I told them it was him. They  
23 told me it was either me or him. I said him, they left  
24 me alone. I got what I wanted."

25 She never provided them any other details.

1 the seriousness is way up there. And they're acting  
2 appropriately, doing what concerned parents would do,  
3 even though Nathan technically and legally wasn't a  
4 parent.

5 You heard him say that he was willing to try  
6 to become that figure and take that responsibility on  
7 and was welcoming that part into his life. You have no  
8 statement from any witness saying Nathan had become  
9 angry. Nathan was violent. Nathan had done anything  
10 but appropriate between he and Ryann on that 17th, 18th,  
11 and 19th.

12 Ryann doesn't even tell you, "Yeah, he got  
13 ticked off at me and lost his temper." There is no such  
14 evidence. All appropriate. And she told you none of  
15 those things happened.

16 The idea the next day of going to Wyoming, on  
17 his way to Utah, I mean, that comes out to be a fairly  
18 simple story when you look at the entire evidence that's  
19 before you. And the State made two exhibits that show  
20 you all the cell towers that his phone hit and  
21 everything else.

22 But you understand why he turned around when  
23 we hear his mother testify about the voicemail she got  
24 where Ryann mom says, "You're going to get arrested."  
25 And the decision is made, "I don't want to get arrested

1 You know, the State's up here making a big thing about  
2 the futon thing. Ryann has never offered to anyone that  
3 interviewed her anything else. She thought what she was  
4 told fit. PA Whitehead said it fit. It all comes  
5 together.

6 What you have in front of you is a situation  
7 where the State wants you to jump to conclusions. In  
8 fact, the State's stood up here and told you that they  
9 had gone to see Whitehead the next morning. When all  
10 the testimony is it was a 5 o'clock appointment that  
11 they went to see Whitehead at. It wasn't the next  
12 morning.

13 The other thing would be the 17th -- the  
14 State's argument with the 17 and 18 is -- what the State  
15 is telling you is that Nathan intentionally inflicted  
16 serious bodily injury on Everett and then takes him to  
17 medical personnel and is handling him.

18 Again, not consistent with it when you look  
19 at the video at what he's doing in the waiting area  
20 while they're waiting for their appointment with PA  
21 Whitehead. And he's the one who points out, "Sir, would  
22 you look at that mark on his head?" He's the one that  
23 did that.

24 Ryann didn't hear any noises. The idea that  
25 Nathan is throwing out different ideas in the interview

1 with Stuber. Stuber is asking, "Well, what could have  
2 caused it?" What Nathan is doing is saying, well,  
3 there's these other people, some of which I don't really  
4 know, I don't know much about. But there are these  
5 other people may be worth talking to. He never once  
6 said, "Joe did it over here and here's who to go see."

7 He's answering Stuber's questions about who  
8 may have been around, who else is around. And he's  
9 trying to be cooperative, give the information that he  
10 has. As he told Stuber "I don't really know some of  
11 these people, but these are people that from Ryann I  
12 know have been around and, you know, possibly are there.  
13 He's not trying to deflect. He sits there and answers  
14 the questions that Stuber puts before him as to what he  
15 was doing and when he was doing it.

16 You have two medical doctors that clearly  
17 state they cannot date these injuries. They don't know  
18 when they happened. They don't know -- like I said  
19 before, whether they're bang, bang injuries or one  
20 injury and days later another injury. There's no way to  
21 medically do that.

22 The State has jumped to the conclusion, that,  
23 well, this fits what we want you to believe. And what  
24 the defense is asking you to do is don't take the leap  
25 with the State because the evidence isn't behind it for

1 reasonable doubt as to how it happened. And when you  
2 consider a two-by-two shower, an adult with a baby and  
3 two feet of space cannot generate the force that these  
4 doctors have told you had to have happened for those  
5 injuries.

6 When you consider all that, your verdict  
7 should be a not guilty verdict on all the counts.

8 Thank you.

9 THE COURT: Thank you, Mr. Snively.

10 Because the State has the burden of proof,  
11 the State does have the right to do a final rebuttal.

12 Mr. Nixon, do you want to do that?

13 MR. NIXON: I'm ready, Your Honor.

14 We get to end this trial just like we started  
15 it. You get to look at me wearing another blue jacket,  
16 another blue shirt, another lucky tie. Still not very  
17 much sleep, even more coffee, but you're in the home  
18 stretch here.

19 I'm not going to take too much of your time,  
20 because you've listened carefully and you've been paying  
21 attention and you know exactly what the testimony truly  
22 said.

23 You know, he doesn't look like a monster,  
24 does he? And it would probably be reassuring if he did.  
25 You'd like to think that somebody that could pick up a

1 you to be convinced beyond a reasonable doubt these two  
2 fractures occurred as the State is telling you they  
3 occurred. You have very strong evidence to suggest that  
4 there was not an injury on the 17th. And again, that's  
5 the Whitehead information.

6 What happened on the 19th just as easily  
7 could have happened before Nathan got in the shower and  
8 Nathan didn't know that Ryann had injured her son. It's  
9 just as plausible. And that Everett stopped breathing  
10 in the shower while Nathan is holding him, just as  
11 plausible as what the State is here trying to convince  
12 you of.

