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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 780250

JOHN VERN COOK, JR.

.....Appellant

v.

COMMONWEALTH OF VIRGINIA

.....Appellee

APPENDIX

John W. Carter
124 S. Market St.
Danville, Va. 24541

Counsel for Appellant

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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COMMONWEALTH OF VIRGINIA,)
CITY OF DANVILLE,) TO-WIT:
IN THE CIRCUIT COURT OF DANVILLE.)

The Jurors of the Commonwealth of Virginia, in and for the body of the City of Danville, and now attending said Court at its November Term, in the year 19 77, upon their oaths present that John Vern Cook, Jr., on or about the 1st day of August, 19 77, in said City, within one mile of the Corporate Limits of said City,
did unlawfully, feloniously and maliciously kill and murder one Luther Boswell, by striking and beating him in violation of Section 18.2-32, Code of Virginia, 1950, as amended,

This Indictment is found upon the evidence of J.W. Martin, Jr.

_____

witnesses sworn before the Grand Jury.

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780250

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JAN 30 1978
RICHMOND, VIRGINIA

VIRGINIA:

IN THE CIRCUIT COURT OF DANVILLE.

COMMONWEALTH OF VIRGINIA)
)
V.) Transcript
)
JOHN VERN COOK, JR.)

. . . . .

The following constitutes a transcript of all of the oral testimony and other incidents of trial in the above-styled cause, before the Honorable James F. Ingram, Judge of the Circuit Court of the City of Danville, on November 18, 1977 and on November 23, 1977, wherein the defendant, John Vern Cook, Jr., was tried on an indictment for murder, and which was electronically recorded.

PRESENT:

William H. Fuller, III, Esquire
Danville, Virginia
for the Commonwealth

John W. Carter, Esquire
Danville, Virginia
for the Defendant

John Vern Cook, Jr.,
the Defendant, in person.

and if this man had certain physical infirmities that could have been equally as likely to have brought about his death as the opinion expressed by that medical examiner, I think we have a right to go into that.

JUDGE INGRAM: All right, sir, call your witness.

DR. KENNETH B. SIZER, the first witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. You, of course, are Dr. Kenneth B. Sizer?

A. That's correct.

Q. And you are a practicing physician here in the City of Danville?

A. Yes, sir.

Q. Dr. Sizer, was the late Luther Boswell a patient of yours?

A. Yes, sir.

Q. Over what period of time?

A. From 1970, the 6th of January, 1970 until his death.

Q. His demise. Dr. Sizer, did Mr. Boswell have a condition of high blood pressure?

A. Yes, sir.

Q. Do your records disclose this?

A. Yes, sir.

Q. And over what period of time?

A. I believe the first time he was noted to have any high blood pressure was the last couple of years. It was first noted to be elevated 12/31/75.

Q. And was he under any type of medication or treatment for this high blood pressure?

A. He was. According to my knowledge he was to have been taking some anti-hypertension medication.

Q. Something that you had prescribed for him I take it?

A. Pardon?

Q. Something that you had prescribed for him?

A. Yes, sir.

Q. Did he have a cirrhotic liver?

A. Yes, sir.

Q. When did this first appear?

A. The definite diagnosis of cirrhosis -- he had had previously precursor to this condition in '72 -- '72 was when he was first noted to have liver disease.

Q. And at the time of his death was he still suffering from cirrhosis?

A. Yes, sir.

Q. And to what extent had it advanced?

A. Well, it had advanced to the point where it had disturbed certain liver functions such as the mechanism of blood clotting and also the various other liver function tests were abnormal.

Q. You mean it had reduced the capability of the blood to clot?

A. Well, that's one of the functions of the liver among other functions which were the abnormalities being produced by the liver disease.

Q. And I take it that the testing of the blood indicated that there was a reduction in the clotting capability of the coagulating capability of the blood?

A. Yes, sir.

Q. Did this patient have a diabetic condition?

A. Yes, sir.

Q. And when did you first diagnose that?

A. The diabetic condition was what we would say of a mild to moderate nature. He was given oral medication for that. And this was determined in 1970.

Q. In 1970?

A. Yes, sir.

Q. And was he on medication for diabetes at the time of his death?

A. Yes, sir.

Q. I think that's all.

MR. CARTER: You may examine him, Mr. Fuller.

CROSS EXAMINATION

By Mr. Fuller:

Q. Dr. Sizer, what were you treating him with for high blood pressure?

A. He was treated with a combination medication designated by the proprietary name of Apresazide, which contains a diuretic and a anti-hypertension.

Q. All right, now what was his blood pressure?

A. His blood pressure, the highest recorded that was noted was two hundred and ten over a hundred and twenty.

Q. When was that?

A. This was 4/29/76, but it was better controlled than that. That was the highest.

Q. All right, now relating your attention to August the 1st of this year, August the 1st of '77, when had you seen him previous to that time?

A. I believe the last date prior to that he was in, May of '76 I believe was the last thing I have. I had him

Q. All right, sir, and he was employed by you, he's the attorney of your own choosing?

A. That's right.

Q. All right, sir. Mr. Cook, do you have any complaints with anyone about anything connected with your case?

A. No, sir.

Q. All right, sir, are you ready to proceed now with the trial of your case?

A. Yes, sir, I am.

Q. All right, do you understand all the questions I've asked you?

A. Yes, sir.

Q. Before we proceed any further, are there any questions that you would like to ask the Court?

A. No, sir, none that I can think of.

Q. All right, considering the questions I have asked you, it is still your desire to waive a jury trial and be tried by the Court?

A. Yes, sir.

Q. All right, you may have a seat at the counsel table with your attorney.

JUDGE INGRAM: All right, let the record show that the Court has inquired of this defendant,

John Vern Cook, Jr., as to his understanding of his waiver of a trial by jury in this case, its consequences and its voluntariness and the Court hereby finds that the defendant has consented to a trial of his case without a jury by the Court, that his consent has been given freely, voluntarily, and intelligently and after consulting and advising with his attorney. Mr. Fuller, does the Commonwealth's Attorney consent to waive a jury in this case?

MR. FULLER: Yes, sir.

JUDGE INGRAM: All right, let the record show that the Commonwealth's Attorney consents to waive a jury as does the Court. Accordingly, the case will proceed without the intervention and use of a jury. All right, let's at this time call all witnesses who have been subpoenaed who will testify in this case and have them separated.

The witnesses for both the Commonwealth and for the defendant were called and separated, after which the following occurred:

JUDGE INGRAM: All right, now, gentlemen, I

record. In this manila envelope we have the hospital records, all that we felt would be pertinent to this case. Perhaps we should introduce that as an exhibit. These are the records of Dr. Sizer in the folder.

JUDGE INGRAM: All right, is there any objection, Mr. Fuller?

MR. FULLER: No, sir.

JUDGE INGRAM: All right, the manila envelope will be marked as defendant's exhibit one.

MR. FULLER: You've already ruled on all of these.

JUDGE INGRAM: Right.

MR. CARTER: Yes, he's ruled on them, I just. . .

JUDGE INGRAM: I'm admitting them now as exhibits in the case. All right, the envelope will be defendant's exhibit one; the manila folder will be defendant's exhibit two. All right, Mr. Fuller.

. . . . . .

DR. RAMON R. ERASMO, the first witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

(Dr. Erasmo spoke with a heavy accent.)

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court, please?

A. I am Ramon R. Erasmo.

Q. Mr. Erasmo, what is your occupation?

A. I am a physician.

Q. And what type of physician.

A. I am a neurosurgeon.

Q. All right, would you state your qualifications as a neurosurgeon?

MR. CARTER: If your Honor, please, if it's of any help to Mr. Fuller and the Court, I will admit Dr. Erasmo's qualifications.

MR. FULLER: All right.

JUDGE INGRAM: All right, sir.

Q. Dr. Erasmo, directing your attention to August the 3rd of this year, would you tell his Honor whether or not you had an occation to receive a patient named Luther Boswell on that day?

A. Yes.

Q. What were the circumstances?

A. On approximately August the 3rd, 1977 Mr. Boswell was referred to me by the emergency room physician because of possible head injury. I saw him in the emergency

room and examined him on that occasion.

Q. Tell us about your examination. What did it reveal?

A. On examination I found out that he has contusion all over the face, part of the chest, the abdomen and the right lower leg.

Q. What do you mean by "contusion"?

A. Basicly he had some swelling. Basicly there were some blood clots on the subcutaneus tissue in the face, chest, abdomen and right lower leg.

Q. All right, and could you tell by looking at his face. . . Just describe his face when you saw him.

A. It was swollen, and the eyes are partially closed because of the swelling, and he was lethargic and hard to be aroused.

MR. CARTER: What, Doctor?

DR. ERASMO: Lethargic.

MR. CARTER: Lethargic and what?

DR. ERASMO: And hard to be aroused.

Q. All right, and where were the contusions on his face?

A. Basicly the contusions is all over the face and extending to the back of the ears on both sides. He had some also on the chest and abdomen, and as I mentioned in the right lower leg.

Q. Now after examining Mr. Boswell in the emergency room, what, if anything, did you do?

A. I have impression that the patient had increased pressure inside the head which could most likely be a blood clot.

Q. Why did you feel that way?

A. The history of this patient indicated that his level of consciousness, that means his awareness to his surroundings, and his responses to the people around him has been decreasing. It's because of the fact that this patient has been observed to be decreasing his level of consciousness. The story that I got was that he was. . .

MR. CARTER: If your Honor, please, I think that. . .

JUDGE INGRAM: Don't tell us what someone told you.

Q. Don't tell us what someone else said.

A. On examination I found out that he easily drifts to sleep and he's drowsy, you've really got to shake him up to elicit any responses. With these in mind plus the fact that he has contusion all over the face indicating injury, possibly to the brain, I have decided that we should do special tests, what we call cerebral angiogram. Now I explained to the family about the

procedure and what I thought about the patient at that time, and we proceeded with the test. The test that we did indicated there was a sign of a mass which could be or is indicative of a blood clot in the brain, that is in the right side.

Q. In the right side?

A. Yes.

Q. The test revealed a mass?

A. Yes.

Q. All right, and then what happened?

A. I consulted the family told them his condition and the findings that we had after the test. I advised the family that this mass effect in the test most likely is a blood clot and has to be removed. The family had agreed to proceed with the procedure. He had surgery and we located a large or huge blood clot in the right side of the brain.

Q. A huge blood clot?

A. Yes, sir.

Q. About what size?

A. The measurements that I got from the pathology department of Memorial Hospital if I'm right, is about four by four by two centimeters, which is the bigger portion. Now

there are smaller size that I submitted for examination and I cannot give you the dimensions right now. Now this size of the blood clot I think is not the actual size that he has because I have to work around the blood clot to remove it, so I have some that goes into the suction and basicly I think the blood clot is bigger than what had been measured.

Q. In other words, you had to remove some by suction as you worked around to keep from destroying tissue?

A. Yes, sir.

Q. So actually it was a larger size than what you actually removed in one piece?

A. Yes, sir.

Q. All right, go ahead.

A. Now. . .

Q. Where did you find this blood clot?

A. It is in the right temporal area, the temporal lobe of the brain.

Q. All right, go ahead and tell us what happened.

A. Now the patient after surgery was put in Intensive Care Unit for follow-up postsurgical care. There was an instance that he seemed to be lighting up and waking up a day or two after surgery, but after a couple of days

he seemed to plateau in his general condition. He did not either to me deteriorate completely or had recovered in such a way that you say that he had improved considerably. Now this goes on for several days, and the few days prior to his demise I noted some changes in his general condition which we have been suspecting or expecting before. He had developed some complication which involved the liver. He developed jaundice, and because of this his general condition gradually deteriorated.

Q. What, if anything, were you able to do at this stage?

A. The condition, the complication or condition, that arise after surgery appears to me to be medical problem more than surgical, so I have consulted the medical consultants to assist in his overall treatment especially along this line. I consulted a couple of internists to take care of the jaundice and possible liver complications.

Q. I see. All right, now go ahead and tell us exactly what happened.

A. Now his liver failure had progressed and I think he died of that complication.

Q. Of the liver complication?

A. That's the way I think about it.

Q. All right. Now what happened. . .What, if anything, else can you tell us medically about it?

A. Now I could be giving a statement that I heard from his past history that I could contribute to the overall evaluation of his case.

Q. Well, don't tell us anything but what you know personally. Let me ask you this. When you performed the operation did you. . .was that the only blood clot you found, the one massive blood clot?

A. The indication of the test indicate the massive blood clot from one side, but this doesn't mean that he has no other smaller blood clots in the other side of the brain that is not surgically treatable. There could be some smaller ones. So I indicated that in my surgical note that as far as I could see in the area where the biggest blood clot there are areas of small hemorrhages in there.

Q. There were some small hemorrhages?

A. On the surface of the brain.

Q. I see.

A. In the area that I could see.

Q. But that's an area that you didn't touch surgically?

A. No, because we go down deeper inside where the blood clot was.

Q. I see. All right, now after his operation and during the postoperative period could you tell us whether or not it became necessary to assist him in his breathing or anything of that nature?

A. In fact after I did the craniectomy or the brain operation I have requested Dr. Bourne to do a tracheostomy, open the windpipe and assist his breathing. And during the course he was assisted in his breathing depending on his needs after surgery.

Q. I see. All right, answer Mr. Carter's questions.

CROSS EXAMINATION

By Mr. Carter:

Q. Doctor, you said that his actual death was brought about by virtue of liver failure in your medical judgment?

A. Yes, sir.

Q. Now this man suffered from a disease known as cirrhosis of the liver did he not?

A. I could not comment on that fully because I don't work exclusively on that side. I work in the neurosurgical side.

Q. The medical records indicate that his liver functioning

was considerably reduced and it continued to deteriorate during his hospitalization?

A. Yes.

Q. And, Doctor, the cirrhosis was in no way related to any type of trauma was it?

A. No, in my judgment.

Q. In other words, cirrhosis comes on for reasons other than trauma as a general rule?

A. Yes, sir.

Q. Now what is the significance, Doctor, of the reduction in liver functioning from a standpoint of the effect that it may have upon the coagulant in the blood?

A. Again, I would not answer you as a specialist in blood diseases, but I would give you my opinion as a medical practitioner. Now the disease of the liver affects the coagulation of the blood. With that in mind I had the anticipation that the person with liver problem could easily bleed and have a blood clot.

Q. One bleeds very easily when the coagulant in the blood is reduced, and this can result from a cirrhotic liver?

A. Yes.

Q. So that one whose clotting abilities are not normal the trauma will. . .the edema from a trauma will be

aggravated to a large extent will it not? Could you let me say, Doctor, correlate one with an advanced malfunctioning of the liver with a hemophiliac?

A. You're talking two different entities, but I would answer your first question. With liver failure problem would. . .clotting, it would aggravate the trauma, it would produce more problem because the cells are not functioning as it should compared to normal cell, you know.

Q. So that you would expect a trauma to be more edematous in a person with a reduced liver function?

A. Yes.

Q. Can you more or less correlate this with what you would expect from a hemophiliac who had suffered a trauma?

A. Now a hemophiliac with a tendency to bleed obviously would have almost comparable situation, that he could bleed also in the head. But the extent of that, I could not quantitate.

Q. Yes, sir. All right, now, Doctor, when you did this craniotomy where did you find the clot itself in relationship to the brain lobes?

A. It is. . .The bulk of the blood clot was in the right temporal lobe. It was intracerebral.

Q. Intracerebral?

A. Yes, sir.

Q. Now tell us if you will, please, Doctor, translate that into lay terms and tell us what an intracerebral hemorrhage is.

A. The term indicates that the bleeding was inside the lobes of the brain. It is not on the surface, but it was inside.

Q. And this is distinguished from let's say a subdural hemorrhage in what manner?

A. Yes.

Q. How would you distinguish an intracerebral. . .

A. The other one is in the outside of the brain. . .

Q. The subdural is on the outside of the brain?

A. Outside.

Q. The intracerebral is inside the lobe of the brain?

A. Yes.

Q. And what you found was an intracerebral hemorrhage?

A. Yes.

Q. Now, Doctor, you said you found some other smaller hemorrhages. Let me ask you if this is unusual in the case of an intracerebral hemorrhage? In other words, is there a swelling of the brain after a cerebral

hemorrhage?

A. There is. . .There could be swelling after a cerebral hemorrhage.

Q. Does this have any effect upon the arterial supply of the occipital portion of the brain?

Q. Your question is so definite that your question points to one definite area of the brain. Now the impairment of the circulation to the occipital area of the brain, which is behind, could not be really pinpoint, you know, whether it is actually diminished or not for the simple reason that there are other channels of blood that goes behind and in front. In his condition the portion of the brain that is involved is more anterior and lateral, more in front and a little bit to the side.

Q. Yes, sir. But, Doctor, when you have an injury to the brain, particularly in the form of an intracerebral hemorrhage, will this create pressures on the arterial blood supply system of the entire brain?

A. Yes, it will, but I would qualify. It will affect some portions of the brain and if the swelling is so extensive already, then it will affect the entire circulation of the brain.

Q. Which could explain the other hemorrhages on the brain

that you found at the time you did your craniotomy?

A. Yes, sir.

MR. CARTER: I think that's all, if your Honor, please.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Doctor, you indicated that cirrhosis of the liver is not the result of a trauma, it's a disease that's built up over a period of time I assume. Is that correct?

A. Yes.

Q. But you also indicated that because of a defective liver of that nature it's more difficult for the blood to clot?

A. Yes.

Q. So at the time you performed your surgery could you tell us whether or not you had any knowledge of the fact that Mr. Boswell may have had liver problems?

A. I have the knowledge that he has possible liver problems.

Q. What kind of a surgical risk did that make him?

A. He had the highest surgical risk patient.

Q. Because he had liver problems?

A. Yes.

Q. All right, now when he was admitted to the hospital, when

you first saw him on August the 3rd, could you tell us whether or not there was any indication that he had liver failure at that time?

A. As far as I could see on examination of him I could not detect, you know, on cursory examination whether there was actual liver failure or not.

Q. All right, when did you first begin to suspect that he was having problems with his liver?

A. I suspected along the way that he will have problems but when the test comes around and his signs and symptoms have changed indicating a liver disease, then I concluded that he has already the problem.

Q. When was that, before or after surgery?

A. I think that was after surgery.

Q. After surgery. All right, when did he become yellow?

A. As far as I can remember it would be around -- I have my notes in there, but I can give you an approximate date -- probably around six or. . .five or seven days. I mean I cannot remember exactly. It would be several days after he had surgery.

Q. After surgery?

A. Yes.

Q. But when he was admitted into the hospital you couldn't

see any obvious signs of any liver failure?

A. No, not that I could see obviously.

Q. Later on when you began to notice it, what were some of the signs that you saw?

A. He become yellowish or icteric you call it in medical term, his liver function test had shown a positive signs of liver disease. His other blood work indicated that the values are that of the liver disease.