13 That is what the doubt is in this case and it  
14 is reasonable. There's several points there's  
15 reasonable doubt in this case when you look at it and  
16 discuss it.

17 And as the judge as told you, if the State  
18 can't prove their case beyond a reasonable doubt, you  
19 have to return a not guilty verdict.

20 And when you consider all this evidence, look  
21 at that, the presumption of innocence, and reasonable  
22 doubt, and the other evidence that's there. Like I told  
23 you earlier, it goes beyond a reasonable doubt from  
24 Whitehead. Count I, clearly, is a not guilty count.

25 Count II is not guilty, because there's a

1 nine-month-old boy and repeatedly shatter his skull  
2 would look like it. Maybe that's the scariest part  
3 about it.

4 You hear about these two horrific injuries  
5 and what do you talk about if you have these two awful  
6 injuries that nobody disputes? Let's make it very  
7 clear. You have never heard any evidence there was  
8 anything but two awful skull fractures.

9 What do you talk about? You talk about  
10 diarrhea, you talk about goose eggs, because those are  
11 the same red herrings that worked with Doug Whitehead.

12 What happens? I mean, you have this paradox  
13 where you have Mr. Snively tell you that, well, there  
14 was no head injury, because it doesn't have anything on  
15 the admittance notes. And then goes on to tell you  
16 about how there's an injury. There's a red bump.

17 We know at the very least there's bodily  
18 injury on the 17th. Alternate Count I is very, very  
19 clear.

20 And you know, ultimately, Nathan has some  
21 success with that futon story. He tells Ryann about it,  
22 he tells Whitehead about it, and they buy it. It's  
23 fairly innocuous, right?

24 All anybody sees is a little red spot or a  
25 bump or a goose egg, whatever you want to call it.



1 Anyway you look at it, it's bodily injury. It's caused  
2 the child pain, he cried.

3 But let's think a little more about the futon  
4 story. Now, Mr. Snively would have you think it's a big  
5 deal that she's able to get to the child fast after he's  
6 hurt. What he always forgets to mention is the five  
7 minutes before.

8 The only evidence that you have is that Mr.  
9 Polakoff is alone with that child for five minutes  
10 before there's a thump. Let's think about that. You  
11 have a 20-pound baby who can't walk, Nathan says six  
12 inches, it's carpeted floor. What makes the thump?

13 The baby can't run off it. The baby can't  
14 pick himself up and throw himself off the edge.

15 Maybe you're wondering if Nathan is in there  
16 why don't he stop him? What do you hear? You hear a  
17 thump. How does a baby make that noise? How does him  
18 rolling off a little, tiny futon get the attention of  
19 his mother in the next room? The answer is it doesn't.  
20 There wasn't a futon incident. That is a red herring,  
21 that's his story.

22 But he had some luck with it. Ryann believed  
23 it. He got Doug Whitehead to say, "Okay, it seems  
24 innocuous enough." A little bump, a little fall.

25 We know that the two know each other. We

1 in the world that it's okay to do this to a little  
2 child, this little 26-inch, 20-pound child?

3 That's the reality of it.

4 You've heard all the testimony. You may be  
5 thinking was Mr. Snively listening to the same testimony  
6 I heard from Dr. Laskey? Was he listening to the same  
7 testimony I heard from Dr. Fouts? Both of them  
8 unequivocally said that bump didn't happen from rolling  
9 off a futon.

10 You heard Dr. Laskey say that a nonambulatory  
11 child, if there's a bump on its head should be an  
12 automatic sign of suspicion. You further heard Dr.  
13 Laskey say that the standard of care demands actually  
14 going beyond just touching a baby or trying to rely on  
15 your visual observations.

16 Basically, she said nobody can do it. No  
17 matter what the training, no matter what the experience.  
18 It's not a thing. It required some sort of testing.

19 So we know at the very least, we have this  
20 thump, we have this red spot, so we have bodily injury.  
21 And then we have a chance to listen to Dr. Laskey.

22 Now, Mr. Snively would like you to look at  
23 things in a vacuum, because do you remember Dr. Laskey's  
24 testimony? It's that I can't look a test and say  
25 something happened right now.

1 actually see them greet each other in the video.

2 And, you know, it's the easy path, isn't it?  
3 You know, sadly, Everett didn't get a chance to see Dr.  
4 Fouts, he didn't get a chance to see Dr. Laskey.

5 Unfortunately, there was some consequences  
6 for that. Now, this is tough because you know in a  
7 perfect world you'd have heard, "The State calls Everett  
8 Musch", and he could have marched up there and told you  
9 what happened. He could say, "This is what happened to  
10 me."

11 But he couldn't, could he?

12 Think about how terrifying that was. There  
13 is a tiny, little child, one hundred percent dependent,  
14 what's he going to do, run away?

15 What's he going to do? Pick up his cell  
16 phone and call the police, "I'm being attacked"?

17 Is he going to tell his mom? Is he going to  
18 hop in his car and drive off? He can't do any of that.  
19 He's an absolutely helpless child.

20 And to that end, he really ends up being kind  
21 of the perfect victim for somebody, doesn't he?

22 There's a lot of times you might be able to  
23 conceive about some sort of situation where maybe  
24 violence even up to and including, you know, taking a  
25 life of another might be justifiable. Is there any way

1 What does she say? She wants all the  
2 information that she can. She pulls in as much  
3 information. She doesn't rely on notes, which we know  
4 have mistakes. They have the name of the father wrong,  
5 they have the age wrong in one circumstance. She goes  
6 as far as to say she's not looked at a series of medical  
7 notes that don't have a mistake.

8 Now, what she says when you take all that  
9 information, you take those tests and when you  
10 conceptualize, you can try and create a timeline. You  
11 can see when the baby stops feeling well and then you  
12 can see where there's things that are symptomatic. And  
13 that's exactly what she did. And where does it all  
14 start? With this fictitious futon incident with Nathan.

15 He's alone with Nathan. And really, that's  
16 maybe the last day that he is that normal, happy,  
17 healthy little boy, as sad as it is to think about.  
18 And, yeah, it's emotional. It's hard not to look at  
19 something like that to see about opportunity lost, to  
20 see about permanent impairment.

21 But you also hear the timeline. And keep in  
22 mind, you never hear anything else. You hear Dr. Fouts  
23 say, you hear Dr. Laskey say, that they have that awful  
24 occipital fracture, you have that stellate fracture that  
25 covers the back of that boy's head.

1 And you hear that it would have been "lights  
2 out." Does it happen in silence? No, the first one  
3 didn't happen in silence. We heard the thump.

4 Did the second one happen in silence? We  
5 don't hear anything. But what did Dr. Laskey also say?  
6 If the baby is knocked unconscious, no, there wouldn't  
7 necessarily be noise. She doesn't say there absolutely,  
8 positively has to be noise heard by somebody else in the  
9 next room.

10 And then Mr. Snively wants to absolutely  
11 limit where the attack took place, in the shower. Who  
12 said it took place in the shower? That guy. Nobody  
13 else. Nobody knows where he's hit. What we do know is  
14 it's a corner. Was it the edge of the sink? Was it on  
15 a faucet? We'll never know. He's not going to tell us  
16 what happened in the bathroom.

17 Other than, the baby stopped breathing.  
18 That's what he tells us. Why does he stop breathing?  
19 Because he has an awful occipital fracture. It's  
20 immediate. And who's holding him? That's undisputed.

21 You've heard him saying on the video, you've  
22 heard it on the 911 calls. There's no dispute at all.  
23 There's no dispute these are awful injuries. No dispute  
24 they're serious injuries, could have killed him.  
25 They've caused permanent damage. They've impaired him.

1 But now we hear things like, oh, it couldn't  
2 be because it's a small shower. We don't know it was  
3 the shower. There's only one guy that says it's in the  
4 shower. We've been very clear that as much as we'd like  
5 to be able to tell you exactly what happened, we can't.  
6 That's because the only witness we have is incapable of  
7 speech at that time.

8 Now, again, we have a little talk about how  
9 Ryann is the next room, she's close by and she gets to  
10 Nathan and Everett right away after he stops breathing.  
11 You know, does it matter now quickly she gets there  
12 after the damage is done?

13 What about the ten minutes that they're alone  
14 that she talks about on the stand? That's the part that  
15 they want you to forget about.

16 So this is really all about getting you to  
17 bite on the red herrings. Think about goose eggs.  
18 Think about diarrhea. Think about this, think about  
19 that. Don't think by the injuries. Don't think about  
20 the obvious.

21 At this point in time, what sort of timeline  
22 do we have? We have -- we're pushing three years since  
23 this occurred. In July of this year, Everett will be  
24 four years old. And you look at that timeline, you have  
25 these nine months where he's a perfectly happy, healthy

1 little boy. And where does that end? It ends abruptly  
2 on the 17th of April, 2019, when he's alone with Nathan.

3 And what happens? It just keeps getting  
4 worse, doesn't it?

5 By the 19th, realistically, he's not the same  
6 little boy with the same sort of opportunities he would  
7 have had he not been alone in the bathroom with Nathan.

8 And then we also have these next couple of  
9 years afterwards, so we've had three years. How is he  
10 doing afterwards? Is he being taken to the emergency  
11 room? Is he getting taken into custody by Child  
12 Protective Services? Is he suffering strange illnesses?  
13 Nothing.

14 Nine months before, no problems. Three days  
15 with Nathan, not so great.

16 All the time afterwards, we seem to have a  
17 little bit better luck. You heard Ms. Rothe testify  
18 that it was her job to get involved. She'd gotten calls  
19 from people like Dr. Fouts, she had gotten calls from  
20 people like Dr. Laskey, and she had an obligation to  
21 make sure that Everett was safe.

22 And what was her safety plan, do you  
23 remember?

24 It was take care of Everett, go to the  
25 doctors' visits, go to therapy, make sure your house is

1 safe. Oh, and, yeah, keep him away from this guy.

2 What happens when she follows through on  
3 that? He thrives again, as well as he can, because  
4 ultimately, he's not going to be the same person.

5 Do you know one thing that Mr. Snively didn't  
6 mention, too, that's really very, very important, why  
7 does Nathan keep telling Ryann or her sister to tell  
8 Ryann not to mention that he's alone with the baby?

9 Why would you tell her that? I think it's  
10 probably because he wants to keep the narrative his own.  
11 You have -- you heard the interview and what does he  
12 make himself out to be? He kind of makes himself to be  
13 the hero, right?