Q. This was after surgery?

A. Yes, sir.

Q. Not before?

A. Not as far as I could see.

Q. Well, though liver disease, cirrhosis, is not the result of trauma, a person who has that condition. . .

MR. CARTER: If your Honor, please, that's a leading question I think.

MR. FULLER: All right.

JUDGE INGRAM: All right, sir. Rephrase your question, please, Mr. Fuller.

Q. Could you tell us whether or not a person who had cirrhosis would be a risk as far as bleeding is concerned if they received any trauma?

A. Yes. Persons with cirrhosis have always a big risk in

bleeding by trauma. I suspected it the first time when I see the patient that he easily could have bleedings in the head.

Q. All rignt.

RE-CROSS EXAMINATION

By Mr. Carter:

Q. Doctor, the decedent did have cirrhosis of the liver when he was admitted to the hospital, and you were aware of this at the time that you talked to the family about the decision of doing the craniotomy in this case?

A. I beg your pardon, sir.

Q. I said you were aware of the fact that he had a liver disease at the time you were discussing the surgical risk with his family?

A. I was aware of the possibility, but I could not pinpoint, you know, on the actual values, his liver function and the cirrhosis. I could not diagnose completely by just cursory physical examination whether he has cirrhosis or not.

Q. Well, Doctor, is cirrhosis something that developes overnight?

A. No.

Q. It's a matter of a long continuing deterioration of the functioning of the liver?

A. Yes.

Q. And you did in fact begin to see the obvious signs of it in the later days in the form of jaundice?

A. Yes.

Q. I believe that one of the functions of the liver is to remove the dead red blood cells from one's body and when it ceases to function then the dead blood cells give us us a yellow or jaundice look?

A. Yes.

Q. I think that's all.

RE-RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Doctor, even though you had some knowledge of his liver problem when you examined the patient, could you tell us whether or not you had any alternative but to operate?

A. The way I'm looking at it, with the findings in the angiogram test, you know, the cerebral angiogram or arteriogram, the lesion was big enough that I have no alternative but to remove the pressure, because if you don't remove the pressure, I think the chances are slimmer than, you know, leaving him go.

Q. If you hadn't removed the pressure, what would have been the results?

A. I think he would have died.

Q. You had to operate?

A. I think I have to operate because of the pressure.

Q. And what you found substantiated what you thought. Is that correct?

A. Yes.

Q. That's all.

RE-RE-CROSS EXAMINATION

By Mr. Carter:

Q. Doctor, except by hearsay are you in a position to know what traumas this man may have received, and when and under what circumstances?

A. No, I could not.

Q. I think that's all.

. . . . . .

DR. DAVID W. OXLEY, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court, please?

A. I am Dr. David W. Oxley.

Q. Dr. Oxley, what is your occupation?

A. I am a forensic pathologist and Deputy Chief Medical Examiner for Western Virginia.

Q. What is a forensic pathologist?

A. A forensic pathologist performs autopsy examinations in cases of death by violence, or by unnatural or undetermined means or manner.

MR. CARTER: If your Honor, please, I will admit the qualifications of Dr. Oxley.

JUDGE INGRAM: All right, sir, the qualifications of Dr. Oxley will be waived.

Q. Dr. Oxley, in your capacity as a medical examiner for the western district of Virginia, could you tell us whether or not you examined the body of Luther Boswell?

A. Yes, sir, I did.

Q. When did you receive the body?

A. On the 20th of August. The body was received on the 20th of August at 12:30 P.M. The autopsy was performed at that time.

Q. All right, and tell us what your autopsy revealed.

A. The body was that of a well-developed, moderately obese white male, seventy-two inches long and weighing an estimated two hundred twenty to two hundred thirty

pounds. The body was unclothed at the time I received it. The skin of the upper chest and upper extremities was tanned by the sun. The skin was also jaundiced as were the whites of the eyes. External examination of the body revealed a partially healed surgical scar on the right side of the head in this region. This was closed with suture material. The head had been shaved, the scalp had been shaved and the hair had grown back to some degree. There were multiple bruises present over the cheeks and chin. There was a bloody fluid present in the mouth. There were bruises present on the cheeks on both sides. There was a tracheostomy stoma, that is a tracheostomy incision just above the suprasternal notch. There was a large irregular bruise on the right upper front of the shoulder. There was a large irregular bruise on the left upper abdomen at the margin of the rib cage, in this region. There was an old healed scar on the right lower quadrant of the abdomen. There was edema, that is fluid, present in the extremities of the hands, feet and lower legs. There was fading purplish bruising of the front of the right lower leg. Internal examination of the body revealed approximately a thousand cc, that is

approximately two pints of fluid in each pleural cavity, each chest cavity. There was approximately two thousand cc of bile tinged fluid in the peritoneal cavity, the abdominal cavity. The other cavities were not remarkable. The heart was enlarged, coronary arteries were patent. There was no definite degree of atherosclerosis or hardening of the arteries in the coronary vessels. The lungs were heavy edematous, that is contained fluid. The substance of the lungs was deep purplish-red. The liver was quite nodular and firm. The cut surface of the liver showed bile staining. The appearance was consistent with cirrhosis of the liver of fairly long standing. The spleen and kidneys were not remarkable. The gastrointestinal system was not remarkable. The brain when the head was opened was quite swollen. There was hemorrhage beneath the arachnoid, which is the membrane covering the brain, over the right parietal lobe, that is the right cerebral hemisphere. There was a large cavity in the area of the temporal lobe containing old blood and recent bleeding, blood clot. There were other smaller blood clots present in the frontal lobe on the right, also in the area of the occipital lobe. The

bone overlying this area had been surgically removed and bone had not been replaced. The defect had been covered with a material called gelfoam.

Q. So you found old and new blood there?

A. Yes.

Q. What would that indicate?

A. It would indicate that there had been further bleeding after the original clot had been evacuated.

Q. All right.

A. There were no fractures present in the ribs, vertebrae or skull.

Q. All right, now these bruises about the face. Where were they again?

A. They were on his cheeks, a large bruise -- there was a large single bruise -- on the right cheek in this region involving the cheekbone and this area of the cheek with associated swelling. There were several smaller bruises on the left side of the cheek in this region involving the cheekbone and side of the face.

Q. And I believe you said there was a bruise to the chest?

A. There was a bruise on the upper chest. There was a bruise on the upper left abdomen at margin of the rib cage, in this area. There was a bruise of the front

part of the right lower leg.

Q. All right, now in your opinion could the bruises on the face have been caused by a fall?

A. In my opinion. . .

MR. CARTER: I think that the doctor can describe what he has seen, but his opinion of whether it was caused by a fall or by what means I do not think is proper in this thing. I think it's a matter for the Court to decide.

MR. FULLER: Judge, that's why we have medical examiners, to tell us in their medical opinion what caused a medical injury; and that's all I've asked him.

MR. CARTER: I think that he can testify to medical facts, but as to his speculation and guess as to what might have caused a particular injury, I don't think is relevant in this case.

MR. FULLER: Well, I do, if your Honor, please.

JUDGE INGRAM: All right, I'm going to sustain the objection on the way in which

the question was formed, but I think that the doctor should be permitted to testify as to his opinion if he has one, as to the cause of the bruises.

MR. FULLER: All right, do you want him to answer it in that manner?

JUDGE INGRAM: I think the question must be rephrased. In its present form I think it's a leading question.

Q. Could you tell us from your examination and evaluation how the bruises that you saw on the deceased were there? I mean could you tell us whether or not it was the result of any one thing or could it have been many?

MR. CARTER: If your Honor, please, I object again. I think this is pure speculation.

JUDGE INGRAM: I'm going to overrule that objection. I think that's a proper question if the doctor can answer it.

A. The bruises on the cheeks. . .

MR. CARTER: We except to the Court's ruling.

JUDGE INGRAM: Yes, sir.

A. The bruises on the cheeks were discreet. That is the

bruises on the left cheek were several small bruises. There was one large one on the right cheekbone. In my opinion these bruises were due to repeated blows to the area of the face rather than a fall.

Q. Rather than a fall. And how can you say that?

A. Well, in my opinion had these been due to a fall there would have been a large single area of bruising rather than small, discreet, separate bruises.

Q. In other words, you make. . .you distinguish it by the fact that there are several separate bruises rather than just one bruise?

A. That is correct. Yes.

Q. Now based upon your examination and evaluation, what would you say was the cause of death?

A. Death in my opinion was due to multiple blunt force injuries to the head with intracranial and cerebral contusions and hemorrhage, terminally complicated by liver failure.

JUDGE INGRAM: Now I'm going to ask you to say that again slowly.

DR. OXLEY: All right, death due to multiple blunt force injuries to the head.

MR. CARTER: Multiple what?

DR. OXLEY: Blunt force injuries.

MR. CARTER: Blunt force.

DR. OXLEY: With cerebral and intracerebral contusions and hemorrhage, terminally complicated by hepatic failure, or liver failure..

MR. FULLER: Judge, I can introduce his report into the evidence.

JUDGE INGRAM: Well, I just wanted to get it down at this point.

MR. CARTER: You say you have introduced it or are in the process of. . .

MR. FULLER: I can.

MR. CARTER: I wish you would.

JUDGE INGRAM: All right, that will be marked as Commonwealth's exhibit one.

Q. Dr. Oxley, will you look at this and tell me if this is the results of your report?

A. Yes, this is a copy of my report.

MR. FULLER: I'd like to introduce this into evidence, if your Honor, please.

JUDGE INGRAM: Any objection, Mr. Carter?

MR. CARTER: No objection.

JUDGE INGRAM: All right, Commonwealth's exhibit one.

Q. I believe that's all I have. Answer Mr. Carter's questions.

CROSS EXAMINATION

By Mr. Carter:

Q. Dr. Oxley, there were no fractures in the facial region, no maxillary fractures, no bones broken anywhere that you were able to observe in the facial or the head region?

A. No, sir, there were not.

Q. And you found bruises primarily around the right and left cheeks?

A. Yes, that's correct.

Q. Now could you state with any medical degree of certainty which of these so called blunt force injuries that you would attribute this cerebral hemorrhage to?

A. Do you mean any one specific injury?

A. Yes, sir.

A. No, sir, I could not.

Q. Now this man had a cirrhotic liver I think was very obvious from your postmortem, at an advanced stage. Now what is the significance from the standpoint of blood coagulation of reduced liver functioning?

A. With the degree of cirrhosis that was present and the

impairment of liver function the blood would not clot at all well, the clogging factor would be quite decreased.

Q. Now one whose blood clotting capability was reduced, can you tell us what we could expect even from a simple trauma?

A. I'm sorry, I didn't catch the question.

Q. I said what could we expect from even a simple trauma where the blood clotting capability of the blood has been reduced substantially.

A. Extensive bruising.

Q. Hum?

A. Extensive bruising.

Q. Extensive bruising?

A. Yes, sir.

Q. One bruises easily?

A. That's correct.

Q. And the area becomes edematous?

A. Yes.

Q. And swollen?

A. Yes.

Q. More so than in a normal person?

A. More easily than in a normal person. Yes.

Q. Now in your original postmortem you reported this as a

subdural hemorrhage did you not?

A. I don't believe so.

Q. Perhaps it was in the history that you had.

A. I don't believe there is any mention in my report that this is a subdural hemorrhage.

Q. Perhaps it was in the history that you gave that it was a subdural. . .

A. I'm sorry, in the what?

Q. In the history that you received that it was subdural?

A. Oh, I see. This is the report of the local medical examiner, Dr. Laird.

Q. But this in fact was not a subdural hemorrhage then was it?

A. No, it was not.

Q. But an intracerebral?

A. That is correct.

Q. Now isn't this a little unusual to find an intracerebral hemorrhage resulting from this type of trauma?

A. No, I wouldn't say it's particularly unusual, not in my experience.

Q. Wouldn't you more than likely expect to find a subdural hemorrhage rather than an intracerebral hemorrhage as a result of a trauma?

A. Subdural hemorrhages are virtually always traumatic in origin. And in answer to your question, in response to trauma I would expect to find subdural hemorrhages.

Q. You would expect it to be subdural rather than intracerebral?

A. Yes.

Q. Now you found some additional hemorrhaging of the brain when you did the postmortem. Would this be an unusual finding in the wake of a craniotomy and a man with full liver functioning? In other words would you expect there to be swelling of the brain following such surgery and as a result of such swelling of the brain some additional hemorrhaging?

A. I would expect additional hemorrhaging in a patient in this condition, yes.

Q. Swelling would upset to some degree the arterial supply of the brain?

A. That is correct.

Q. And this would be postoperatively?

A. Well, there were other hemorrhages, what are called ball hemorrhages, these are little, small round hemorrhages, that would not be postoperative. The additional hemorrhage in the cavity from which the original clot

was evacuated would have been postoperative.

Q. Did you find other than the incision made in the scalp for the craniotomy, did you find any other abrasions, or contusions, cuts or what not in and about the skull region, the forehead, the base of the brain or anywhere in this area?

A. No, sir. Around his scalp regions now?

Q. Um-huh.

A. Contusions or abrasions of the scalp, no.

Q. You found no contusions, no abrasions except to the face?

A. That is correct.

Q. Didn't this seem a little unusual to you, Doctor, from the standpoint of some medical causation between that and an intracerebral hemorrhage?

A. No, not -- again not -- in the condition that this man was in and the fact that he obviously had a thick liver and obviously he had a decreased clotting function. I didn't feel that this was unusual at all. I might have in a normally healthy male with adequate clotting function.

Q. Did you get any history of high blood pressure on this man?

A. No, I did not.

Q. So you don't know whether or not he had hypertension?

A. I do not.

Q. If he had a history of hypertension, would you be able to relate this medically to these few bruises you found on his cheeks?

A. If he had a history of hypertension, could I relate it to the bruises?

A. Yes, sir. Yes, could you relate the intracerebral hemorrhage to the bruises on his face?

A. In view of the history that I had on this man I could. Yes.

Q. Hum?

A. In view of the history that I obtained from the local medical examiner on this man I would still relate the bruises to the intracerebral hemorrhage.

Q. Let me state a hypothetical question to you. A good deal of your opinion is based upon a history that was given to you by the local medical examiner which related to you only one single incident of trauma. Is that correct?

A. That is correct. Yes.

Q. Now, Doctor, should it turn out that there was a second trauma three days later, and should it be shown

that this man was conscious, ambulatory, and responsive until three days later, assuming that he then had gotten out of bed, and had slipped and had fallen and had first struck his face on a bed and then had fallen back and struck the back of his head on the floor. Would you be in a position then to state which causal relationship brought about this blood clot? Let me give you one further element. Assume further that he became comatose almost immediately after the second trauma, would you be able to relate the intracerebral hemorrhage to either of these traumas?

A. To either specifically, no; and given that set of circumstances I would say that the intracerebral trauma could be related to either or both.

Q. Either? More likely to the latter though if he was not comatose until after the second injury?

A. If he showed no neurologic symptoms until after the second injury, it would probably be more likely related to the second injury.

Q. That would be more probable than the first injury?

A. Given that set of circumstances, yes.

Q. I think that's all.

. . . . . .

JUDGE INGRAM: All right, let's take a little recess here.

Following the recess, the Court, all counsel and the defendant returned to the courtroom, and the proceedings continued as follows:

DR. PAGE HUDSON, the first witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. Doctor, state your name for us, please.

A. Page Hudson.

Q. Where do you reside, Doctor?

A. Chapel Hill, North Carolina.

Q. I believe you are the Chief Medical Examiner for the State of North Carolina. Is that correct?

A. Yes, sir, I am.

Q. Doctor, will you tell us what your experience and educational background has been?

MR. FULLER: Judge, I'll waive his qualifications.

JUDGE INGRAM: All right, sir.

MR. CARTER: If your Honor, please, in that I don't think that the Court has ever had Dr. Hudson here before, it might be helpful

if we get some of his background. On the other hand, if the Court would prefer not, we would waive that.

JUDGE INGRAM: The Court is willing to accept Dr. Hudson as the Chief Medical Examiner for the State of North Carolina, and with that qualification I think that that's sufficient.

MR. CARTER: All right, sir.

Q. On that basis we will proceed. Doctor, have you had the advantage of looking over the hospital records kept at Memorial Hospital during the period of approximately August the 3rd of 1977 to about August the 19th concerning a patient by the name of Luther Wiley Boswell?

A. Yes, sir, I have.

MR. CARTER: If your Honor, please, these are the same documents which the Court has placed in evidence this morning.

JUDGE INGRAM: All right, sir.

Q. And have you had the advantage of reviewing the medical records of Dr. Kenneth B. Sizer of the City of Danville?

A. Yes, I have.

Q. In connection with this same patient?

A. Yes, sir.

Q. This gave you a medical history back about how many years, Doctor?

A. I believe it went back to references back even back to 1970, 1972, 3 and subsequent to that.

Q. And have you had the advantage of the autopsy report made by Dr. Oxley?

A. I have.

Q. Now after reviewing these various records and documents, what can you tell us about the general health of the decedent?

A. The health of the decedent was marginal, and would you like for me to go into the specifics?

Q. Yes, sir, if you would.

A. He had demonstrated liver disease, the condition, the reserve of his liver was only marginal. He was a man with mild diabetes. He had hypertension.

Q. Is that high blood pressure, Doctor?

A. High blood pressure, yes, sir.

Q. All right, sir, is there any evidence in these records to indicate the cause of the cirrhotic liver?

A. Yes, there was.

Q. What was that?

A. There was a history, a long history of relatively severe

alcoholism.

Q. Now, Doctor, can you tell us what one could expect from a patient who has very severly limited liver functioning when it comes to traumatic injuries?

A. Any general injury to the person who has severe liver disease can result in the inability of the liver to make certain proteins and other substances, particularly those that are concerned with blood clotting, or that prevent abnormal bleeding and hence easy bruisability will result from that. With a little more stress to the diseased liver ceases to have the ability get rid of blood pigments and therefore jaundice develops and edemaral swelling of the body will develop.

Q. The edema comes from the inability of the blood to coagulate?

A. From that and from the inability of the liver to properly make proteins.

Q. What would you expect by comparing a trauma or bruise, contusion, to one with severly limited liver functions as compared with what you would expect from one who has a normal functioning liver?

A. Any sort of force or injury that would normally produce bruising or some bleeding in the normal individual would

produce more severe bruising and more severe bleeding in the person that has a liver in the condition that it was in this patient.

Q. Now, Doctor, you, of course, have read all the reports. What type of hemorrhage was it which Dr. Erasmo removed?

A. The hemorrhage that he treated was what is called an intracerebral hemorrhage, that is a collection of blood within the substance of the brain.