14 He's an EMT, he's Johnny on the spot with his  
15 medical skills. That's not what you saw with what  
16 actually happened.

17 He even talks about how the baby's heart  
18 stopped and he kept him alive. He's a super dad ready  
19 to take responsibility. Until he thinks he might get in  
20 trouble, in which case he had no problem pulling the  
21 plug and never seeing that boy again.

22 So it's a tough situation for Everett and it  
23 is emotional, but the facts are clear. We have an  
24 absolute timeline as to when that boy stopped breathing.  
25 We've heard the two doctors say that it's when he was

1 injured and he was with Nathan.

2 It's a commonality that can't be ignored over  
3 this almost four years of this little boy's existence.  
4 Everything bad happens distilled comes down to this two  
5 days that he spent with Nathan.

6 You heard a lot of excuses. Bob would say  
7 they're harmless. Mr. Snively would say they're  
8 harmless, you shouldn't pay attention to them. He's  
9 just trying to be helpful with Officer Stuber. He's got  
10 stories about the two-year-old cousin, a 12-year-old  
11 cousin, most of Ryann's family.

12 He even tries to make Ryann seem like --  
13 well, he's talking about postpartum depression, he's  
14 talking about stories about sexual bondage. And we've  
15 heard that's not the case, she told you that. She'd  
16 never heard of that. It's embarrassing.

17 And the thought I'm going to leave you with  
18 is what should be the easiest question to answer if you  
19 didn't hurt that child?

20 Well, "Are you sure that you didn't just get  
21 angry and throw that child?"

22 "Well, unless I blacked out, I guess."

23 What kind of answer is that?

24 I think if you look at all your notes, if you  
25 look at what the testimony truly tells you, there's

1 make that happen for you. You will dictate the time to  
2 end deliberations.

3 For example, if you worked for awhile and  
4 felt exhausted as a group and decided that you wanted to  
5 reconvene in the morning, you can keep going, that's  
6 your decision. I'm not going to ask you that and I'm  
7 not going to order a certain time. So those are  
8 essentially the rules that you will live by here.

9 The first thing to do when you go down there  
10 is to select a foreperson. And once again, you can  
11 deliberate under no time pressure.

12 I'll ask now that the clerk to administer the  
13 oath to the bailiffs.

14 (Wherein, the bailiffs were  
15 sworn.)

16 THE COURT: All right. So again, you will be  
17 released to the jury room and deliberate. Take your  
18 notebooks this time with you.

19 I will send in for your review the jury  
20 instructions that I read to you, as well as the paper  
21 exhibits. I will tell you that the bailiff is going to  
22 hold cell phones while you deliberate. If you need to  
23 check with a loved one, all you've got to do is tell the  
24 bailiff and he'll let you out and you can make a  
25 necessary call in that way.

1 really no other decision but to decide that Nathan  
2 Polakoff is, in fact, guilty of two counts of assault on  
3 a minor, inflicting serious bodily injury.

4 THE COURT: Thank you, Mr. Nixon.

5 All right. So the case is now submitted to  
6 you and it is the time for jury deliberations. Now,  
7 this is will only be the 12. I'll ask the alternate to  
8 stay in the courtroom once I release the jury and then  
9 I've got to talk to you.

10 Let me just real briefly explain kind of the  
11 rules now. Essentially, once you go in there and  
12 deliberate, you're somewhat in control of your destiny  
13 in a sense. What you'll do is you'll communicate with  
14 me through written notes passed to the bailiff on any  
15 issue of substance. That's the only way that will  
16 happen.

17 Let me tell you this, you are under no time  
18 pressure to reach a verdict. You need to take all the  
19 time that you need to reach a true verdict. No one is  
20 going to be coming down there knocking on the door  
21 asking if you've reached a verdict. Are you close?

22 I won't allow that to happen. I won't do it,  
23 either.

24 You will determine when you want to eat  
25 meals. If you do, you let the bailiff know and we will

1 All right. The alternate, again, please  
2 remain in the courtroom as the jury panel is excused.

3 And you are excused and you can begin  
4 deliberations.

5 Everyone rise for the jury.

6 (Wherein, the jury is not  
7 present.)

8 THE COURT: You can be seated. Ms. Giesick,  
9 please come forward, close enough to hear me.

10 Ms. Giesick, you have maybe the worst job.  
11 What I need you to do is to remain available, that  
12 doesn't mean in this building, though, until a verdict  
13 is rendered.

14 So you're going to remain under that  
15 admonishment that you heard me go on and on each time,  
16 that you can't talk about this case or the substance of  
17 it in any way with anybody. Don't look at any other  
18 information or form any opinion. You've just got to  
19 wait.

20 In essence, if a juror had an accident or got  
21 severely ill or something, you would have to be in a  
22 position where you could step in as one of the 12. So  
23 you're what they call the unsung hero of the group.

24 MS. GIESICK: Story of my life.

25 THE COURT: What we'll do with your notebook

1 is we'll keep it.  
 2 MS. GIESICK: Okay And I gave it to them.  
 3 THE COURT: So the bailiff will get that for  
 4 me.  
 5 MS. GIESICK: And my coat and my phone is in  
 6 that room.  
 7 THE COURT: All right. And I'll have the  
 8 bailiff grab that for you, as well.  
 9 MS. GIESICK: I gave it to the lady that was  
 10 sitting next to me.  
 11 THE COURT: What we'll do is have the bailiff  
 12 get that to you. We'll just let you go into the clerk's  
 13 area there and we'll get it for you.  
 14 MS. GIESICK: Well, do you want me to just  
 15 have her keep my notebook?  
 16 THE COURT: We will. No, no. We'll lock it  
 17 up.  
 18 MS. GIESICK: Okay.  
 19 THE COURT: The other thing, do you live in  
 20 Red Lodge?  
 21 MS. GIESICK: No, I live in Bridger.  
 22 THE COURT: So that's a little farther. Can  
 23 you give your cell phone number to the clerk? I'm not  
 24 going to have you remain in Red Lodge, even though that  
 25 is a ways, but it's not that far, because that would be

1 difficult. But I would ask that you please have your  
 2 phone on you, make sure that we can reach you if we need  
 3 to, if need be, and we would have to have you come and  
 4 take your place. Okay?  
 5 MS. GIESICK: Okay.  
 6 THE COURT: Any questions about that?  
 7 MS. GIESICK: No.  
 8 THE COURT: Just go around to the clerk's  
 9 office and we'll get your contact information and I'll  
 10 make sure you get your stuff. Okay?  
 11 MS. GIESICK: Okay. Thank you.  
 12 THE COURT: Thank you.  
 13 All right. Counsel, please give the clerk  
 14 your contact information. If you are going to go out of  
 15 the building, let us know. Don't go anywhere,  
 16 You can go -- or at least to the clerk's  
 17 office. Thanks.  
 18 Lawyers, I don't want you more than ten  
 19 minutes away. Okay? Any questions?  
 20 MR. NIXON: No, Your Honor. I wonder if I  
 21 may approach? I do have the instruction absent the  
 22 highlight.  
 23 THE COURT: What you're talking about is  
 24 Instruction 24 that had accidental highlight on a  
 25 portion?

1 MR. NIXON: Yes. I believe it's State's 23,  
 2 Court's 24.  
 3 THE COURT: Yes. So that's what I'm  
 4 replacing now.  
 5 All right. And, Counsel, I don't think  
 6 there's any disputes with regards to exhibits. It's not  
 7 my intent to send in any of the disks, but the paper  
 8 exhibits will go in.  
 9 MR. SPOJA: I still owe the Court for that  
 10 26A, the disk that we talked about with Officer Stuber.  
 11 THE COURT: Oh, yes. You can get that to me.  
 12 That's not going in.  
 13 MR. SPOJA: I can help Mr. Snively with that  
 14 disk --  
 15 THE COURT: Sorry to interrupt you.  
 16 MR. SPOJA: No.  
 17 THE COURT: Any question about the exhibits?  
 18 As I said, I intend to put in all the paper exhibits  
 19 that have been introduced, but not the disks that  
 20 contain the videos, right?  
 21 Any question? Any problems with that?  
 22 MR. SNIVELY: Your Honor, no questions.  
 23 THE COURT: Mr. Nixon, corrections?  
 24 MR. NIXON: No, Your Honor. The only thing I  
 25 would just clarify, obviously, is the State doesn't want

1 the demonstrative exhibits going down to the jury.  
 2 THE COURT: No, they won't. And you agree  
 3 with that?  
 4 MR. SNIVELY: I do.  
 5 THE COURT: All right. I'll put those  
 6 exhibits and these original instructions and get them  
 7 down there.  
 8 We are in recess.  
 9 (Wherein, a recess was taken.)  
 10 (Wherein, the following took  
 11 place in chambers.)  
 12 THE COURT: We're on the record, DC 19-17,  
 13 State versus Polakoff.  
 14 We're in chambers. The jury has been  
 15 deliberating. A note has come.  
 16 Well, I should say, counsel for the State is  
 17 present.  
 18 Counsel for the defendant is present. The  
 19 defendant is present.  
 20 The Court received a note that indicates  
 21 quote, "We're deadlocked 11 to 1. How long do we keep  
 22 deliberating?"  
 23 I'll ask the parties for their position as to  
 24 the appropriate response to that note.  
 25 MR. NIXON: Your Honor, I'd simply ask that

1 you give Instruction No. 26, at this point in time, the  
2 Norway-type instruction. In light of them only  
3 deliberating for really about three hours, considering  
4 the dinner break, I think it's appropriate to give that  
5 instruction.

6 THE COURT: Your position, Mr. Snively?

7 MR. SNIVELY: Judge, we would object to any  
8 other instructions.

9 THE COURT: Okay. So your position is I call  
10 a mistrial? Is that what you're saying?

11 MR. SNIVELY: Well, to allow them to continue  
12 to deliberate.

13 THE COURT: Just don't answer the note, is  
14 that what you're asking me?

15 MR. SNIVELY: In essence, to say there is no  
16 time. There is no amount of time.

17 THE COURT: Oh.

18 MR. NIXON: I guess the State wouldn't be  
19 adverse to just letting them continue to deliberate. I  
20 don't know as far as time tonight or do you want to  
21 inquire about taking a break? I don't know.