Q. Within the lobe of the brain itself?

A. Yes, sir.

Q. And what frequency in your medical judgment would you find an intracerebral hemorrhage resulting from traumatic origin?

A. It's very rare, very rare to have an intracerebral hemorrhage from blunt trauma. The only instances in my personal experience that I've ever seen, they have been very few, and the only experiences from the medical literature have been those resulting from massive severe head trauma wherein some say automobile accident type of thing or falling from a distance against concrete, things of that sort, those causing then skull fracture and intracerebral hemorrhage.

Q. Now would you expect this to come from a blow from some point other than the cranial cavity itself?

A. Excuse me, I didn't. . .

Q. I say in these unusual instances which you have experienced or which you have medical records of where in intracerebral hemorrhage has occurred as a result of trauma, where would you expect the trauma to be?

A. If I understand your question correctly, I would expect the force to come, of course, from without and to damage both the scalp, and the skull and the brain and causing hemorrhage within the substance of the brain as well as on the surface of the brain.

Q. What would your expectation be medically as to any causation from blows about the face and the cheeks?

A. I would not expect blows about the face or cheeks, non-fracturing blows, to cause an intracerebral hemorrhage.

Q. Then if you had, or you were doing a postmortem on a body and there was a history of hypertension or high blood pressure, and evidences of bruising about the cheeks and the jaw, in your medical judgment what would the significance of an intracerebral

hemorrhage be, or what would the causation be?

A. My experience has been a hemorrhage or two or a bruise or two about the cheeks, having the intracerebral hemorrhage, usually the hemorrhage has occurred first. We see scrapes and bruises upon the face commonly in the person who has had a stroke and who collapses striking his face or cheek.

Q. Now, Doctor, is there any medical significance to smaller hemorrhages in and about the brain in the case of the craniotomy here where the main blood clot was removed?

A. The hemorrhages that one might see at autopsy following such a procedure.

Q. What would cause these smaller hemorrhages in the brain?

A. The necessary trauma incident to surgery itself causes some small hemorrhages, the manipulation, the insertion of needles into the brain. But with surgery, or strokes, or trauma or other conditions that cause injury to the brain there is typically usually swelling of the brain. This is one of the hazards, one of the things that physicians treating their patients try to prevent and to minimize. This swelling leads to compression of blood vessels around the brain and in

the brain and can sufficiently impinge upon them to cut off the blood supply from parts of the brain leading to small hemorrhages in certain portions of the brain.

Q. Doctor, did the hospital record indicate that an arteriogram was done prior to surgery?

A. It did.

Q. And would you explain to us exactly what an arteriogram is and how it is performed?

A. An arteriogram is an x-ray taken after a certain kind of dye is injected into an artery. This dye has material in it that is opaque or dense to the x-ray so that on the x-ray the outline of the artery and its branches can be seen. An arteriogram was done shortly after admission to the hospital and it revealed the evidence of an intracerebral hematoma and it showed compression and squeezing of blood vessels in the brain from that hematoma.

Q. Doctor, what is the usual cause of an intracerebral hemorrhage?

A. The vast, vast majority of intracerebral hematoma are due to what we call strokes, high blood pressure being one of the most common things preceding the stroke.

Q. Just what happens when one has what lay people call a stroke?

A. The most. . .There are several kinds of strokes.

MR. FULLER: If your Honor, please, I don't mind all this medical history, but I can't see any relevance to this. We don't have any evidence that he had a stroke.

MR. CARTER: We certainly do. He had an intracerebral hemorrhage which the doctor has just testified in the vast majority of cases is the result of hypertension and a stroke.

MR. FULLER: We don't have any evidence in this case that that was the problem.

MR. CARTER: We don't have any evidence that it isn't.

JUDGE INGRAM: Well, I'm going to permit him to answer the question, Mr. Fuller.

Q. Go ahead, Doctor.

A. A classical type of stroke, and if I might cite an example such as that that President Roosevelt died of, is a small blood vessel deep within the substance of the brain breaks, ruptures, and a large collection

of blood ensues gathering within the substance of the brain and forming a hematoma. A hematoma is a collection of blood, an intracerebral hematoma.

Q. So it is the breaking of some of the small blood vessels in the brain as a result of high blood pressure or elevated pressure of the blood?

A. High blood pressure and some mild degree of arteriosclerosis.

Q. Let me ask you this. If one had reduced liver functioning, would that have any effect in your medical judgment on the susceptibility to hemorrhaging in the brain?

A. Yes, sir, a person with severe liver disease as I indicated before who has marginal ability to coagulate his blood is more likely to bleed from whatever the injury, from whatever the source, be it a natural phenomenon or trauma phenomenon, injury phenomenon.

Q. And the medical history which you have examined indicated what about the decedent's blood pressure and hypertension?

A. That in addition to his mild diabetes he did have hypertension and had had for several years.

Q. Doctor, if you had, let me state to you if I may, a hypothetical question, if we take a deceased person who was engaged in a physical altercation with another,

MR. CARTER: Hum? He was admitted on the 3rd.

MR. FULLER: Early in the morning.

MR. CARTER: The first injury was on the 1st, so forty-eight plus twelve is what, sixty?

MR. FULLER: Yeah, but forty-eight hours would be late the 3rd, and sixty would be into the 4th.

MR. CARTER: The 1st about. . .

MR. FULLER: Late in the afternoon of the 1st.

Q. All right, Doctor, I'll rephrase the question. Suppose the patient was engaged in an altercation in the afternoon of August the 1st, that he remained ambulatory and responsive until the morning of August the 3rd at which time he suffered a fall, that this patient had high blood pressure, and hypertension and a cirrhotic liver, that on the 3rd he fell and struck his face on a bed and then fell backward and struck the back of his head on a hardwood floor and thereafter surgery was done which disclosed the existence of the intracerebral hemorrhage. Do you have a medical opinion as to the cause of the cerebral hemorrhage?

A. Yes, sir, in a qualified. . .

Q. Would you tell us what it is?

A. The type of hemorrhage -- in my opinion the type of hemorrhage -- that you describe and the type of patient that you describe, is far and away more likely to be due to a spontaneous stroke than any other cause.

Q. All right, let me take my hypothetical question one step farther. Your answer is that you would not have expected either of these two traumatic experiences to have cuased the intracerebral hemorrhage?

A. By themselves, no, sir.

Q. Let's say suppose that, take the basic premise that it was traumatic in nature, which of the two traumatic experiences would you, if you have a medical opinion, would you have attributed the hemorrhage to?

A. Since there's ordinarily more force generated in striking a hard surface in a fall, I would lean somewhat toward the fall as opposed to being struck in the face by a hand.

Q. If the history given to you was that the patient was not comatose until after the second fall, would that have any basis on your opinion?

A. A little bit, sir. It would make me somewhat more inclined to consider the second injury than the first.

Q. But it's your medical opinion that neither of these traumas would have caused this type of hemorrhage?

A. I would not have expected either of these two forms of trauma to have caused the type of hemorrhage that was found in this patient.

Q. Doctor, ordinarily what type of hemorrhage do we expect in the crainal cavity as a result of trauma?

A. From either of the types of trauma that have been discussed, far and away the most common hemorrhage that I would expect to see would be a so-called subdural hemorrhage, or subdural hematoma. This is a collection of blood outside the brain between the brain and the tough membrane called the dura that surrounds it.

Q. So this would be between the brain and the dura, which I take it is close to the surface or interior of the skull itself?

A. Yes, sir.

Q . As distinguished from being located in one of the lobes?

A. As distinguished from being within the substance of the brain itself. And the next most, a very reasonable, fairly common and the next most likely hemorrhage would be an extradural or epidural hematoma, which is

a collection of blood not only outside the brain but outside the dura, between the dura and the bone.

Q. Doctor, if subsequent examination of the decedent indicated no bruises, contusions, fractures to the skull itself, and but only contusions to the face in and about the cheeks and jaw, what significance, if any, would that have in your medical opinion about the causation of this hemorrhage that was experienced by the decedent?

A. You say with no contusions or fractures of the bone but with the contusions about the face, in my consideration of the intracerebral hemorrhage I believe it would be very unlikely, most unlikely that the injury that caused bruising about the face caused the intracerebral hemorrhage.

MR. CARTER: You may examine.

CROSS EXAMINATION

By Mr. Fuller:

Q. Doctor, you admit that because of liver problems that it's more difficult for the blood to clot?

A. Yes, sir.

Q. So anybody that's marginal in that respect and who is injured and has to have surgery, it's going to be a

greater risk because there is always that danger that the blood won't clot?

A. Yes, sir.

Q. Now the fact that you. . .Suppose you have a person that has an advanced case of cirrhosis, then that person is going to be a pretty big risk as far as operating is concerned. Is that correct?

A. Yes, sir, the risk is certainly greater than with the person who doesn't have cirrhosis.

Q. And if there is any internal bleeding, a person with an advanced case of cirrhosis is going to have difficulty as far as the clotting is concerned. Is that correct?

A. Yes, sir.

Q. Well, wouldn't that make it easier if a person was bleeding internally because of some advanced liver problem, wouldn't it make it easier for a head injury to be intra than under ordinary circumstances?

A. It would make any hemorrhage easier, sir. Yes, sir, intra or subdural.

Q. Either one?

A. Yes, sir.

Q. It would make it easier?

A. Yes, sir.

Q. All right, now let me give you these facts. Suppose you have a situation. . .Well, before I ask you this, in the first place your answer to the question about falling and hitting your head on a bed or being struck with fists, say, has to be qualified because you don't know which of the blows had the most force do you?

A. That's certainly true. Yes, sir.

Q. I mean if a person, if it was a baby bed say, and the baby bed was about this high, and the person didn't fall very far and just struck their head, it's conceivable that that blow wouldn't have had as much force as somebody who weighed a hundred and eighty or ninety pounds hitting somebody as hard as they could. Isn't that true?

A. That's true. Yes, sir.

Q. Okay. Now suppose you have this factual situation. Suppose a hundred and eighty-five or a hundred and ninety pounder strikes a sixty-one year old person with cirrhosis of the liver four or five times rather severely, right after that the person who is struck begins to swell up rather severely, the face where he was struck, becomes unconscious and starts snoring as if he were asleep, wouldn't you say that that

beating had something to do with that condition?

A. I would certainly suspect so. Yes, sir.

Q. And that if from then on for the next forty-eight hours, or the next thirty-eight hours the person was semiconscious you would have to again say that the physical beating that the person received had something to do with that condition?

A. I would believe so.

Q. Suppose after that the person was taken to the hospital and then the operation was performed and a blood clot was removed as it was in this case, you are not in a position to say that it could have been a cause of that beating. . .that it could not have been a cause of that beating are you? Right after the beating the person swells severely, becomes unconscious, seems as if they are asleep, they are snoring, and then off and on they are semiconscious, are able to walk with help on one occasion to the bathroom, fall on the way back, taken to the hospital the following day in a semiconscious condition, never regains consciousness at the hospital either before or after surgery, all of this happening right after the physical beating, you can't say that that beating wasn't the

cause of death can you on those facts?

A. Assuming those facts. . .

MR. CARTER: I think, if your Honor, please, he's got to give him more of the man's medical record than he has given to him in this hypothetical question.

JUDGE INGRAM: Such as?

MR. CARTER: Sir?

JUDGE INGRAM: Such as?

MR. CARTER: Such as the man was suffering from hypertension, the man had a cirrhotic liver and. . .

MR. FULLER: Well, if your Honor, please, I take the position that you take a person as you find them. If you hit an eighty year old man, you can expect worse results than if you hit a forty year old man.

MR. CARTER: I'm talking about causal relation right now.

MR. FULLER: That's exactly what I'm talking about.

JUDGE INGRAM: All right, let's rephrase the hypothetical, Mr. Fuller, with all the facts

relative to this, and then propound it to the doctor.

MR. FULLER: All right, sir.

A. A sixty-one year old man with cirrhosis of the liver, a mild case of diabetes, hypertension, he is beaten severely by a young person, a hundred and eighty-five or ninety pounds, right after the beating the sixty-one year old man's face swells severely, he becomes unconscious, sleepy, starts snoring, later complains of a headache, later starts spitting up blood, later has to go to the bathroom, falls on the way back, is taken to the hospital within about -- probably within less than -- forty-eight hours, semiconscious there and then, of course, surgery was performed, and, of course, consciousness is never regained, and of course you know what the surgery revealed, a blood clot. On those facts you couldn't say that the beating was not the cause of death?

A. I could not say, assuming those facts, that the beating had nothing to do with it.

Q. That's what I mean. I mean it may have been that the person's medical history reacted different because of the beating than an average healthy person would

have, but if that person visibly seemed to be in good condition before the beating and all of this happened afterwards, you certainly couldn't say the beating was not the cause of death could you?

A. I would not attribute the cause of death directly to the beating. I would certainly consider that it may well have gotten things started, but that anywhere along the line the spontaneous stroke could have occurred, but perhaps contributed to by the circumstances that you are speaking of.

Q. It could occur any time, anyplace on anybody couldn't it?

A. Particularly in the conditions of health he had. Yes, sir.

Q. Right, I understand that his health condition was poor according to the medical history, but the fact remains that all of this happened, the bleeding, the swelling right after the beating.

MR. CARTER: Now wait a minute. Are you telling him something or are you asking him a question?

MR. FULLER: I'm asking him a question.

MR. CARTER: Now your hypothetical question. . .

MR. FULLER: That's exactly what I'm. . .

MR. CARTER: . . .didn't. . .

MR. FULLER: . . .doing, Mr. Carter.

JUDGE INGRAM: All right, just one talk at a time. I can't hear. . .

MR. CARTER: If your Honor, please, that question did not bring into this matter the hypothetical problem of a second trauma. I think that's. . .

MR. FULLER: Mr. Carter asked that question. I think I'm entitled to ask the one on the evidence that I think is important, if your Honor, please, because you haven't heard. . .

JUDGE INGRAM: I think the question, the hypothetical question that was propounded was proper and the questions that have followed relating to it are also proper, Mr. Carter. I'm going to permit them.

MR. CARTER: We except.

Q. The question I asked you was if there was no evidence of any difficulty before the beating, and right after the beating all of these things took place that I have enumerated to you, wouldn't that indicate to you

that the beating at least set in motion everything else that happened?

A. Yes, sir, assuming the facts as you have outlined them including the person being semistuporous we'll say. . .

Q. Yes, sir.

A. . . .right on from the point of the beating, then I would believe that that beating had contributed to the eventual outcome.

Q. All right, sir, that's all I have.

RE-DIRECT EXAMINATION

By Mr. Carter:

Q. On the other hand, Doctor, if the patient was not semi-conscious or comatose for a period of let's say from the afternoon of August the 1st through the afternoon . . .or to the morning of August the 3rd, would this change your opinion of the situation?

A. Yes, sir, that would modify my opinion if he were relatively clear for a period of a day or so.

Q. Then would you then attribute any part of what he had experienced to the altercation?

A. I would find it very doubtful that the altercation did, and certainly not any more than say for example the

fall.

Q. Let me ask you this too, Doctor. Would there be any significance if the evidence showed that this man had complained of headaches for a week or more prior to this situation? Would that have any significance medically?

A. Yes, sir, it would, particularly in a person with the conditions of health described in this man. As I think we all know, there are almost innumerable causes of headaches, but in a person of this age with hypertension and mild diabetes a headache is much more ominous and one of the things that would likely be contributing to it would be a small leak in a blood vessel or the changes in the blood vessels that are occurring from the diabetes and from the hypertension. It's a very ominous sign. This is almost like a bomb ready to go off.

Q. Thank you, Doctor.

. . . . . .

MR. CARTER: Your Honor, that's our medical side of it subject to the right to call Dr. Kuhn when he is available.

JUDGE INGRAM: All right, sir. All right,

MR. FULLER: That's right. I mean in other words, if he was able to get around and things of that nature.

JUDGE INGRAM: That's the question he wishes to ask. Now the position the Court is putting you in, Mr. Carter, is do you object to that witness testifying to that having not been sequestered from the beginning of the trial?

MR. CARTER: I don't really think so, if your Honor, please. I think the Court is quite capable of taking into consideration the weight that he gives to it.

JUDGE INGRAM: All right, sir.

. . . . . .

VIRGINIA GILES, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court, please?

A. Virginia Giles.

Q. Mrs. Giles, you are the deceased's sister. Is that correct?

A. Yes, sir.

Q. Now did you see him on August the 1st?

A. No, sir.

Q. You didn't see him on August the 1st?

A. No, sir, I saw him the day he went into the hospital. Yes, I did. I spent the morning with him August the 1st. I went about 8:30 and stayed until about 11:30.

Q. Where were you with him?

A. I was at his apartment on West Main Street.

Q. You stayed with him from about 8:30 until 11:30?

A. Yes, sir.

Q. What was his condition then?

A. Well, normal, like I usually see him.

Q. He was able to get around?

A. Yes, sir. I usually go up and clean his apartment, and that's what I did that morning.

Q. And he appeared to be normal in every respect?

A. Yes, sir.

Q. I see.

MR. FULLER: Mr. Carter?

CROSS EXAMINATION

By Mr. Carter:

Q. Was he drinking that morning?

A. No, sir.

Q. Are you sure?

A. I'm positive.

Q. I think that's all.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Mrs. Giles, did he get anything to drink while you were there?

A. No, sir, he did not drink one thing while I was there.

Q. Did he get anything to drink?

A. He went out while I was there and he came back, but if he drank anything, I did not know it.

Q. Could you tell us whether or not he purchased anything to drink while you. . .

A. I assumed he did.

Q. Why did you assume that?

A. Because he came in with a bag in his hand.

Q. I see.

A. And I assume that's what was in it.

Q. I see. All right.

RE-CROSS EXAMINATION

By Mr. Carter:

Q. Why, Mrs. Giles, would you assume that was what was in

it?

A. Because when you bring a bottle in in a bag, you can always tell what it is.

Q. I think that's all.

A. I don't think he went anywhere else, brought anything else in that bag.

MR. FULLER: All right, that's all.

. . . . . .

MELINDA MCSHERRY, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court, please?

A. Melinda McSherry.

Q. Ms. McSherry, what is your occupation?

A. I'm a licensed practical nurse in the emergency room.

Q. Were you on duty in the Memorial Hospital emergency room on August the 1st of this year?

A. August the 1st?

Q. Uh-huh. August the 3rd. August the 3rd.

A. Yes, sir.

Q. All right, now were you there when Mr. Boswell arrived?

A. Yes, sir.

Q. How did he arrive at the hospital?

A. By the Danville Life Saving Crew.

Q. All right, could you tell us whether or not you saw him when he arrived?

A. Yes, sir, I took care of him.

Q. You took care of him. Would you describe to his Honor his condition?

A. Well, his face, he had mark contusions and bruises, and his eyes were swollen shut. He was drowsy and lethargic.

Q. He was what?

A. Drowsy and lethargic. And for the physical condition, that's the way he looked.

Q. All right, now how severe was the swelling?

A. About the face, his eyes were swollen shut, his face was swollen rather badly.

Q. Where were the contusions? Do you remember?

A. Well, his eyes -- like I said, his eyes -- were swollen shut and bruised, and the bruises were just about in the general area of his face.

Q. I see. All right, now you said he was drowsy. Was he conscious, or was he semiconscious or was he unconscious?

A. He wasn't unconscious. He. . .If you spoke to him, if you called his name, he would respond. I mean he never

talked to me. A couple of times he did answer Dr. Erasmo when he was examining him, but he wasn't unconscious.

Q. All right, was he what you would say conscious?

A. Well, not to the extent of being alert and coherent. I mean he would. . .

Q. When he would talk how would he talk?

A. Well, the one thing, I just heard him say, "No." Most of the time he just didn't, you know; but like when I was cleaning his face up, he indicated that he, you know, he'd push my hand away at one point.

Q. But he didn't say anything?

A. No.

Q. Was he making any sound through his mouth?

A. No, sir.

Q. You say he wasn't unconscious but he really wasn't alert?

A. No, he wasn't.

Q. All right, and what did you do after you worked with him awhile?

A. Well, when he first got there we took his vital signs, his blood pressure, pulse, et cetera. Then I called Dr. Mier in and he examined him first.

Q. Was there any problem with his vital signs?

A. No, sir.

Q. His vital signs were all right, his blood pressure and other things were all right?

A. Yes, sir.

Q. All right, and after Doctor. . .Who examined him?

A. Dr. Mier, the emergency room doctor examined him first.

Q. Dr. Mier. And then what happened?

A. Well, he referred him to Dr. Eraso. Well, first he ordered a series of x-rays, and then when he came back from x-ray he referred him to Dr. Erasmo.

Q. And from there Dr. Erasmo took charge?

A. Yes, sir.

Q. Was that the extent of your involvement?

A. Yes, sir.

Q. There in the emergency room on August the 3rd?

A. Yes, sir.

Q. Do you remember about what time it was that he arrived there on August the 3rd?

A. Well, according to our emergency room log it was about 7:45.

Q. 7:45?

A. Yes, sir.

Q. On the morning of August the 3rd?

A. Yes, sir.

Q. All right, answer Mr. Carter's questions.

CROSS EXAMINATION

By Mr. Carter:

Q. Mrs. McSherry, did you examine his head, and scalp and this area?

A. Yes, sir.

Q. Did you find any bruises, contusions or anything of that sort?

A. On the back of his head?

Q. Well, on top, back, anywhere?

A. There were some bruises. There were no lacerations.

Q. Where were the bruises?

A. Just mainly about this. . .both sides of his face, his eyes were swollen shut. . .

Q. Mostly around his cheeks and jaw. Is that right?

A. Yes, sir.

Q. But not involving the skull itself?

A. I don't remember any on the skull.

Q. Any evidence of any fracture of the jaw, or the nose, or the prefrontal sinuses or in any of this area?

A. Well, it was impossible to determine until they were x-rayed because of the swelling.

Q. Well, did the x-rays disclose any fractures?

A. They were negative.

Q. They were negative for fractures?

A. Yes, sir.

Q. Thank you, Mrs. McSherry.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Mrs. McSherry, in regard to his head and the back of his head, you say there were bruises but no cuts?

A. There were no lacerations.

Q. There were no lacerations, and were there any knots from swelling on the top or back of his head?

A. I don't remember any on the back of his head.

Q. All right, that's all.

. . . . . .

LINDA JEFFREYS GODFREY, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Will you state your name to the Court, please?

A. Linda Jeffreys Godfrey.

Q. Mrs. Godfrey, what is your occupation?

A. I'm a L.P.N. in Memorial Hospital.

MR. CARTER: You are what?

MRS. GODFREY: A L.P.N. at Memorial Hospital.

MR. CARTER: L.P.N.

Q. Were you working during the morning hours of August the 3rd of this year?

A. Yes, sir.

Q. Were you there when Mr. Boswell arrived?

A. Yes, sir.

Q. How did he arrive?

A. By the Danville Life Saving Crew.

Q. Approximately what time?

A. It was in the early morning, I'm not sure of the time.

Q. Okay, now what roll, if any, did you play in admitting him to the emergency room?

A. Well, when he came in we put him in one of the examination rooms and we started cleaning him up and. . .

MR. CARTER: Mrs. Godfrey, will you try and speak a little more distinctly and a little slower? I'm not getting a great deal of what you're saying.

MRS. GODFREY: Okay.

A. We put him in the examination room and we started cleaning the blood off of him and got his vital signs.

MR. CARTER: You brought him in the examination room and did what?

A. We started cleaning the blood off of him and got his vital signs.

Q. Were his vital signs all right?

A. Yes, sir.

Q. What did you do then?

A. After we finished doing that?

Q. Yes.

A. The doctor came in and ordered x-rays on him.

Q. Where was the blood on him when you. . .

A. On his face.

Q. On his face?

A. Uh-huh.

Q. All right, and would you describe the condition of his face?

A. His face was swollen and it was discolored, and he had dried-up blood all over it, and his eyes were swollen shut.

Q. His eyes were swollen shut?

A. Um-huh.

Q. And his face you said was swollen and he had what?

A. Dried-up blood.

Q. Where was the dried-up blood?

A. It was all over his face.

Q. Was he able to respond?

A. He mumbled, you know, he was drowsy and he mumbled to us. When we spoke his name he, you know, mumbled something. I couldn't understand him.

Q. You couldn't distinguish what he had to say?

A. Huh-uh.

Q. Do you know whether or not there were. . .You say his face was swollen?

A. Yes, sir.

Q. Could you describe anything else about his face?

A. It was discolored, it was purple and blue, you know, bruised looking.

Q. Where were the bruises?

A. All over his face.

Q. All over his face?

A. Uh-huh.

Q. Do you know whether or not there were any bruises in his head or the back of his head?

A. No. It was just all over the front of his face is all I. . .

Q. All right, answer Mr. Carter's questions.

CROSS EXAMINATION

By Mr. Carter:

Q. No injuries about the skull itself?

A. No. Everything was just bruised looking.

Q. I think that's all.

. . . . . .

JAMES SEAMSTER, the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court, please?

A. James Seamster.

Q. Mr. Seamster, Mr. Boswell was your father-in-law. Is that correct?

A. Yes.

Q. Could you tell the Court when you first heard about the injuries or the difficulty he was in?

A. My wife called me at work around 1:30 or 2:00 o'clock.

Q. What day?

A. It was on a Tuesday. I believe it was August the 2nd.

Q. August the 2nd. All right, and your wife called you and you went home. Is that right?

A. Yes, sir.

Q. What happened then?

A. She told me that. . .

Q. Don't tell us what she said, just tell us what. . .

A. What happened?

Q. What you did, yeah.

A. Well, I went home and got her, we went to Mrs. Cook's house.

Q. Mrs. Cook. Now who is Mrs. Cook?

A. This was the lady that had called my wife and said Mr. Boswell was there.

Q. Okay, so you went to Mrs. Cook's house. Did you know Mrs. Cook?

A. Yes.

Q. How did you know her?

A. Mr. Boswell had been living there seven or eight years.

Q. I see. All right, and what did you do after you went and got your wife?

A. I took her to Mrs. Cook's.

Q. And you went with her?

A. Yes.

Q. Did anybody else go?

A. No.

Q. All right, and what happened?

A. We went in and found Mr. Boswell there.

Q. Where was he?

A. In the bedroom in the bed. He had a sheet up to about his neck and his face was real battered blue and just about twice as big as it normally would be, and the right side of his face was, it seemed like something had hit him on the right side of the face; and I asked Mr. Boswell what had happened. . .

MR. CARTER: If your Honor, please. . .

Q. Well, don't tell us what he said. You can't tell us what he said. And then what happened? Was your wife with you? Was your wife with you?

A. Yes.

Q. Was she with you when you went in and saw Mr. Boswell?

A. Yes.

Q. All right, what was her reaction?

A. She got upset and nearly fainted when she seen her father.

Q. And what did she do then?

A. I sort of helped her back to the den and saw that she kind of got set down there with Ann Cook and I went back to the bedroom.

Q. You went back to the bedroom?

A. And spoke to Mr. Boswell.

Q. And then what did you-all do?

A. Then we left and. . .

Q. This was about what time would you say on Tuesday, August the 2nd?

A. About what time of day on Tuesday?

Q. Yeah, uh-huh.

A. I'd say it was around 2:00 or 2:30. It was in the afternoon, 1:30, 2:00, somewhere like that.

Q. All right.

A. It was after lunch.

Q. All right, and then what did you-all do then?

A. We went back to the car and she. . .I told her I thought her father needed medical attention, and she said, well, she. . .

Q. Don't tell us what she said.

A. Okay.

Q. And did you talk to Mrs. Cook also?

A. Yes, sir.

Q. About the medical attention?

A. Yes, sir.

Q. All right, now go ahead and tell us what happened after

that.

A. Then I went and called his sister, Mr. Boswell's sister. I went to her, I didn't call her, I went to where his sister was at. She works at the hospital or at the Stratford. . .and discussed it with her, and we decided to call his brother and we did. And we called him on the phone and he came back over to my house, and then we met there and we called by phone back, and he and I was going back to get Mr. Boswell, and Mrs. Cook advised us that he was up drinking orange juice or something and he really wasn't as bad as we thought, and that he would be all right. And then she said that if we would, bring him some bed clothes. And a little while later we -- I guess it must have been close to 5:00 or supper time by then, and we -- did take these clothes. And by her telling us this we decided we would wait, maybe he would be better. And so she advised us not to come, but we went ahead then anyway. My wife, and my daughter and I went back down there and they went back in and took the bed clothes and I stayed outside. And then they came back out and my daughter was a little upset at seeing her grandfather, and so we left there and went

home.

Q. What happened after that?

A. You mean that night or. . .

Q. When was the next time you. . .

A. Contacted her? It was the next morning Mrs. Cook called me at home.

Q. About what time was that?

A. 5:30 I'd say. I was asleep. It was in the night.

Q. All right, and what was the result. . .

A. She said that she wanted me to come get Mr. Boswell, she had slept with him and he just wasn't responding to her treatment, and that she just wanted me to come and get him.

Q. What did you do?

A. I called the Life Saving Crew.

Q. And what happened after that?

A. I called his brother and told him what I had done, and then I went in I think and washed up and went down to Ann Cook's.

Q. You went down to Ann Cook's?

A. Yes.

Q. Did you get there before or after the Life Saving Crew arrived?

A. After. They was there putting him in the Life Saving Crew when I got there, they was putting him in the ambulance.

Q. What did you do then?

A. She came and told me she had some things that belonged to Mr. Boswell, his car keys, his billfold, his glasses and she advised me that he had some money in his billfold. And the boys, I turned and told the two young boys I'd meet them at the hospital. And then she went in the house, said, "Wait a minute," and then come back again and said that. . .She said, "I also want you to know that I put all of his clothes, all his clothes in his car." And so she give me the keys, you know, the keys and the billfold.

Q. And what did you do then?

A. I went to the hospital.

Q. And were you there when he arrived or after he arrived?

A. I think I was there after. It was at sort of the same time, you know, that they pulled in and was unloading him because I rode right on with them just a little bit, but they got there and then I came in right behind them.

Q. Okay, and he was admitted that day?

A. Yes, sir.

Q. What day was that?

A. Now this was on Wednesday, it would have been the 3rd I suppose.

Q. August the 3rd?

A. Yes, sir.

Q. All right, answer Mr. Carter's questions if you will.

CROSS EXAMINATION

By Mr. Carter:

Q. Mr. Seamster, do you have a very good recollection of the events?

A. Do I have a very good recollection?

Q. Yes, sir.

A. I think I have a sound mind, pretty much so. I forget some things.

Q. The reason I asked the question was your testimony varies so much from what it did in the lower court.

MR. FULLER: Now if your Honor, please, let Mr. Carter point out to him where it varies and show him where it varies rather than testifying.

MR. CARTER: I certainly am.

Q. Didn't you testify in the lower court that your daughter

did not go to the Cook home?

A. I was reminded when I got home. I was discussing it with my wife and she said Betsy did go with us. And I didn't at that time recall, no, sir.

Q. And I believe you said that your daughter didn't go at all.

A. No, my daughter went.

Q. In your testimony in the lower court?

A. No, I did say that I didn't think she was with us.

Q. And then you said that the reason that you went back over there was to carry some bed clothes. Is that correct?

A. Yes, sir.

Q. You said you and your wife went?

A. Yes, sir.

Q. You denied that your daughter was along.

A. No, my wife and I did go and my daughter was with me.

Q. Downstairs you denied that she was with you?

A. I think I said she wasn't but I didn't recall her being.

Q. And then you say that Mrs. Cook met you at the curb-stone?

A. She came to the back door.

Q. And received these things?

A. Right.

Q. Today you say your wife and daughter went in and carried them?

A. They did go in, yes, sir.

Q. So your recollection is not too good of these matters?

A. Thank you, sir.

Q. You've had to have it refreshed by members of the family.

MR. CARTER: I think that's all, if your Honor, please.

. . . . . .

DETECTIVE J. W. MARTIN, JR., the next witness called on behalf of the Commonwealth, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name to the Court, please?

A. Detective J. W. Martin, Jr., Danville Police Department.

Q. Mr. Martin, did you investigate this charge?

A. Yes, sir.

Q. When was it brought to your attention?

A. On August 3rd, 1977.

Q. All right, and did you have an occasion to talk to the defendant?

A. Yes, sir.

Q. On what day?

A. On the 3rd of August.

Q. All right.

A. 1977.

Q. On August the 3rd, and where was he when you talked to him?

A. 338 Westhampton Avenue.

Q. I believe the 3rd of August was on a Wednesday. Is that correct?

A. Yes, sir.

Q. And this place that you talked to him, is that where he lived?

A. No, sir, that's the residence of Mrs. Ann Cook, his mother.

Q. I see. All right, tell us about your conversation with him, what, if anything, you told him before you talked to him and what, if anything, he said.

A. On this date we went to 338 Westhampton, and our conversation started out with Mrs. Cook, and during the conversation the defendant stated he would like to tell us what happened. And before -- we told him before -- he told us anything we would like to advise him of his

rights. We advised him orally of his rights. He stated that he understood them. We went over them twice with him, and then he told us what happened.

Q. All right, did he tell you orally?

A. Yes, sir.

Q. And did you later reduce it to writing?

A. Yes, sir.

Q. All right, tell us exactly what he said.

A. Mr. Cook stated that on Monday afternoon he went to his mother's home to pick up some clothes and Luther Boswell was there drunk; his mother wanted the keys and Luther would not give them to her; Luther has a set of keys to the house and has had them for seven years; Mrs. Cook dates Luther Boswell; when Vern asked him for the keys he stated that they got into an argument and Luther tried to hit him; Vern stated that he lost his temper severely and struck Luther five times; at this point his mother interrupted and said that he only struck him four times.

Q. All right, when you say, "Vern," who is that?

A. Vern Cook, the defendant.

Q. All right. So what, if anything, else did he say?

A. He said that after he struck Luther he noticed that

his face swelled up severely and that he became unconscious and was snoring as if he was asleep. Vern stated that he left and came back later that night and Luther was complaining of a headache, and he tried to get him to go to the emergency room but he would not. He said he was still drinking heavily. And we asked Vern to come to the police department with us, we would like to take a statement and type it up. He went and made a phone call, came back and stated that he had talked to his father-in-law and he wasn't going to make a statement. He started talking again and Detective Goss advised him of his rights and he stated he understood and did not wish to make a statement at this time. But he did say that he knew that he had lost his temper and when he struck this man he knew he had done wrong.

Q. All right, that was on August the 3rd?

A. Yes, sir.

Q. And these keys that you are referring to, what kind of keys were they?

A. They were supposedly keys to the house, Mrs. Cook's house, Mrs. Ann Cook's house.

Q. So the situation developed over the keys according to

what the boy told you?

A. Yes, sir.

Q. All right, answer Mr. Carter's questions.

CROSS EXAMINATION

By Mr. Carter:

Q. Mr. Martin, he said he was drinking heavily?

A. Yes, sir.

Q. And that shortly after this he went to sleep but indicated that he was in a condition of a high degree of intoxication?

A. Are you referring to when he said he struck him?

Q. No, I'm talking about after he had struck him. Of course, on both occasions I gather.

A. He stated that his face swelled up and he became unconscious, and was snoring as if he was asleep.

Q. Did he say he became unconscious or he went to sleep? Do you recall?

A. The only thing I recall, Mr. Carter, was that he was snoring as if he was asleep and that he became unconscious.

Q. Well, when one is sleeping one is unconscious is he not?

A. Sir?

Q. I say, when one is asleep one is unconscious?

A. Yes, sir.

Q. Did he state to you that this man had grabbed him by the shirt and torn his shirt?

A. I didn't remember it until it was brought out downstairs that Vern did state that he grabbed his shirt. I don't recall anything about the shirt being torn, but I do recall Vern stating that he grabbed his shirt and he tried to hit him.

Q. Did you know Luther Boswell?

A. No, sir, I wouldn't have known the man if he had walked up and spoke to me.

Q. I think that's all.

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Mr. Martin, let me ask you one more question. When he was telling you what happened, did he tell you where this took place?

A. It was in a room. He either told us or his mother told us. . .

Q. I mean I don't mean exactly the place, but where was the location?

A. This house? 338 Westhampton.

Q. All right, and that's in the City of Danville?

A. Yes, sir.

Q. Okay, that's all.

. . . . . .

MR. FULLER: If your Honor, please, that's the evidence for the Commonwealth.

JUDGE INGRAM: All right, sir.

MR. CARTER: If your Honor, please, could I have just a moment or two before we proceed?

JUDGE INGRAM: Yes, sir, why don't we take about a five minute recess.

. . . . . .

Following the recess, the Court, all counsel and the defendant returned to the courtroom, where the proceedings continued as follows:

JUDGE INGRAM: All right, are you ready to proceed, gentlemen?

MR. CARTER: If your Honor, please, I would like to move the Court at this stage of the trial to strike the prosecution's evidence in this case. I submit to the Court that at this stage of the trial the cause of death has not been shown beyond a reasonable doubt, that there are several different causations that may have brought about this man's death,

but this is an element of the case that must be proved beyond a reasonable doubt as any other factual issue in the case, and if it is as probable that the death resulted from some other traumas or natural cause, as it is that it occurred as a result of the alleged assault on the decedent, that this fails to carry the burden of proof.

JUDGE INGRAM: All right, sir. Mr. Fuller?