22 THE COURT: I think the language of the note  
23 is such that the Norway-type instruction could be  
24 helpful in that it does -- essentially, it's going to  
25 lead them to either revisit their views or make a solid

1 the bailiff bring the jury up and I'll provide this and  
2 indicate just to the jury that it is for them to  
3 determine whether they want to continue on this evening  
4 or start fresh, something of that nature. I'm not going  
5 to tell them I'm not going to send them home. I told it  
6 was up to them and I'm going to leave it up to them. I  
7 want to make sure they have that option. Okay?

8 MR. NIXON: Okay.

9 THE COURT: All right. I'll see you in the  
10 courtroom.

11 (Wherein, off the record.)

12 (Wherein, the following took  
13 place in open court.)

14 THE BAILIFF: All rise.

15 THE COURT: Please be seated. Thanks.

16 The Court is in the courtroom in State versus  
17 Polakoff.

18 Counsel for the State is present. Counsel  
19 for the defendant is present. And the defendant is  
20 present.

21 The jury is not present.

22 We just deliberated in chambers about a note  
23 that was provided and indicating the jury is having  
24 difficulty reaching a decision. Any reason --

25 Well, the Court's determined I'm going to

1 determination that they can't agree. That's really the  
2 point of that instruction.

3 And so if the note had simply said, "How long  
4 do we keep deliberating?" I would agree, I would simply  
5 say keep working in good faith or something. But I  
6 think it's probably -- I believe it is worthwhile under  
7 this circumstance to go ahead and give the Norway. And  
8 while they haven't been at it for that long in these  
9 kind of terms, three hours, they haven't been at it, you  
10 know, an hour, either.

11 And so I do think that that's what I would  
12 do. I will give 26. We can call it Court's 1. It's  
13 essentially the Norway instruction that the Court has  
14 modified slightly. I eliminated the sentence that, "It  
15 is you and you alone that can decide this case."

16 I took that out and added at the end, "I'm  
17 not requesting any particular amount of time, but I'm  
18 asking you to try to again."

19 As to the form, do you any objection to that,  
20 Mr. Nixon?

21 MR. NIXON: No, Your Honor.

22 THE COURT: As to the form, Mr. Snively?

23 MR. SNIVELY: As to the form, we don't  
24 object.

25 THE COURT: All right. Meanwhile, I'll have

1 bring the jury in, provide the final Norway  
2 instruction.

3 Any reason for the jury not to come in right  
4 now, Counsel?

5 MR. SNIVELY: No, Your Honor.

6 MR. NIXON: No, Your Honor.

7 THE COURT: Okay. I'll ask the bailiff to  
8 bring them.

9 (Wherein, the jury is present.)

10 THE COURT: Be seated. Thanks.

11 The jury is present.

12 Do you so stipulate, Mr. Nixon?

13 MR. NIXON: Yes, Your Honor.

14 THE COURT: Mr. Snively?

15 MR. SNIVELY: Yes, Your Honor.

16 THE COURT: In response to your note, there  
17 is an additional instruction that I will provide to the  
18 jury for situations like was expressed to the Court.  
19 And it may not provide for the specific answer that you  
20 asked for, but it is in keeping with the law the  
21 instruction that I'm going to give you right now.

22 (Wherein, the jury instruction  
23 was read.)

24 THE COURT: I'm simply going to add, as I  
25 told you at the beginning, I'm not going to direct you

1 to go home and start in the morning, I'm not going to  
 2 tell you to stay here all night. That is up to you  
 3 guys. I am going to ask that you go down there now.  
 4 If you make a determination that you're tired  
 5 and you think it would be helpful to start in the  
 6 morning, let me know. That's what we'll do. If you  
 7 want to work later that's your choice. Again, let me  
 8 know.  
 9 For now, I'll ask you to return for further  
 10 deliberations.  
 11 (Wherein, the jury is not  
 12 present.)  
 13 THE COURT: All right. We're in recess.  
 14 (Wherein, a recess was taken.)  
 15 THE BAILIFF: All rise.  
 16 THE COURT: Please be seated. Thank you.  
 17 Okay. We're back in court, State v.  
 18 Polakoff.  
 19 After a note was provided by the jury, we had  
 20 an in-chambers discussion off the record, the Court has  
 21 determined based on the information and what's taken  
 22 place so far, that further deliberations are simply not  
 23 going to solve the impasse, so we'll go ahead and call  
 24 the jury in and I'll send them home.  
 25 Anything anyone wants to place on the record

1 before I call the jury?  
 2 MR. NIXON: No, thank you.  
 3 THE COURT: Mr. Snively?  
 4 MR. SNIVELY: No, Your Honor.  
 5 THE COURT: All right. Bring them in.  
 6 (Wherein, the jury is present.)  
 7 THE COURT: Go ahead and be seated.  
 8 Counsel for the State, do you stipulate that  
 9 the jury is present?  
 10 MR. NIXON: Yes, Your Honor.  
 11 THE COURT: Mr. Snively?  
 12 MR. SNIVELY: Yes, Your Honor.  
 13 THE COURT: Okay. I called you in here, of  
 14 course, based on the last note. Could the jury  
 15 foreperson please identify themselves?  
 16 MS. BOGGIO: Kerri Boggio.  
 17 THE COURT: Okay. I did receive a note. Of  
 18 course, this followed the original note indicating you  
 19 were having difficulty. You went back and worked  
 20 diligently again. I'm asking you if you believe further  
 21 deliberation would change the impasse?  
 22 MS. BOGGIO: I think we're deadlocked right  
 23 now. I mean, we did one of them before the first note.  
 24 But on this on the second, I don't...  
 25 THE COURT: Wait a second. So you did reach