MR. FULLER: Well, if your Honor, please, I think that motion would fall for two reasons. One is, of course, Mr. Carter's witnesses have been taken out of order, and at this particular point the Court must consider the evidence in the most favorable light to the Commonwealth whether or not we have made out a prima facie case. And certainly with Dr. Oxley's testimony we made out a prima facie case. And as a matter of fact, from a factual point of view the Court is its own judge of the credibility of the witnesses or which theory they want to believe, and the Common-

wealth has proved a theory by its medical examiner as to the cause of death.

JUDGE INGRAM: All right, sir. The Court is of the opinion that the Commonwealth has made out a prima facie case, and the motion, accordingly, will be overruled, Mr. Carter.

MR. CARTER: We respectfully except to his Honor's ruling.

JUDGE INGRAM: Yes, sir. The objection will be noted for the record.

. . . . . .

EMMA HALL, the next witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. State your name for us, please, ma'am.

A. Emma Hall.

Q. Where do you live, Mrs. Hall?

A. Eden, North Carolina.

Q. Are you acquainted with Mrs. Ann Cook?

A. Yes, sir.

Q. Were you acquainted with Mr. Luther Boswell?

A. Yes, sir.

Q. Did you have occasion to be at the Cook home on August the 1st of this year?

A. Yes, sir.

Q. Will you tell his Honor how you happened to be there, the circumstances under which you happened to be there and about what time it was?

A. Well, me and Ann Cook had went to a friend of ours husband had died, and we had went to the funeral, and when we left from up there we come back to her house.

Q. I believe this is on the corner of Westhampton and Stratford Place?

A. That's right. And when we left the funeral Ann wanted me to go back home with her, and we went by the funeral home and picked my car up and then we went on to her house. And she wanted us to go out and eat supper, but we didn't. We drank some coffee and set and talked, and I told her I had to go home, but she didn't want me to leave but I told her I had to. And we went on outside and Ann was standing on the porch and I was on the sidewalk, and Luther drove up, and I told her 'cause she was trying to get in touch with the lawyer to get a paper fixed to keep him away from there, and she had also tried to get a

man to come to change the lock. . .

MR. FULLER: If your Honor, please, I. . .

Q. Just tell us what happened.

MR. FULLER: This is strictly hearsay.

JUDGE INGRAM: All right, sir, the objection of the Commonwealth will be sustained.

A. Well, anyway, I told her, I said, "There's Luther right now." And she said, "Are you sure?" and I said, "He's coming up the bank now." So he come on up and Ann told him, said, "Luther, don't you come up here, don't come in here," said, "I done told you to stay away."

MR. FULLER: Well, of course, if your Honor, please, this. . .

JUDGE INGRAM: All right, sir.

Q. What sort of shape was he in?

A. Well, he was drinking, and he was in old bermuda shorts and bedroom shoes. He was right slouchy looking and real hateful. He was really, real just violent language.

Q. What do you mean he was hateful?

A. When Ann, you know, when Ann spoke to him, the way he acted, he was just. . .You would have had to have

seen him to know what I meant. . .I mean. He spoke . . .When she was talking to him I couldn't understand what he was saying. He was mumbling kindly. I couldn't understand him. She told him to get in that car and leave, and she meant it.

Q. Did he?

A. No, sir.

Q. What did he do?

A. Well, whenever I left, I told Ann I was going and he just went on up the steps and was going right on in the house, just pushing right on in.

MR. CARTER: You may examine, Mr. Fuller.

Cross Examination

By Mr. Fuller:

Q. Well, Mrs. Hall, you and Mrs. Cook are good friends are you not?

A. Yes, we work together.

Q. You work in the mill together?

A. Yes, sir.

Q. And it wasn't anything unusual about him being down there was it?

A. Well, she had been trying to make him stay away for a long time. I heard her. . .

Q. Well, what I'm saying is he had been living down there for a long time too hadn't he?

A. Well, yes, sir, he had. That's what they said now. I don't know.

Q. Okay.

A. Because he's never been. . .He'd just come in when I would be there, but him living there, I don't know that. I mean I couldn't set here and say that he was.

Q. But you thought he was didn't you?

A. Well, I know he come in and went out, but I couldn't set here and swear that I knowed he was living there.

Q. Yeah. All right, well, if he wasn't living there or staying down there all the time, she wouldn't have had any reason for not wanting him to come down there and changing the locks would she?

A. She didn't want him there. I know that.

Q. I know, but that was because he had been there for a long time hadn't he? All right, now when he came up, drove up that day he was very nice to you wasn't he?

A. Yes, sir, he spoke real nice to me, but he sure didn't her.

Q. Well, he told her that she sounded like she was taking leave of her senses didn't he?

A. That was because she said something to him about him coming down there. She told him that he had no business coming down there picking up her paper ever morning because when she went to her mother's, she told her son to come down and get her paper.

Q. All he told her was, "You sound like you've taken. . .

A. Taken leave of your mind, but he was just real hateful.

Q. But he was very nice to you?

A. He spoke real nice to me. Well, he always did, because I've knowed him longer, a lot longer than I knowed Ann. I worked for him.

Q. And he was nice to you?

A. He spoke real nice to me.

Q. All right, that's all.

. . . . . .

ANN COOK, the next witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination

By Mr. Carter:

Q. You are Mrs. Ann Cook. Is that correct?

A. I am.

Q. You live on Westhampton Avenue at the intersection of Stratford Place?

A. I do.

Q. And this young man sitting beside me here is your son. Is that correct?

A. He is.

Q. All right, I want you to tell his Honor in your own words what took place and led up to the altercation between Vern and Luther Boswell on the 1st day of August, 1977.

A. Luther had been a long time acquaintance of mine, and on this particular day he came to my house around 6:00 o'clock in the afternoon; and for some time I had asked him not to come, that I did not want to see him. He was aware of this but he insisted on coming anyway. At this particular time I was standing on the front of my home talking to a lady who I had spent several hours with that afternoon. I had been to a funeral.

Q. Was that Mrs. Hall?

A. Mrs. Hall.

Q. All right.

A. And so as I was standing at the front of the house he spoke to her and. . .

Q. Who is "he"?

A. Luther spoke to her and came up the steps and kind of

pushed me away, and opened the door and went on in. And he went to the kitchen.

Q. What was his condition?

A. He was drinking, he was intoxicated but in the usual manner.

Q. You mean this was not an unusual condition for him?

A. No. He was in his usual manner. And after Emma left I went on inside, and we began. . .

Q. Had you ever asked this man not to come to your house?

A. I had on any number of occasions, and positively for two years I had been trying to get him to stay away from my home and he was aware of this. And we began to get in a heated argument.

Q. Let me ask you, would he come to your house on occasions other than when you were at home?

A. Absolutely. He used my house for any reason that he wanted to use it at any time that he wanted to use it. And one. . .

Q. How about your automobile?

A. He used my automobile at any time that he wanted to use it.

Q. Well, now was this with your permission?

A. With it or without it.

Q. Well, did he ever use the automobile without your permission?

A. Absolutely.

Q. Did he have a key to your automobile?

A. Absolutely.

Q. Where would he pick the automobile up?

A. Where I parked it while I was at work, the Traveler's Service Station.

Q. All right, on this occasion then you said he went on into the house. Did you forbid him to go in?

A. I absolutely did.

Q. He went on in anyhow?

A. Right.

Q. What happened then?

A. He went to the kitchen and I went on in the den, and he wanted to know what in the. . .was wrong with me; and I told him there was nothing wrong with me, that I didn't want to see him. And he proceeded to get a glass of water, and began telling me where he had been that afternoon. I think he said that he had been out in the sun and talking to some friends. And he began right away, wanted to know where I had been, using profanity, where in the hell I had been the

whole weekend. I had been visiting my mother and I had spent two nights in Roxboro. And he wanted to get real arrogant and ugly about my visit and where I had been. He accused me of other things.

Q. When did Vern arrive on the scene?

A. Well, I was sitting in the den, Luther was sitting on one side of the room and I was sitting on the other, and we were in quite a hassle with words when Vern came in.

Q. You mean there was an argument going on between the two of you?

A. Right. And. . .

Q. Where was Vern living at that time?

A . Vern was living on Watson Street.

Q. I believe he was married and had his own house?

A. Right.

Q. How long had he been married then?

A. He got married June 19th.

Q. And this was August 1st?

A. Right.

Q. About six weeks, a little less?

A. And Vern had come by from work to get some things that I had laundered for them, and of course I hadn't

seen him since Friday, and when he came to the door he said, "Well, what's wrong?" And I was crying at my usual. . .I was crying and really upset, and. . .

Q. Because of what?

A. Because of this argument that Luther and I were having. He was accusing me of things that I hadn't done, that I didn't intend to do and didn't want to do. And so I was crying and Vern said, "Well, what is wrong?" and I said, "Mother. . .I mean I said, "Vern," I said, "this man is worrying me to death." I said, "I only want my house key from him. I asked him not to come back here." He said, "How many times have you told him?" I said, "I have told him lots of times. He's aware of it, he knows this." He said, "Well, does he have the key now?" I said, "He didn't use the key today because the door was open, but he came in anyway." And so Vern said to him, Vern sat there on the edge of the chair and he said, "Luther," he said. . .

Q. Now you say, "On the edge of the chair."

MR. CARTER: All right, if your Honor, please, let me introduce first these pictures as defendant's exhibits.

COURT DEPUTY CLERK: They will be four and

five.

JUDGE INGRAM: All right, are there any objections to the photographs of the living room, Mr. Fuller?

MR. FULLER: No, sir.

JUDGE INGRAM: All right, they will be admitted as defendant's exhibits three, four and five.

MR. CARTER: And I would submit these two photographs of the bedroom as defendant's. . .

JUDGE INGRAM: All right, is there any objection to these, Mr. Fuller? All right, these will be admitted as defendant's exhibits six and seven.

Q. Now, Mrs. Cook, you started to testify as to Vern's arrival and where he sat. I hand you now what is designated as defendant's exhibit number three.

MR. CARTER: If your Honor, please, would it be permissible for Mrs. Cook to come over here and point out to his Honor the various locations of the furniture and what have you?

JUDGE INGRAM: Well, if she comes to this microphone so it will be picked up.

Q. Mrs. Cook, if you will stand here so that this microphone will pick up your conversation, or your testimony, and point out to his Honor, if you will, where Vern sat down.

A. This is the entrance from the living room to the den, and this is the door. . .

Q. This is the den?

A. This is the den.

Q. I see. All right.

A. This is not the living room. This is the den. This is the door in which my son entered here.

Q. Pointing to the left side of the picture?

A. Right. Luther was seated here.

Q. Now you are pointing there to the couch?

A. Right.

Q. Right.

A. He was seated there, and I was seated over here.

Q. This is the chair in the very lower. . .

A. Um-huh.

Q. . . .right hand corner of the photograph?

A. Right. And right by this pole lamp there is a straight chair that just has a cushion in it. It's just a straight chair that I use all over, everywhere. Anyway,

Vern sat here on the edge of this chair and talked with Luther and Luther was sitting there. This is the chair right there.

Q. So you were sitting in the chair shown here in the lower right corner of the picture?

A. I was.

Q. Mr. Boswell was sitting on the sofa there?

A. Right.

Q. And Vern was sitting in the straight back chair, which would be at the extreme left of the picture?

A. Yes.

Q. All right, if you will, go back to the witness stand.

A. I would like to say that that is a matter of maybe five feet in that area there.

Q. You mean five feet from the chair in which Vern was sitting. . .

A. Uh-huh.

Q. . . .to the couch?

A. Couch.

Q. All right, if you will, just go right back up to the stand. Recount to us what took place.

A. Well, Vern sat on the edge of this chair and he was in a very good frame of mind, and he said to Luther,

he said, "Luther, why are you here bothering my mother? I thought we had been through this many times before that you would not return to this house."

Q. Had Vern ever asked him before to stay away?

A. Yes.

Q. Over what period of time, how many occasions, or can you give us some idea of that?

A. Well, I would say he had asked him on two occasions about a month and a half prior to the wedding he asked him not to come back there unless he was announced or invited or what have you, and they agreed. Luther was in perfect harmony with him at that time, but then he had asked him before not to come back and he did come.

Q. What do you mean, he had asked him before?

A. Well, he had asked him on another occasion that he and I had had lots of words, and I did not want him to come back and Vern asked him not to come back, and he told Vern that he had more right there than he had.

Q. At your house?

A. At my house.

Q. What sort of disposition did Mr. Boswell have, particularly

when he was drinking?

A. Well, Luther was a very harsh and abrupt person. Anbody that knows him knew that. There were times that he was very arrogant and very ugly in the presence of not only my family, my friend; and he was a very possessive type of person, and a very violent type person.

Q. That's what I wanted to know. Tell us about. . . You've described him as a very violent sort of person.

A. Well, I've had quite a few knocks from him myself.

MR. FULLER: If your Honor, please, I can't see where that's relevant, whether he's knocked her or not.

Q. Was Vern aware of the fact that he had physically abused you?

A. No.

Q. He was not?

A. No.

Q. Was Vern aware of the fact that he had been convicted of a homicide in Roanoke County?

A. Yes.

MR. FULLER: If your Honor, please, I don't think that this type of testimony is proper

coming from her. It might be from the defendant, but not from her. She's not on trial today, and. . .

MR. CARTER: I just simply asked her if Vern was aware of the fact that he had been convicted of a homicide.

JUDGE INGRAM: I think that would be a question that the defendant would need to be asked, Mr. Carter, rather than. . .

MR. CARTER: I was just going to introduce this court order from that court, but I'll do it when I put Vern on the stand.

Q. All right, now tell us what occurred. You said that Vern had told him, that he repeatedly told him to leave you alone?

A. Right. Well, Luther got real angry with Vern right then and he said, "Vern," he said, "I been running from trouble for eight years." He got on his feet then and he says, "I'm not taking no smart talk from you anymore or any other damn somebody."

Q. What did he mean he had been running from trouble for eight years?

A. Well, Luther had been on probation for the murder of

some woman in Roanoke, and that was his statement. He said. . .

Q. Had he just been released from probation?

A. Yes.

Q. All right. Okay.

A. And he says, "I'm not running from you or from anybody," and says, "You have no right to tell me what to do. Why are you here?" And Vern says, "Well, I only want to talk to you, Luther." He says, "I don't want any trouble with you and I'm not going to have any trouble with you." And Luther gets on his feet and he was a man that weighed two. . .He was six one and weighed two forty. And I think he frightened Vern to tell you the truth.

MR. FULLER: If your Honor, please, we're not interested in what she thinks.

JUDGE INGRAM: Sustained.

Q. All right, go ahead and tell us what happened.

A. Well, anyway, he grabbed Vern in the collar and he went to slap him right in the face, and Vern ducked, and he hit him but he did not hit him in the face. And he jerked him in the collar.

Q. Now who is he?

A. Luther jerked Vern right in the collar of his shirt. He ripped the whole facing plus a button flipped across the room. And I said, "Well, there's no need for this." And about that time Vern hit him and he hit him too. Luther hit Vern and Vern hit him back. And, of course, I think that he may have had. . .Well, he pushed Vern. At the time that Vern gave him the second lick again he struck at Vern and just gave him just a flare of a lick. Vern gave him three licks with his fist. The third lick set him on the couch. I mean he kind of just, he tripped kind of over a beanbag that was close there, and he sat back on the couch.

Q. All right, and what happened then?

A. And immediately his face swelled. Vern went and got a pitcher of water and I got a bag of ice, and he said, "Well, Vern, I don't know what happened to me." He said, "You didn't hit me that hard." I bet he said it two or three times.

Q. All right, what happened then?

A. And so I got the ice water and I ran and got a bath cloth, and he put it on his face and I also made an ice bag. And he sat there for a few minutes and he

said, "I've had a terrible headache for three weeks."

MR. FULLER: If your Honor, please, this is all hearsay.

JUDGE INGRAM: Yes, sir, it is. Are you objecting?

MR. FULLER: Yes, sir, I sure am.

JUDGE INGRAM: All right, the Court is going to sustain your objection.

Q. All right, what happened then?

A. Well, after then Vern said to him, said, "Luther, are you hurt?" And he said, "No."

MR. FULLER: If your Honor, please. . .

JUDGE INGRAM: Don't tell us what. . .

Q. Don't tell us what they said. Just tell us what happened.

A. Well, . . .

Q. This was about what time now, in the afternoon or the evening?

A. I would say this was around 6:30 or quarter to 7:00.

Q. All right.

A. And Luther said, "I will be all. . .

Q. Don't tell us what Luther said.

A. All right.

Q. Just go ahead and just tell us what happened, how he appeared, how he reacted and so forth.

A. Anyway, I got the bath cloth, and the ice bag and carried it to him, and his face was beginning to swell. He got up and went into the bathroom and looked at his face, and he commented about his face. He came back and sat on the couch, and Vern said, "Are you hurt?" Luther said, "No."

Q. Don't tell us what he said.

A. Okay. And. . .

Q. How long did Vern stay there?

A. He stayed there for thirty minutes.

Q. And he was helping you with Mr. Boswell, trying to get him straightened out. . .

A. Yes.

Q. . . .and get him cold compresses on his face?

A. And he said, Luther said that. . .

MR. FULLER: If your Honor, please, I don't know how many times she's got to be told to stop testifying to hearsay.

JUDGE INGRAM: All right now, Mrs. Cook, you may testify as to what you saw, you observed, what you know, but don't tell us

what was said by someone else.

MRS. COOK: All right.

Q. Did he loose consciousness at any time?

A. No.

Q. Did he respond to what you said to him?

A. Absolutely.

Q. Was he capable of walking?

A. Sure. He walked anywhere he wanted to.

Q. Did he stay there that evening?

A. Yes.

Q. Did he have any problems about. . .Did he want a drink?

A. Well, I said, "Well, I don't think we have anything to drink."

Q. Did he ask for something to drink?

A. Absolutely.

Q. Did you get him something?

A. Yes.

Q. Did he have some whiskey there in the house?

A. In the house and in the car.

Q. How much whiskey was in the car?

A. Possibly less, about that much in a fifth bottle. A little less than a half fifth.

Q. So you got that for him?

A. Yes.

Q. And he also had some whiskey in the house?

A. Yes.

Q. And how did he rest that evening?

A. Fine.

Q. Now did you make any effort to get in touch with his relatives on this particular evening of August the 1st?

A. Yes.

Q. What did you do?

A. I called Jean. I called her. . .

Q. Who is Jean?

A. I called Mrs. Seamster, Jean Seamster, his daughter.

Q. The daughter of Mr. Boswell?

A. Right. And she was not at home. I spoke with her older daughter, Kim, and Kim said, "What. . .

MR. FULLER: Well, if your Honor, please. . .

Q. Don't tell us what Kim said.

A. Oh, okay.

Q. You just tell us what message, if any, you imparted to Kim for her mother.

A. I told Kim that Luther and Vern had had a fight at my house and I wanted Jean and James to come over.

Q. All right, and what happened? That was that evening.

Did you hear anything from the Seamsters that evening?

A. No.

Q. And when did you first hear from the Seamsters?

A. The next morning, I would say around 9:00 o'clock.

Q. You received a call from whom?

A. Mrs. Seamster.

Q. Did they come to the house to see Mr. Boswell?

A. Yes.

Q. And how long were they there?

A. Oh, I would say thirty minutes.

Q. And after that they left. Did they come back at anytime that day?

A. They came back on a second occasion several hours later in the afternoon bringing their daughter with them.

Q. I believe she's. . .

A. Betsy Clay.

Q. I believe she is a student nurse?

A . Yes.

Q. And did you at any time urge them not to call a physician in or urge them not to remove him to the hospital?

A. Well, Luther insisted that he would be all right, and that was why I kept him in my home overnight.

Q. He didn't want to go?

A. He didn't want to go to the hospital and he didn't want to go. . .do anything, he just wanted to be there.

Q. Now what were his activities during this period of time from the late afternoon of August the 1st until the morning of August the 3rd? Just describe to us how physically he reacted to things and. . .

A. Well, he motivated very well. He went anywhere he wanted to in the house. He went to the bathroom, he went to the kitchen and got his own whiskey, and he drank milk, and orange juice and water during that time, and he ate chicken noodle soup. That was the only thing he asked for, on Tuesday night.

Q. Tuesday night.

A. He asked me if I had. . .He asked me what kind of soup I had, and he ate chicken noodle soup. I told him I had tomato soup and chicken noodle soup, and he said he preferred chicken noodle.

Q. And was he responsive to the conversation. . .

A. Absolutely.

Q. . . .between you and. . .

A. At the table, he ate at the table.

Q. All right, now what happened the morning of the 3rd of August?

A. Well, when. . .

Q. The truth of the matter is, it might be well if you would come over here next to this microphone, and take a look at exhibits six and seven, and advise his Honor what these two pictures represent.

A. Well, this is my bedroom.

Q. That's defense exhibit number six.

A. This is my. . .

Q. And that represents your bedroom?

A. This is my bedroom. This a rather high bed, but that's the way it looks.

Q. Now where was Mr. Boswell?

A. He was in this bed.

Q. In that bed indicated on the left hand side of the lower left corner of defendant's exhibit number six. Now you'd better put it up here so his Honor can see it. He's the man we want to observe these. You say he was in this bed right here?

A. Right. Right.

Q. Now this is defendant's exhibit number seven, and I think that's substantially the same scene. Point out to his Honor, if you will, where the bed is that Mr. Boswell was occupying.

A. This is the bed.

Q. All right. Okay, what happened that morning?

A. Well, at the end of this room there is a hall, and I was in the den and I heard a. . .

Q. Do you mean the opposite from the side of the room on which the bed is located?

A. No.

Q. You are pointing to the lower portion of the photograph designated as defendant's exhibit number seven, and you're pointing to the lower portion of that photograph?

A. Yes. Right.

Q. The hallway is somewhere. . .

A. There's a hallway there.

Q. All right.

A. Well, he called me.

Q. That's Luther Boswell?

A. Right. He called me.

Q. This was about what time?

A. I think it was around 4:30.

Q. In the morning?

A. In the morning.

Q. All right.

A. And he was trying to reach the light.

Q. What light?

A. The light by the bed. This lamp.

Q. This lamp right here?

A. He was trying to reach that.

Q. I see.

A. There were no lights on, and I immediately went to the hall and cut the hall light on. And I asked him what he was doing, and he said he was going to the bathroom. And I said, "Well, let me help you." And he said, "I don't need any help," and about that time he fell out in the floor.

Q. What happened? In what position was he when you first came there to observe him?

A. Let me see. He was sitting up.

Q. He was sitting up?

A. He was sitting up on the edge of the bed.

Q. Which edge?

A. On this edge of the bed.

Q. All right.

A. Reaching for this light, and he fell and hit the corner of the baby bed and floor very hard.

Q. Whereabouts on the corner?

A. Right here.

Q. Right here?

A. This bed jammed against the wall.

JUDGE INGRAM: Where?

MRS. COOK: Right here. He hit that part of the baby bed, and it jammed the bed up. . . the baby bed, and it jammed the bed up. . .

Q. Did you see what part of his anatomy came in contact with the baby bed?

A. Well, it nicked his ear, but the. . .

Q. What do you mean, nicked his ear?

A. There's a metal piece that runs right there on the edge of that baby bed.

Q . Right there?

A. Yes, sir. That he struck his head on, on that metal piece, plus the bed plus he hit a hard lick on the floor.

Q. You say he nicked his ear. Now what happened?

A. Well, the ear bled from it.

Q. All right, and then what happened? You said he fell on the floor. How did he fall on the floor?

A. Well, he was facing this window when he fell. He was facing that window and he fell over on his right side, plus that he hit his head very hard on the floor, flat on the floor.

Q. What is the composition of that floor?

A. It's a hardwood floor. It was no carpet.

Q. All right, you may take the stand again. All right, what happened then, Mrs. Cook, after this fall?

A. After then I said to him, I said, "Lord, have mercy, what caused you to fall?" And he said, "I don't know. . .

JUDGE INGRAM: No, don't tell us what he said.

Q. Don't tell us what he said, Mrs. Cook. Just tell us how he reacted after that.

A. Anyway. . .

Q. Were you able to get him back in the bed?

A. No, I could not.

Q. You said he weighed about. . .

A. He said just to let him. . .

MR. FULLER: If your Honor, please, she's been told repeatedly to stop saying what he said, and she keeps on doing it.

A. Anyway, I got two pillows and put under his head in that position on the floor.

JUDGE INGRAM: All right, now the Court wants to caution you, Mrs. Cook, not to

tell us what was said by anyone else during this. The evidence that you are attempting to introduce by saying what someone else says is hearsay, and that's not admissible. So I want to caution you not to tell us again what somebody else said. All right.

Q. So you put two pillows under his head at that point?

A. Yes.

Q. And did you cover him up?

A. Yes.

Q. Was he responding to you at that point? Don't tell us what he said, but I mean was he conscious of what you were doing?

A. Yes.

Q. And what did you do then?

A. I called Vern, and he said. . .

Q. No, don't tell us what Vern said. You called Vern?

A. I called Vern.

Q. And did you advise him that Mr. Boswell had had a fall?

A. Yes.

Q. And you asked for his advice?

A. I told him that I could not move him from the floor, and he said, "Well, call the Rescue Squad."

Q. So you called the Rescue Squad. Did you advise Mrs. Seamster and other relatives after that?

A. I immediately called Mr. Seamster, and he told me that he would call the Rescue Squad.

Q. Please, don't tell us what people said. You'll get Mr. Fuller's blood pressure up and he may have a cerebral hemorrhage. Okay, what happened after that?

A. I called his brother.

Q. And how long was it before the Rescue Squad arrived?

A. I would say maybe twenty minutes, fifteen or twenty minutes. A very short time.

Q. What was his condition when the Rescue Squad got there? Had there been any change in his condition that you could observe at that point?

A. No.

Q. How did he get to the stretcher?

A. He walked with my and the attendant's help to the living room.

Q. Into the living room?

A. Yes.

Q. And got upon the stretcher there?

A. Yes.

Q. And did you see him at any time after that?

A. One time after he was a patient at Memorial Hospital.

Q. I see. But he was then comatose and. . .

A. Yes.

Q. . . .and unconscious?

MR. CARTER: You may examine, Mr. Fuller.

JUDGE INGRAM: All right, Mr. Fuller, before you start -- I do this with some reservation -- but in view of the time, it might be that this would be an appropriate place to stop for lunch. Let's call all the witnesses, both those who have testified and those who have not in the courtroom before we recess. I want to instruct them.

All of the witnesses, both for the Commonwealth and for the defendant, were called into the courtroom, where the Court instructed them as follows:

JUDGE INGRAM: Ladies and gentlemen, at this time we are going to recess for lunch, and I would like to caution you not to in any way speak to anyone about anything that you may have testified to or that you are going to testify to, and I do not want you to discuss the case in any way from now until

JUDGE INGRAM: All right, we had Mrs. Cook on the stand ready to commence cross examination. Are you ready, Mr. Fuller?

MR. FULLER: Yes, sir.

JUDGE INGRAM: Mr. Carter?

MR. CARTER: Yes, sir.

JUDGE INGRAM: All right, call Mrs. Cook back to the stand.

ANN COOK, who was testifying at the time the lunch recess was declared, resumed the stand, and testified as follows:

CROSS EXAMINATION

By Mr. Fuller:

Q. Mrs. Cook, how long had Mr. Boswell been living with you?

A. He had not been living with me.

Q. He had never lived with you?

A. He had lived with me but he hadn't lived with me lately.

Q. Well, what does lately mean?

A. A year and a half.

Q. He still had his clothes at your house didn't he?

A. Some things, yes.

Q. And he still had a key to your house didn't he?

A. Yes.

Q. And he had had that key for how long?

A. I'm not sure.

Q. It had been a considerable length of time though hadn't it?

A. Yes.

Q. All right, now you say that on the day in question he came by your house about 6:00 o'clock. Is that correct? On August the 1st.

A. Yes.

Q. And he went in the house though you told him not to?

A. Yes.

Q. You had been trying to keep him away for two years you say?

A. Yes.

Q. But you said he had been living with you up until a year and a half before that.

A. Well, Luther Boswell maintained his own apartment at all times. He lived in and out of my house at his own discretion.

Q. But you didn't object to it did you?

A. At one time, no.

Q. All right, now you said on direct examination that you had been trying to keep him away for two years.

A. That's right.

Q. Why didn't you call the police?

A. I had called the police.

Q. To get him away from your house?

A. No.

Q. Well, why didn't you prefer charges against him when he used your car without your permission?

A. I guess I would say this, that I had gotten to the point that I was afraid of the man.

Q. Afraid of him?

A. Absolutely.

Q. And you just let him keep on coming there and staying there when all you had to do was call the police?

A. You don't just call the police, you have to have a warrant issued.

Q. Not if somebody is trespassing on your property, you can call them and tell them to go up there couldn't you? Why didn't you go get a warrant?

A. I did once.

Q. Did you prosecute it?

A. No.

Q. All right, he arrived on this occasion and after your friend left you say that the two of you were arguing.

Is that correct?

A. Yes.

Q. He was accusing you of running around with somebody else. Is that correct?

A. Yes.

Q. You were crying and upset when your boy came in. Is that correct?

A. Yes.

Q. You told your boy that he had been worrying you?

A. Yes.

Q. And that you wanted the key to your house?

A. Yes.

Q. And you say that your boy was sitting in a chair about five feet from where Boswell was?

A. Yes.

Q. And your boy wanted to get those keys from him didn't he?

A. He talked with him.

Q. He wanted to get the keys from Boswell?

A. Yes.

Q. And he started over towards Boswell didn't he?

A. No.

Q. Now, Mrs. Cook, you've testified before haven't you?

A. Yes.

Q. I just want to remind you you are under oath. Are you saying that your boy did not start towards Mr. Boswell?

A. Luther started toward him first.

Q. He walked over to your boy?

A. Absolutely.

Q. Rather than your boy walking towards him?

A. Yes.

Q. Are you sure of that?

A. Absolutely.

Q. Are you sure you haven't testified to the contrary?

A. No.

Q. All right, and then you say Mr. Boswell swung at your boy and he ducked?

A. Yes.

Q. And then your boy hit him three times?

A. He hit him too.

Q. But he hit him three times you say?

A. And in the meantime he had him in the collar.

Q. But he hit him three times?

A. Absolutely.

Q. You have said four on other occasions haven't you?

A. Well, I'm not sure that the fourth lick hit him.

Q. You told the officers that he hit him four times didn't you?

A. I said, "three or four."

Q. And you said that the reason he was beaten and swollen so badly is because your boy had on a big ring. Do you remember saying that?

A. I said that he was wearing the ring, but I also told you that he said he was not wearing the ring.

Q. I don't care what he said, I'm talking about what you told the officers.

A. I thought he was because he always wears it.

Q. That's what you told the officers isn't it?

A. Absolutely.

Q. And after your boy hit him the last time he fell onto the couch, his face got swollen pretty quickly thereafter didn't it?

A. Yes.

Q. And he started spitting up blood too didn't he?

A. Yes, a small amount.

Q. But it wasn't a small amount of blood later on that day, and that night he was spitting it up all over himself wasn't he? That's why you put those papers

down on the floor.

A. It was not why I put the paper on the floor.

Q. Well, why did you put the paper on the floor?

A. Because I had an ice bucket. . .I mean a bucket there to put an ice pack in that was leaking. It was a plastic bag and I put it there to protect the floor.

Q. You didn't tell the officers that you put the newspapers all around the floor because he was bleeding and spitting up strings of blood?

A. I did not.

Q. You deny that?

A. Absolutely.

Q. I'm going to ask you this statement. Do you deny you told the officers that on Monday evening you put newspapers all around on the floor away from the bed because Mr. Boswell was bleeding and spitting up strings of blood?

A. I did not put the newspaper on the floor until Tuesday morning.

Q. You deny that?

A. Absolutely.

Q. Do you deny that he was spitting up blood Monday night?

A. He was spitting up blood but he went back and forth to

the bathroom.

Q. He was spitting up blood wasn't he?

A. Small amounts, yes.

Q. Well, he was spitting up blood wasn't he?

A. He was spitting up blood, yes.

Q. All right. And this is before his alleged fall. Isn't that right?

A. Yes.

Q. Do you deny that after he was beaten that he became drowsy and went to sleep?

A. No, I don't deny that.

Q. He did didn't he?

A. Yes.

Q. All right, and you admit that before he fell he was swollen, that he was drowsy and he was spitting up blood?

A. Yes.

Q. Now, you remember when James Seamster came over during the afternoon of August the 3rd with his wife?

A. Yes.

Q. Do you remember explaining to them what happened?

A. Yes.

Q. Do you remember telling them that Vern had hit Luther

three times and that the reason he was bruised and swelled so much was because Vern had on his class ring and that did the damage?

A. Well, I thought that was the reason.

Q. Do you remember Mrs. Seamster mentioning calling the police and you telling her that Luther was an intruder?

A. Yes.

Q. You did that to frighten her from calling the police didn't you?

A. I had no motive for frightening her.

Q. Well, why did you tell her he was an intruder when she said she wanted to call the police? You were trying to frighten her to keep her from calling the police weren't you?

A. No.

Q. But you remember telling her that he was an intruder?

A. No, I did not use those words.

Q. Well, what words did you use?

A. I didn't use that particular word. I may have said that he came when I didn't want him to come, but I didn't use the word "intruding".

Q. All right. Do you remember telling her that you were there that day and your son came in and wanted to

know why you were so depressed and you said that Boswell was there and had a key to the house? Do you remember that?

A. Yes.

Q. Do you remember telling her then that Vern said, "I can take care of that matter," and that he would get the key, and that Vern proceeded to the den where Mr. Boswell was and asked him for the key?

A. Yes.

Q. Mr. Boswell would not give Vern the key. She said that Vern proceeded to beat Mr. Boswell. He only hit him three times. She said that the reason Mr. Boswell was bruised so badly was because Vern had his class ring on and Mr. Boswell had been drinking heavily. Do you remember that?

A. I may have said that.

Q. You didn't say anything at all about Mr. Boswell walking toward your boy, you just said that Mr. Boswell wouldn't give him the keys and your boy hit him three times. Do you remember telling them to leave him there, that you would nurse him back to health and have him ready to go to his apartment by that Thursday?

A. Yes.

Q. Do you remember telling them when you called early Wednesday morning that Mr. Boswell was not responding, that you had slept in bed with him and kept a close check on him but there was nothing else you could do?

A. I did not say that I had slept in bed with him on Tuesday night.

Q. Do you remember telling them that he was not responding and there was nothing you could do?

A. I did not say that.

Q. What did you say?

A. I said that Luther had fallen out of bed and I could not get him up.

Q. All right, now you remember when the Life Saving Crew came that day?

A. Yes.

Q. They came to the door and they asked you if someone had been beaten, and you said, "Yes, right back here." Is that correct?

A. Yes.

Q. You took them back in the back bedroom, and he was on the floor at that time. Is that correct?

A. Yes.

Q. You told them that you heard him fall out of the bed

and you couldn't get there in time to catch him. Is that right?

A. Yes.

Q. And you told them you thought if you kept him there and nursed him, his wounds would heal and he would be all right, but you said that instead of getting better he got worse. Is that right?

A. Yes.

Q. They asked you if he was your husband and you said, "No, he is my lover."

A. Yes.

Q. They asked you who beat him up and you said your son. Do you remember that?

A. Yes.

Q. They asked you when it happened and you said, "Monday." Is that right?

A. Yes.

Q. At this time Mr. Boswell was sleeping and snoring, and they told you that really it wasn't an emergency then, it was an emergency on Monday. Didn't they say that?

MR. CARTER: If your Honor, please, I don't think that's got anything to do with it. It's

purely self-serving. She can be asked what she said on that occasion.

JUDGE INGRAM: Are you objecting to the specific last question that Mr. Fuller asked?

MR. CARTER: Yes, sir, I am.

JUDGE INGRAM: All right.

Q. All right, I'll ask you this question. You told them that your son had come in, the man had been drinking and there was an argument about him having a key to your house, and you wanted the key back. Is that right? Did you tell them that?

A. Yes.

Q. Then you said that your son came in while you were arguing and he beat him. Then you said, "You know how a son can be when somebody won't give his mama's keys back." Do you remember saying that?

A. Yes.

Q. Then they tried to get the stretcher in there. And do you remember telling them that you wanted to get some help from them but you didn't want to get the police involved?

A. No.

Q. You don't remember that? He was asleep wasn't he?

A. No.

Q. You don't remember them telling you to wake him up while they went and got the stretcher?

A. He was not exactly asleep.

Q. All he could do was mumble or moan. Isn't that true?

A. He spoke his name.

Q. He couldn't make it to the stretcher except by virtue of being carried by the members of the Life Saving Crew and you. Is that right?

A. He walked very well I think.

Q. You mean without any help?

A. No, I helped him.

Q. They helped him too didn't they?

A. Yes, but he walked.

Q. Why is it that you come in here today and say in court after all this period of time that Mr. Boswell swung at your boy, and advanced toward your boy, when all you told two members of the Life Saving Crew was that your boy hit him, you didn't say a thing. . .

MR. CARTER: If your Honor, please, I think the first thing he'd better do is ask her if that's what she said.

MR. FULLER: Well, she's already admitted that, Mr. Carter.

MR. CARTER: I know, you start off and predicate these things on do you still beat your wife type of questions.

MR. FULLER: Judge, I realize Mr. Carter is trying to give her some time to get her thoughts together, but I've already asked. . .