1 a verdict on one of them?  
 2 MS. BOGGIO: Uh-huh. That was before we came  
 3 up here the first time.  
 4 THE COURT: Okay. That's okay. Just let  
 5 me --  
 6 MS. BOGGIO: I thought you needed all of them  
 7 at once.  
 8 THE COURT: No, no. That's okay. I wanted  
 9 to make sure where we are. So you did reach a unanimous  
 10 verdict on one of the counts, but you were unable to on  
 11 another?  
 12 MS. BOGGIO: Yes.  
 13 THE COURT: Okay. And do you believe that  
 14 further deliberation -- it sounds like further  
 15 deliberation on the remaining issue, am I right, based  
 16 on your note, you don't leave believe it will change  
 17 anything?  
 18 MS. BOGGIO: I don't believe it will.  
 19 THE COURT: Okay.  
 20 MS. BOGGIO: We're all at the same place that  
 21 we were, even after looking at everything and rereading  
 22 everything out loud to each other and using the white  
 23 board.  
 24 JUROR: Looking at all the pictures again.  
 25 THE COURT: Okay. All right. So what we'll

1 -- all right. As to the -- which count did you reach a  
 2 verdict on?  
 3 MS. BOGGIO: One.  
 4 THE COURT: And the second one you didn't?  
 5 MS. BOGGIO: Right. Do you want to know what  
 6 part of it?  
 7 THE COURT: No, not yet. You're just fine.  
 8 I'm just making sure we do this right,  
 9 because of the mixture here.  
 10 With regard to Count II, I want the clerk to  
 11 read the names of the jury. And all I want to do is  
 12 inquire if you agree that further discussion on Count II  
 13 would be useless. Okay? Let's just do that first. Go  
 14 ahead.  
 15 THE CLERK: Jo Anne Herem.  
 16 MR. HEREM: I think we're deadlocked.  
 17 THE CLERK: Elizabeth Sommerdorf.  
 18 MS. SOMMERDORF: Deadlocked.  
 19 THE CLERK: Brittney Dimich.  
 20 MS. DIMICH: Deadlocked.  
 21 THE CLERK: Elizabeth Korth.  
 22 MS. KORTH: Deadlocked.  
 23 THE CLERK: Samantha Anttila.  
 24 MS. ANTILA: Deadlocked.  
 25 THE CLERK: Earl Zumbrun.

1 MR. ZUMBRUN: Deadlocked.  
 2 THE CLERK: Christopher Ewing.  
 3 MR. EWING: Deadlocked.  
 4 THE COURT: Kerrilee Boggio.  
 5 MS. BOGGIO: Agreed, deadlocked.  
 6 THE CLERK: Jamie Krug.  
 7 MS. KRUG: Deadlocked.  
 8 THE CLERK: Michael Bohleen.  
 9 MR. BOHLEEN: Deadlocked.  
 10 THE CLERK: James Maize.  
 11 MR. MAIZE: Agreed, deadlocked.  
 12 THE CLERK: Stephanie Fletcher.  
 13 MS. FLETCHER: Deadlocked.  
 14 THE COURT: Okay. All right. Thank you.  
 15 What I will ask then -- I'm not going to have  
 16 you do further deliberation. I will take your word for  
 17 it on Count II.  
 18 I will ask about Count I, that you did reach  
 19 a verdict. Correct?  
 20 MS. BOGGIO: Yes.  
 21 THE COURT: Is that verdict unanimous as to  
 22 each finding?  
 23 MS. BOGGIO: Yes.  
 24 THE COURT: And it's been signed by the  
 25 foreperson?

1 MS. BOGGIO: Yes.  
 2 THE COURT: I'll ask the bailiff to please  
 3 come forward and then you can hand the verdict form to  
 4 the bailiff. Okay?  
 5 All right. You can be seated. Thanks.  
 6 "As to Count I, we, the jury, duly impaneled  
 7 and sworn to try the issues in the above-entitled cause  
 8 enter the following unanimous verdict, to the charge of  
 9 assault on a minor, Count I, not guilty.  
 10 "To the charge of assault on a minor,  
 11 Alternative Count I, not guilty."  
 12 All right. Ladies and gentlemen of the jury,  
 13 is this your verdict to Count I?  
 14 THE JURY: Yes.  
 15 THE COURT: Does anyone wish to poll?  
 16 MR. NIXON: No, Your Honor.  
 17 MR. SNIVELY: No, Your Honor.  
 18 THE COURT: All right. I will enter judgment  
 19 to Count I based on the verdict.  
 20 I'm going to get you out of here, okay?  
 21 You're now released from your admonition not to discuss  
 22 the case. You may discuss the case now with anyone you  
 23 want to, family, friends, lawyers, even the media, if  
 24 you want. But you don't have to.  
 25 So if you don't want to talk about any of