MR. CARTER: There isn't anything wrong with her thoughts.

JUDGE INGRAM: Rephrase the question, Mr. Fuller.

Q. Why didn't you tell the members of the Life Saving Crew the things you've testified to in here today?

A. I didn't ever say that he had been beaten. I said that he had had a fight. I used the word "fight" specifically.

Q. I went through this point by point and asked you if that's what you said, and you said, "Yes." And why was it that you wouldn't talk to anybody from the police department? I had to call a Special Grand Jury to get you. . .

MR. CARTER: If your Honor, please, I don't

is a proper authority.

Q. You admit that you told these two men from the Life Saving Crew that your son had beaten up Mr. Boswell because he wouldn't give you the key? Don't you admit that?

A. I admit that I said that Luther and my son had been in a fight. I specifically used the word, "fight".

Q. You said it was because he wouldn't give your son a key. Is that right?

A. Absolutely.

Q. All right, that's all.

RE-DIRECT EXAMINATION

By Mr. Carter:

Q. Mrs. Cook, I'm not sure that you understood entirely one of the questions propounded to you. Was this drowsiness that you described as far as Mr. Boswell was concerned a condition that existed from the time of the fight until the time of the fall, or were there interludes of drowsiness?

A. Well, Mr. Carter, I'd like to say that Mr. Boswell was the type of man that did a lot of drowsy sleeping at any time that he was intoxicated.

Q. And was he intoxicated on this occasion?

A. Absolutely.

Q. Was it a constant condition of drowsiness or was this something he lapsed into when under the influence of alcohol?

A. I think under the influence of alcohol.

MR. FULLER: If your Honor, please, we don't care what she thinks. That's not proper.

Q. Well, let me say did it coincide with the excessive use of alcohol or was it a constant thing?

A. The constant use of alcohol.

Q. No, but I'm talking about the drowsiness, was this something connected with the use of alcohol or during this period of time from the afternoon of August the 1st until the morning of August the 3rd was he drowsy the entire time or what was his condition?

A. Oh, he motivated doing his own thing throughout my house during this time.

Q. Well, now just what does that mean? I'm not. . .

A. Well, he stayed in bed off and on, and he slept off and on during this time.

Q. Well, during this period of time was he responsive to questions that were propounded to him?

A. Yes.

Q. Was he aware of what was going on around him?

A. Yes.

Q. I think that's all.

RE-CROSS EXAMINATION

By Mr. Fuller:

Q. Mrs. Cook, you say that you had been trying to keep him away for two years?

A. Yes.

Q. Well, what was he doing with whiskey in your house then if you'd been trying so hard and so noble to keep him away?

A. Well, he had been at my house that weekend and I wasn't even there.

Q. That's right, but what were you doing letting him keep whiskey in the house and clothes in the house? If you didn't want him there, why didn't you take his clothes and get them out of the house?

A. They did. They stayed on the porch last winter for one month.

Q. But you didn't make any effort to take them out when he came back did you?

A. Absolutely I. . .

Q. The truth of the matter is you'd run hot. . .

MR. CARTER: Let her answer the question, if your Honor, please.

Q. . . .and cold wouldn't you? You'd run hot and cold wouldn't you?

MR. CARTER: Let her answer the last question, and then let him ask. . .

Q. Is that right?

MR. CARTER: If your Honor, please, I think she has a right to answer the question without being interrupted.

JUDGE INGRAM: There are two questions. Answer one and then the other. Do you know what the questions are?

MRS. COOK: No, I'd like to. . .

Q. All right, I'll give you the question. Why. . .What you did really was you'd tell him to get away when your boy would come down there complaining and then when he'd leave you'd call him up on the phone and want him to do things for you wouldn't you?

MR. CARTER: If your Honor, please, that wasn't the question.

Q. Is that right?

MR. CARTER: That wasn't a question.

MR. FULLER: It's the question I'm asking now.

A. No.

MR. FULLER: If you want to ask it over, you do it.

A. No.

MR. CARTER: Now if your Honor, please, I'm getting a little tired of this. I think that I abide by the rules of evidence and I think the Commonwealth's Attorney should.

MR. FULLER: You never abide by the rules of evidence.

JUDGE INGRAM: All right, that's enough. Mr. Fuller, can you remember the original. . .

MR. FULLER: No, I can't Judge.

JUDGE INGRAM: All right, I think I'm going to ask the reporter to play back the original question, I'm going to ask the witness to answer that question, then I want her to answer the second question that you asked, and then you may proceed with such other questions that you wish to propound to the

witness.

The Court Reporter then played back the last portion of Mrs. Cook's cross examination, after which the following occurred:

JUDGE INGRAM: Do you understand the question?

MRS. COOK: No, what was the question?

JUDGE INGRAM: Mr. Fuller first asked you why didn't you take his clothes out, and you said you put them out on the porch one time, and then you started to say something else when he asked you why didn't you. . .

A. When I put these clothes out on the porch they stayed out there for a solid month, and I came home from work one day and they were back in the closet and I didn't even know that they were in this particular closet for several days. I thought they were completely gone.

JUDGE INGRAM: All right, and then he asked you, "You run hot and cold don't you?"

A. I don't know how to answer a statement like that.

MR. CARTER: Answer what? I didn't get what. . .

JUDGE INGRAM: State your answer again for

Mr. Carter. She said she didn't know how to answer a statement like that.

MR. CARTER: What was the statement, you blow hot and cold? Well, I don't think she has to answer that.

JUDGE INGRAM: All right, Mr. Fuller.

Q. You also stated that he had this alleged fall, that you were in the other room and he called you, and he was sitting up on the bed and he got up to go to the bathroom and just fell and hit his head. Is that right?

A. Well, I think he was reaching for the light. I cut the light on in the hall.

Q. But the question is, he fell when he got up?

A. Right.

Q. Do you remember telling the police that on that occasion he wanted to go to the bathroom and that you took him to the bathroom and he was unable to stand while you were taking him?

A. I did not.

Q. You deny that?

A. Absolutely.

Q. You deny you then said you took him back to the bedroom

and he fell on the paper when you were bringing him back from the bathroom?

A. I certainly do.

Q. All right, that's all I have.

MR. CARTER: No further questions.

. . . . . .

BETSY COOK, the next witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. State your name for us, please, ma'am.

A. Betsy Cook.

Q. And you, of course, are the wife of the defendant, Vern Cook. Is that correct?

A. That's right.

Q. Do you remember the evening of August the 1st?

A. Very well.

Q. And you and Vern were living where, Watson Street?

A. That's right.

Q. And did he come home that evening?

A. Yes, sir, he did.

Q. About what time was this?

A. I would say it was in the vicinity of about 7:00 o'clock,

maybe a little after.

Q. Was there anything you noticed about his clothing?

A. Yes, sir.

Q. Tell us what it was.

A. The shirt that he was wearing that evening had been badly ripped.

Q. Describe to his Honor if you will, the type of shirt he was wearing, and where the tear was and to what extent and so forth.

A. Okay. The shirt was a blue cotton stripe. It had a three button tab which stopped about right here.

Q. It didn't button all the way up the front?

A. No.

Q. It was a slip-over type of shirt?

A. Right, a short sleeve cotton shirt, three buttons to here. And when Vern got home that evening the second button had been ripped from the shirt and in addition there was a tear that extended below the tab down the shirt.

Q. What did you do with the shirt?

A. Well, I examined it after he took it off and assessed after examining the shirt that since the tear extended below, down into the shirt itself, that the shirt could

not be repaired, so I discarded it.

Q. At that time were you conscious of the fact that there might be some criminal charges arising out of this matter?

A. No, certainly not.

MR. CARTER: You may examine.

CROSS EXAMINATION

By Mr. Fuller:

Q. You knew he was going to be charged with something didn't you?

A. No, sir, I didn't.

Q. You didn't think he was going to be charged with anything?

A. No, sir.

Q. Well, why did he refuse to talk to the police?

MR. CARTER: If your Honor, please, do you want me to answer that question?

JUDGE INGRAM: Well, I assume you just voiced an objection to that question.

MR. CARTER: I do indeed. I don't think that she knows, but I can tell the Court why.

JUDGE INGRAM: Well, if she doesn't know, she can just state that.

Q. You threw the shirt away?

A. Yes, sir, that's correct.

Q. Okay.

. . . . . .

JOHN VERN COOK, JR., the defendant and a witness in his own behalf, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. I believe you are John Vern Cook and you are twenty-two years of age?

A. (To which the witness nodded his head in the affirmative)

Q. I believe you are a graduate of Duke University?

A. That's right.

Q. What type of degree do you hold?

MR. FULLER: If your Honor, please, this is not relevant, absolutely no relevancy at all as to guilt or innocence.

MR. CARTER: Well, if he's so sensitive about it, I'll withdraw the question.

MR. FULLER: It's not, and you're always talking about you always do everything so proper, Mr. Carter. You know it's not relevant.

MR. CARTER: Now I have the floor right now, Mr. Fuller, and I'd just as soon you didn't interrupt me. I withdraw the question, if your Honor, please.

JUDGE INGRAM: All right, sir.

Q. Vern, go ahead and tell his Honor in your own words just exactly what. . .to begin with what relationship you have had with Mr. Boswell up until the time of this altercation you-all had and just generally what happened thereafter.

A. Well, I've known Mr. Boswell for approximately seven years. Over the last three years -- four years rather -- I have had only occasional contact with Mr. Boswell.

Q. How long has it been since you lived in your mother's home?

A. A little over four years, the period of time that I was in college and since that time. On the occasions during this time that I have had contact with Mr. Boswell on several of those occasions I was threatened physically by Mr. Boswell. There was an incident last winter, for example, at which time Mr. Boswell threatened me with a liquor bottle in his hand to hit me over my request that he not be around our house over the

holidays, and the other times that I've had relations with him over the last four years were insignificant and, you know, very sparse. I did however have knowledge of Mr. Boswell, his relationship with my mother, his history and if I may say, criminal history. I had knowledge of his propensity for violence. I had knowledge from people that I played golf with that he had been dismissed from golf clubs for violence. I knew that he had been convicted of a serious crime related to violence. And I had seen on occasions myself his aggression and temper displayed before.

Q. Were you aware of the fact that he had been convicted of a homicide in the Circuit Court of Roanoke County?

A. Yes, I was.

MR. FULLER: If your Honor, please, I don't think it's proper to introduce a record. The only purpose that this type of evidence can come in is to show in a case where self-defense is alleged that the defendant knew that the deceased had a reputation for violence. You don't introduce his record.

MR. CARTER: I don't know why not. I don't

know of a better way of showing the reputation he had for violence. He was convicted of a homicide.

JUDGE INGRAM: Well,. . .

MR. FULLER: He's already testified that he had a reputation for violence. I think that's proper.

JUDGE INGRAM: I believe the witnesses' and the defendant's testimony is sufficient, Mr. Carter, to establish the point that you. . .

Q. All right, go ahead, Vern.

A. I was recounting my history up into the time, August 1st, the date of the altercation. Do you want me to proceed?

Q. Yes, sir.

A. Is that enough details on the history?

Q. I think so unless there is something about, you know, the relationship in the past that. . .

A. I would say that one of the salient things about my relationship with Mr. Boswell over the last four years and even seven years was his disrespect for my family and his mistreatment of my little sister who, she's thirteen

now and her age ranged in that period from six or seven until thirteen. He, Mr. Boswell. . .

MR. FULLER: If your Honor, please, I don't think this is relevant. I don't think it's relevant to come in and say what he didn't like about the man. Now he can get into evidence any propensity for violence.

MR. CARTER: I think also if Mr. Fuller is going to contend that he did not. . .that he was not justified in using what force he did, or if he's going to contend that his self defense plea was not valid, I think he can show mitigating circumstances that might have motivated him. And I certainly think that offenses against members of his family are valid under those circumstances.

MR. FULLER: If he wants to prove premeditation, then I guess. . .

JUDGE INGRAM: Well, I think that. . .

MR. FULLER: If he wants to make a case of. . .

MR. CARTER: Mr. Fuller, let his Honor rule on this and just quit arguing with me.

JUDGE INGRAM: I think that the evidence that is permissible, Mr. Carter, is evidence tending to show the violent nature of the decedent. I don't believe that unless there are specific acts which the witness is about to testify which go to that issue, that this testimony is proper.

A. Okay.

MR. CARTER: Well, I except to the Court's ruling.

Q. Go ahead, Vern, tell us what happened on August the 1st.

A. Okay, on August 1st I left work at about somewhere in the neighborhood of 6:00 o'clock, maybe a little after, and driving home I drove by my mother's house to pick up some laundry. She had been out of town for three days and had done some laundry for me at the end of the week before, and I hadn't seen her for three days. She had been visiting with my grandmother. And I dropped by to pick up my laundry and chat with her because she was going on vacation up to where my little sister was staying the next day. And I arrived at the house again between I guess about 6:15 and I proceeded to go up to the front door and began

opening the front door, and I heard voices in the den to the left of the front entrance. And I recognized the loud voices and shouting to be my mother and Mr. Boswell. I proceeded into the house. I inquired as to what was going on and why all the shouting, and, you know, mother implied to me that there was an argument. She wanted Mr. Boswell to leave. She was quite adamant in that, and I sat down and was kind of tired, and I just wanted to see what I could do to calm the issue and bring the thing to the proper conclusion. I sat down and started talking to Mr. Boswell about why he had come to visit my mother and why she was so agitated, you know, whether he was badgering her or whatever. And mother said that she wanted him to leave, and that he had a key to the house and she wanted him to give her back the key. So I asked Mr. Boswell if this was true, and he denied it. I asked him would he leave, and he said, "No." And I asked him if he would let me see the keys and he said, "No," and he was during this whole time I was sitting and he was sitting. And I was quite matter of fact about the whole conversation and he was very loud, aggressive in his tone toward

my mother and she certainly was a participant in this conversation. At one point in the discussion I mentioned that if he would let me see his keys, I could determine whether or not he had my mother's house key, and he. . .

Q. Did he deny having her key?

A. He did deny having the keys and said he had never had the keys, and that if he had the keys, he wouldn't give them to me, that I had no right to inquire as to what he had, I had no right to question his, you know, his right to come on that premises. So I asked him for the keys and he wouldn't give them to me. This sort of. . .He was shouting and very aggressive tones, and he stood up and I stood up, and I asked him to give me the keys and he said he wouldn't give me the keys, and he swears and comes toward me, grabs my shirt in a swearing gesture, about just instantaneously grabs my shirt and, you know, calls me a few names and tells me I don't have any business . . .All this is in a process of a swearing and a reaching, and he swings at me with his right hand, sort of grabs my shirt and swings at me with his right hand. I sort of fend the blow away, returned a few

of my own blows very spontaneously. I was very frightened by this man's aggression toward me in the first place. I had been talking in very matter of fact terms, as I am talking to you now. He was shouting towards me and his manner was so aggressive that I was on edge even before he stood up emotionally, an emotional edge, and when he came at me I was very frightened and in fact I feared my mother's security and my own secutiry, and I retaliated his blow with my own. And after, you know a matter of seconds I would say he sat back down, he sort of stumbled and sat back down, and I immediately put things back into perspective so to speak I guess, and realized that I shouldn't have been provoked and wanted to, you know, attend to him. He had sat back down and I immediately asked him, "How are you?" you know, "How do you feel?" and he says, "Fine. . .

MR. FULLER: If your Honor, please. . .

MR. COOK: Okay. Okay, I'm sorry.

MR. FULLER: . . .he's been testifying to hearsay. During the struggle I didn't object, but I'm going to object now for anything else he's got to say in regard to

hearsay.

JUDGE INGRAM: All right, don't tell us what he said.

Q. He sat back down. At that point I went into the kitchen and got some ice out, gave mother the ice and she in turn gave the ice to Mr. Boswell. He put it on his face. I had conversation with Mr. Boswell. I asked my mother to call Mr. Boswell's next of kin, or his daughter, Mrs. Seamster, which she did. She called the house I guess around 6:45, maybe 7:00 o'clock. I talked with Mr. Boswell some more and went home and had dinner. After having dinner at my home on Watson Street I came back at about 8:30 to see if the Seamsters had come, and they had not. And before I left to go home for dinner I heard mother's conversation with I believe one of Mrs. Seamster's daughters and the urgency of the conversation was apparent to me, and I would assume apparent to the party on the other end. And I assumed at that time that they would come on over and Mr. Boswell would go on about his way.

Q. All right, right after this altercation was Mr. Boswell responsive to questions that were directed to

him?

A. Yes, completely responsive.

Q. Was he aware of what was going on around him?

A. Oh, yes, quite aware of everything, in fact, he was aware. . .He was very cogent I think in his conversation.

Q. He carried on a conversation with you?

A. Yes.

Q. And with your mother?

A. Sir?

Q. And with your mother?

A. And with my mother, yes. In fact, she got the house key out of his pocket.

Q. She did?

A. Yes.

Q. And recovered the house key?

A. That's right.

Q. Now. . .

A. And he didn't object at that point either.

Q. Did you see him on a later occasion?

A. I came back at 8:30. I talked with him then. Before I left and again. . .

Q. At 8:30 in the evening?

A. In the evening. I left about 7:00, and I went home and had dinner and came back about 8:30. I had conversation with him on both occasions. And at each time I asked him if he wanted me to call or take him to the emergency room or did he need medical assistance. And we had other conversation relative to how he felt and his desires, if he needed anything. I also had a conversation when I came back at 8:30 about whether or not. . .There was a reason why he stayed there immediately after the altercation, and when I came back at 8:30 I inquired further about his reasons for staying there, and I asked him if he could drive home, if he felt like driving home and, you know, go back up to his apartment. It was dark, it was getting dark at this time, it was right at dusk and he was negative in his reply, and so at that point I assumed that the Seamsters would be coming over at any minute, so I went back home. This was, you know, 9:00 o'clock.

Q. When did you next see him?

A. I don't think I came down anymore that night. I saw him again the next morning.

Q. About what time?

A. I was going to work. That was a quarter to 7:00. I didn't have any conversation with him at that particular time. No, hold on, excuse me. I came back at 8:30 to see if the Seamsters had come and to talk with them, and I came back again. . .I believe I came back again around 11:00 o'clock, and I had conversation with him. Every time I came to the house that night I did have conversation with him. Then I saw him again on Tuesday morning and I did not have conversation with him on that morning. I walked in to see if he was still there, and my mother and him were both asleep, and this was, you know, fairly early in the morning.

Q. You say about 7:30?

A. Yes. And I went on to work and called mother about, you know, called her during the morning about whether or not the Seamsters were coming over and how, you know, how he was doing. Then I saw him for the last time on Wednesday morning. My mother called me up. I was awakened by her phone call at about a quarter to 6:00 in the morning perhaps, before I usually get up. And mother said that Luther had fallen out of the bed, had struck his head and that she could not. . .