1 this to anyone else, you flat don't have to. If anyone  
 2 pushes you on that, let the clerk know, she'll let me  
 3 know and I'll do something about it. Okay?  
 4 That is up to you guys. You choose who you  
 5 talk to and to the extent to which you do.  
 6 I will say this, and I know you don't want to  
 7 do it right now as late as it is, if you have questions  
 8 for me about this process, let the clerk know, give her  
 9 your number and I'll call you.  
 10 There may be things I could have done better  
 11 for you, there may be things that you just have  
 12 questions about that I couldn't talk to you about  
 13 before. You've done your duty with regard to Count II.  
 14 I recognize how frustrating this can be.  
 15 You did exactly what I asked and you went  
 16 back and worked harder. As you have already figured  
 17 out, a criminal conviction takes a unanimous verdict.  
 18 It's supposed to be hard. A civil case only takes a  
 19 majority, but criminal takes unanimous. No one could  
 20 have worked harder than you guys did, so I thank you  
 21 very much for your service.  
 22 You are discharged. Thank you so much.  
 23 (Wherein, the jury is not  
 24 present.)  
 25 THE COURT: All right. You may be seated.

1 Counsel, all right. We do have a verdict on  
 2 Count I.  
 3 As to Count II, I'm declaring a mistrial  
 4 based on the inability of the jury to reach a verdict.  
 5 I'll leave it to -- now is not the time. I'll leave it  
 6 to the parties to address the Court with regards to  
 7 where we go from here as far as Count II.  
 8 Again, with regard to Count I, the defendant  
 9 is discharged as to that count and Count I is dismissed.  
 10 Pending determination of where we go with  
 11 Count II, is there issues about the defendant's  
 12 continued release?  
 13 MR. NIXON: No, Your Honor.  
 14 THE COURT: So, Mr. Polakoff, you will remain  
 15 on essentially pretrial release until further order of  
 16 the Court, the same conditions, until changed by the  
 17 Court or if and when.  
 18 Is there anything else to be addressed on the  
 19 record before we adjourn?  
 20 MR. NIXON: Nothing from the State.  
 21 MR. SNIVELY: No, Your Honor.  
 22 THE COURT: Thank you, Counsel, for your very  
 23 professional work in this case. I appreciate it.  
 24 We are adjourned.  
 25 (Whereupon, the trial was adjourned.)

1  
2  
3                   C E R T I F I C A T E  
4

5       STATE OF MONTANA                )  
6                                        ) ss.  
7       COUNTY OF YELLOWSTONE        )  
8

9           I, the undersigned officer of the Court, under my  
10       commission as a Notary Public in and for the State of  
11       Montana, do hereby certify that the foregoing testimony  
12       upon oral examination of the witness named herein was  
13       taken stenographically before me and thereafter  
14       transcribed under my direction;  
15

16           That the witness before examination was first duly  
17       sworn to testify truthfully; that the transcript of the  
18       hearing is a full, true and correct transcript of the  
19       testimony including questions and answers and all  
20       objections, motions, and exceptions of counsel made and  
21       taken at the time of the foregoing examination;  
22

23           That I am neither attorney for, not a relative or  
24       employee of any of the parties to the action; further,  
25       that I am not a relative or employee of any attorney or  
26       counsel employed by the parties hereto, nor financially  
27       interested in its outcome.

28           IN WITNESS WHEREOF, I have hereunto set my hand and  
29       my official seal this 15th day of April, 2022.  
30

31                                       \_\_\_\_\_  
32       **STACY A. FORTUNE, CCR**  
33       NOTARY PUBLIC in and for the  
34       State of Montana, residing  
35       at Billings.  
36       My commission expires 12-17-24.  
37



## **Exhibit 2**

Mark D. Parker  
Michael L. Dunphy  
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[mdunphy@parker-law.com](mailto:mdunphy@parker-law.com)

Attorneys for Defendant

**FILED**  
Carbon County District Court  
Rochelle Loyning, Clerk

APR 22 2022

By Jenny A. Dravetsky  
Jenny A. Dravetsky, Deputy

**MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT,  
CARBON COUNTY**

**STATE OF MONTANA,**

Plaintiff,

vs.

**NATHAN SAMUEL POLAKOFF,**

Defendant.

Cause No. DC 19-17- (135)

**DEFENDANT'S MOTION TO  
DISMISS COUNT TWO ON DOUBLE  
JEOPARDY GROUNDS**

\*\*\*\*\*

COMES NOW the Defendant, Nathan Samuel Polakoff by and through his attorneys of record, and respectfully moves the Court to dismiss "Count Two" on double jeopardy grounds concerning the above-referenced matter. An accompanying brief is filed herewith.

DATED this 22<sup>nd</sup> day of April, 2022.

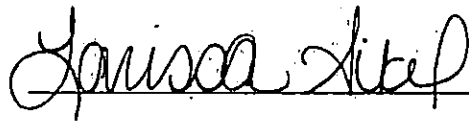
Michael Dunphy  
Mark D. Parker  
Michael L. Dunphy  
Attorneys for Defendant

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that a copy of the foregoing document was served upon opposing counsel of record by causing the same to be deposited in the U.S. Mail, postage prepaid, addressed as follows:

Alex Nixon  
Carbon County Attorney  
P.O. Box 810  
Red Lodge, MT 59068

Dated this 22nd day of April, 2022.

\_\_\_\_\_