MR. FULLER: If your Honor, please, he knows this is hearsay. He keeps right on going into what somebody else said.

MR. COOK: Oh, I'm sorry.

A. I got a phone call from my mother.

Q. What did you do in response to that phone call?

A. In response I told my mother to call the Rescue Squad and in the meantime I would come down and see if there was anything that I could do. I got in my clothes real quickly, and jumped in the car and ran, you know, rode down there. I walked into the house, observed Mr. Boswell prone on the bedroom floor. I did not have conversation with him. I assumed that there was nothing that I could do, informed my mother to call the Rescue Squad, went home, got ready for work and went to work.

Q. That's the last time you saw him?

A. That was the last time I saw him.

MR. CARTER: You may examine.

CROSS EXAMINATION

By Mr. Fuller:

Q. When you came by your mother's house on this occasion you knew Mr. Boswell was inside the house before you

ever heard any argument didn't you?

A. No, sir. I knew he was in the house actually as I was coming in the door. I opened the screen door and I could hear loud voices.

Q. You saw his car out there didn't you?

A. That's right.

Q. So you knew he was there before you ever stopped didn't you?

A. I knew his car was there.

Q. Well, you didn't think he was walking somewhere did you?

A. Well, I knew his car was there and he had on numerous occasions left his car to go off and play golf, or left his car there to do something, you know, his car was there.

Q. He had been living there hadn't he?

A. No, he had not.

Q. He had never lived there?

A. I did not say that. You asked me if he had been living there. I assume you meant the period preceding to. . .

Q. No, I'm talking about if he had ever lived there.

A. I would say he lived there of sorts for awhile in the past.

Q. And you very naturally resented that?

A. I would say that's maybe an inaccurate statement.

Q. That it is what kind of a statement?

A. An in. . .I don't know whether I naturally resented that. I never approved of Mr. Boswell's treatment to my family, especially my little sister.

Q. Well, did you approve of him staying there?

A. His staying there per se, no. I mean I had no objection to him staying there per se, no.

Q. That didn't bother you?

A. Not it and into itself. His demeanor and. . .

Q. You didn't resent the fact that he was living there with your mother?

A. Let me give you an example. I would resent more the fact that he would. . .had a tendency to urinate with the door open.

Q. Well, I know you're about to have a fit to get that in. I'm just asking you a question.

A. Okay.

MR. CARTER: If your Honor, please,. . .

MR. FULLER: He wasn't responsive to the question.

MR. CARTER: . . .I think what he had better do if he's got some objection to what this

witness is saying, direct his remarks to the bench and not bulldoze the witness.

MR. FULLER: He's tried that about three times, Judge, and that wasn't. . .

MR. CARTER: All right, direct your position to the Judge then and not to the witness.

MR. FULLER: . . .responsive to my question.

A. Rephrase your question. You just asked me. . .

Q. I asked you if you resented him staying there with your mother.

A. No.

Q. You didn't resent that?

A. No.

Q. Had you ever threatened him?

A. No, sir.

Q. You deny that you had ever threatened him?

A. I certainly do.

Q. Actually he was afraid of you wasn't he?

A. No, sir, by no means.

Q. Well, I mean you know the thing that is quite interesting about this, you talk about how frightened you were of him, and yet, all the testimony from your mother has indicated that he was drunk.

A. He, at the time of my entering the room and his. . . I was able to discern from him an aggressive mood, a mood of hostility. And at that point, I. . .the fact that he was drunk, a man like Luther it was hard to say whether he was drunk or not. He was drinking almost all the time, and I'm. . .again that's hearsay, so I mean. . .

Q. You thought he was under the influence didn't you?

A. Yes, but he certainly wasn't lethargic under the influence.

Q, But you knew that he was under the influence of alcohol and you also knew that he wasn't in good health didn't you?

A. I did not know the state of the man's health other than I can make conjectures as to his appearance, his habits.

Q. Well, the incident developed over your wanting the key that he had to your mother's house?

A. What incident is that, the. . .

Q. When you hit him. That's what I'm talking about.

A. That incident was propagated by him striking and tearing my shirt.

Q. Well, I'm asking you if the argument was over the keys.

You've already testified that you were asking him about keys.

A. Yes. I was asking him first to leave, and along with that to give me his keys to my mother's house.

Q. You said he said he didn't have any keys.

A. That's right.

Q. You knew he did because he'd been coming in and out for seven years hadn't he?

A. I knew he had keys because my mother told me that he had keys and was freely letting himself in and out.

Q. And he told you that if he had the keys, he wouldn't give them to you?

A. That's correct.

Q. And that made you mad didn't it?

A. No, I just asked him at that point, "Well, if you don't have the keys, let me look at your keys and I'll determine whether or not you have the keys."

Q. And he told you he wasn't going to do that didn't he?

A. That's right, and that's when he stood up and grabbed me by the neck and swung at me.

Q. How many times did you hit him?

A. I thought. . .I really wasn't counting, it was a very. . .

I retaliated his blows to me, and it was a very quick exchange. It was just a matter of seconds. I really didn't. . .I think three times I would say, three times.

Q. You didn't have a mark on you, not one mark on you.

A. Are you asking a question or. . .

Q. Yeah, that's what I'm asking you. You didn't have a mark on you?

A. I think I had a welt on my arm from where I caught his first blow, and I had a torn shirt.

Q. You didn't show this to anybody did you?

A. By Wednesday when the police were interrogating me a red welt on my arm had gone away.

Q. I see. All right, you told the police that you lost your temper severely and struck him five times didn't you?

A. I don't recall saying that.

Q. You don't recall that remark?

A. I do not recall saying I struck him five times, nor do I recall saying that I lost my temper severely.

Q. Do you remember that after you said that you had struck him your mother interrupted and said, "No, you only struck him four time."? Do you remember

her interrupting?

A. I do remember her interrupting about the number of blows, but at that time I made it clear to the policeman as well as my mother that I did not know how many times I had struck him and that I was retaliating his blows to me and. . .

Q. Well, quite obviously his blows didn't amount to anything did they?

A. I don't know what you mean by that.

Q. Well, I mean you disabled him and he. . .

A. That's a matter of judgment I think.

Q. Well, I mean it's a matter of history as to what happened.

A. Well, he was completely. . .After the incident he was able to walk around, he was able to ask for things that he wanted. For example, whiskey.

Q. Well, do you remember telling the police officer that after striking Luther you noticed his face swelled up severely and that he had become unconscious, he was snoring as if he were asleep?

A. I remember telling the. . .This was when I was explaining to the police officer the interim of time between the incident and when I saw him at 8:30. And

when I saw him at 8:30 he was sleeping, and I don't remember calling him unconscious. I think he was sleeping. I couldn't. . .Sleeping is unconscious in a sense. I did not knock him out so to speak with my blows because immediately after the altercation he and I had conversation, and my mother had conversation with him.

Q. But his face became swollen right after you had hit him didn't it?

A. Yes, sir.

Q. It went right up?

A. Right up. . .I mean in a matter of five minutes he was beginning to swell up, in a matter of ten he was swollen up.

Q. All right, do you remember telling the officer that you knew you lost your temper and that you knew that you had done wrong when you hit him?

A. No, sir, I don't remember saying that. I remember talking to the officer, but the feeling that I had then and the feeling that I have now is that being physically provoked by his aggression was probably not the best judgment at the time, but I don't think at the time I didn't feel like I had done any wrong

doing and I don't feel like. . .

Q. You deny that then? You deny that you said. . .

MR. CARTER: If your Honor, please, he's already testified. . .

Q. . . .you lost your temper. . .

JUDGE INGRAM: Wait a minute. I can't hear but one of you at a time.

MR. CARTER: I know. He stopped the witness before he got through answering the question. I would like for Mr. Cook to have the opportunity to. . .

MR. FULLER: Well, he's not being responsive.

MR, CARTER: . . .finish his answer and then he can ask him another question.

A. Okay, go ahead, Mr. Fuller.

Q. Do you deny that you said you lost your temper and that you knew you'd done wrong? I'm just asking you if you deny the testimony of Detective Martin?

A. In this instance, yes, I do not remember saying that I had lost my temper and that I'd done wrong.

Q. All right.

A. Perhaps in the communication in his transcribing my communication with him. . .

Q. All right, that's all I wanted to know.

A. . . .could have been a misinterputation, but. . .

Q. Do you remember telling your mother that it was ridiculous for an intelligent person like you to waste any energy on a worthless person like Luther Boswell?

A. Again, about specifics of that particular statement, I cannot swear to. I'm very sorry. There was conversation between the detectives and myself and my mother at periods interceded. I do not remember specifically that statement, no.

Q. You have a pretty quick temper don't you?

A. No, sir.

Q. You don't?

A. No, sir. In my judgment I don't have a quick temper.

Q. You didn't loose your temper on this occasion?

A. No, sir. I was. . .

Q. That's all.

A. Okay.

. . . . . .

MR. CARTER: If your Honor, please, this will be the evidence for the defense with the exception of Dr. Kuhn who is on his way down here now. If your Honor could

give us a few moments for him to arrive and let me have a brief conference with Dr. Kuhn, we could conclude our testimony at that point.

MR. FULLER: Judge, I have some rebuttal testimony. Do you want me to go on with it?

JUDGE INGRAM: No, I think we'd better, in spite of the fact that we'll have some delay in it, I think that it should come at it's logical place.

MR. FULLER: All right, sir.

JUDGE INGRAM: Let's just take a recess until Dr. Kuhn gets here.

. . . . . .

Following the recess, the Court, all counsel and the defendant returned to the courtroom, where the proceedings continued as follows:

DR. ROBERT A. KUHN, the next witness called on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. I believe you are Dr. Robert A. Kuhn. Is that correct?

A. Yes, sir.

Q. And you are a practicing neurosurgeon here in the City of Danville?

A. That is correct.

Q. Would you tell us something of your medical educational background, Doctor.

MR. FULLER: I'll waive his qualifications.

JUDGE INGRAM: All right, sir.

Q. All right, he admits the qualifications for the Doctor. Doctor, have you had an opportunity to examine the medical records dating from about August 3rd, 1977 through about August 19th, 1977 kept by Memorial Hospital in connection with a patient by the name of Luther Wiley Boswell?

A. Yes, I have.

Q. I believe I delivered to you a copy of those records?

A. That is correct.

Q. Doctor, let me state to you a hypothetical question. Suppose we take a patient who becomes involved in an altercation who suffers bruises in and about the jaw and the cheeks without any fracture resulting, on let us say August the 1st at about 6:00 P.M., that subsequent to that the patient is ambulatory and responds to conversation and is apparently alert,

on the. . .

Q. All right. Doctor, I will undertake now to restate the hypothetical question and I hope that I will include all of the details which seem to be important to some of us. Let me start over and say that you have the case of a patient who becomes engaged in a physical altercation with another individual at about 6:00 P.M. on August the 1st, that several blows are struck to the face in the area of the cheeks and jaw, that there are no fractures resulting from this but that shortly after the altercation the patient's face begins to swell rather markedly and becomes blue, that the patient spits out of his mouth on occasions small amounts of blood, that he is ambulatory, he is responsive to his surroundings, that he carries on conversations with other individuals that are coherent, that at approximately 5:30 A.M. on the 3rd day of August the patient is sitting on the side of the bed, he falls forward, strikes the right side of his face on a piece of furniture, specifically a baby bed which is in the close proximity to the bed in which has been lying, and then falls on the hardwood floor on the right side

of his face, that thereafter he becomes semiconscious, has to be aided to or helped to the stretcher on which he is carried to the hospital, shortly thereafter a craniotomy is performed and it is found that he has an intracerebral hemorrhage which is evacuated. On the basis of that, Doctor, do you feel that you are qualified to give a medical opinion as to the cause of the hemorrhage? I'm not talking about the cause of death, the cause of the hemorrhage.

A. Yes, I do.

Q. And would you tell us in your medical judgment what the cause would be and why you make this medical judgment?

A. I believe the cause of the intracerebral hemorrhage was the series of blows which the patient sustained on his head, either falling out of bed or falling and hitting the floor; and I do so for I think very straightforward and valid neurosurgical reasons. There are two main ways in which the brain responds to insult or injury. One of them is on a time course of the patient being neurologically insulted, ill, steadily deteriorating and dying unless there is some intervention. Now the second customary course

is the more happy one. The patient receives an insult, shows the maximum neurologic deficit at the time of the injury or shortly thereafter, and by shortly thereafter I mean one or two hours, and from thenceforth the curve is one of steady recovery. Now this classic course of events either of which almost invariably accompany a head injury are singularly lacking in this case. The very fact that after a presumed injury to the brain that a patient is alert from twenty-four to thirty-six hours, walking about, precludes almost absolutely any serious injury at the moment to the brain.

Q. And for that reason you conclude that it must have been the second trauma. . .

A. That is correct.

Q. . . .rather than the first?

A. That's right.

Q. Which caused this. Doctor, in cases of liver have hading deficiency, can you tell us what this does to the qualities of coagulation of the blood?

A. Well, with any interference with the liver function generally there is interference also with the ability of the liver to generate those substances which are

necessary in blood for proper coagulation. In addition, alcohol does other things. It, of course, acts directly on brain structure as we all know after we take one or two drinks. But it does something more fundamental. It actually affects capillary frugality and especially in the brain. So a so called heavy drinker is a prime suspect for hemorrhage.

Q. Now, Doctor, one who has this deficiency in the coagulation of the blood, what are his propensities as compared with one with normal liver functioning in the case of let's say a trauma to almost any part of the body?

A. Well, the ability to respond to any insult is much less in an individual who was an habitual alcoholic.

Q. And this means, of course, that the capillaries do not repair themselves with normal rapidity?

A. That's right.

Q. Does this bring about more or less edema in the area of a trauma?

A. Yes, it contributes to the edema.

MR. CARTER: You may examine him, Mr. Fuller.

CROSS EXAMINATION

By Mr. Fuller:

Q. Suppose you had this situation. A sixty-one year old man, a severe case of cirrhosis of the liver, mild diabetes, high blood pressure, he's struck from three to five times in the face with a fist from a hundred and eighty-five to a hundred and ninety pounder who is about twenty-two years of age, within five minutes thereafter his face begins to swell, the beaten man, shortly thereafter he looses consciousness and starts snoring as if he were asleep, he's not very alert after that and that night he's spitting up blood, the next night he has to go to the bathroom, he can't make it by himself, someone helps him to the bathroom, he's unable to stand, and he falls striking his head on a baby bed, would that factual situation change your conclusion?

A. Well, I notice you make repeated reference to facial swelling. It really has little to do with the brain.

Q. I'm not talking just facial swelling.

MR. CARTER: If your Honor, please, please let the doctor. . .

JUDGE INGRAM: Let's let him answer, and then. . .

MR. CARTER: The witness answer the question

and then let him ask another.

A. So what I wanted to do first of all was try to make clear that almost any amount of facial swelling or scalp swelling has little relationship causally to brain injury. Some of our worst trauma cases who look the worst are actually fine as far as their brain is concerned.

Q. But I'm not. . .What I also. . .

MR. CARTER: If your Honor, please, the doctor is trying to answer the question. I think he has a right to give a full and complete answer to the question before he is. . .before another question is propounded.

MR. FULLER: I'm trying to ask him something else, if your Honor, please.

JUDGE INGRAM: All right, let me just. . . Is there anything else you wanted to say in response to that, Doctor.

DR. KUHN: Yes, sir, I wanted to talk about the nasal bleeding. If he doesn't desire to pursue that, I won't.

JUDGE INGRAM: Well, I don't think we have that. So you may proceed.

Q. In this factual situation, of course, is a person that is not alert, that there is some evidence that he lost consciousness right after the beating, and he's snoring as if he's asleep.

A. Is that a question?

Q. Does that change your conclusion?

A. Not at all.

Q. Why?

A. Because there is I understand fairly good evidence that this man was on his feet and alert twenty-four hours after the beating.

Q. I'm telling you now in another factual situation that he wasn't. That's what I'm asking you. Does it change things if he wasn't alert, if he became unconscious shortly after the first beating, and that he acted as if he were asleep and was not alert?

A. If you changed the story as follows, the man is beaten momentarily unsconscious, comes to and then slowly and steadily deteriorates until he's semi-conscious and is brought into the hospital, I would say I certainly would change my mind. Yes.

Q. Well, that was a different factual situation that I presented you.

A. I see.

MR. FULLER: That's all.

RE-DIRECT EXAMINATION

By Mr. Carter:

Q. Doctor, you started to say something about the nasal bleeding?

A. Yes. Coughing or spitting up blood has little or no significance to brain injury. It has a lot to do with a nose bleed. And very frequently, of course, patients who are beaten up have a nose bleed and they swallow the blood. But insofar as brain injury is concerned, that has no significance.

Q. And with a patient who apparently had a trauma to the lip, who had a very reduced liver functioning, would you expect any type of hemorrhaging around and about the lip and mouth?

A. I would expect it to be more prolonged.

Q. Now, Doctor, again would you explain to his Honor the sequence of events that would have to take place for you to believe that there was any causal connection in the hypothetical question between the initial altercation, that is you recited to Mr. Fuller certain facts that would have to have taken place to bring you

to the conclusion that there was any causal connection between the cerebral hemorrhage and the first trauma?

A. Well, really actually the only thing I can do is in other words repeat what I said originally. When patients receive a brain injury if it's of any severity, they manifest those effects at the most within hours, a few hours at the most; and then the course is in one of two directions, steady improvement or they deteriorate and die.

Q. All right, if the patient was ambulatory let's say within hours after the initial trauma, would this be of any significance?

MR. FULLER: If your Honor, please, he's already asked this in a hypothetical question. He's just going over ground he's already plowed.

MR. CARTER: If your Honor, please. . .

MR. FULLER: This was a part of his hypothetical question.

MR. CARTER: I think I have a right to go into the factual situation if the doctor feels that it's significant from a standpoint of rebutting the hypothetical question which

was put to him on cross examination, and that is the situation that was set up and I am asking him what the doctor feels would be the significance if rather than following the steady deterioration which the doctor has described as being the history, or one of the two types of histories of the head injury, whether or not this is consistent with one or the other.

MR. FULLER: Well, if your Honor, please, that was a part of his hypothetical question to begin with. Then I asked a hypothetical changing the factual situation. All he's doing is going back over ground he's already covered.

JUDGE INGRAM: All right, I'm going to let the witness answer this hypothetical, Mr. Carter.

Q. All right, Doctor, before all of that, do you understand what I'm trying to ask you before we got into all this hassle? What's I'm trying to say is that if following the first or initial trauma, if this patient remained ambulatory, which of these two courses

would you suggest the patient was taking at that point?

A. I would say the patient was beginning to get well.

Q. Now, Doctor, if you has an appreciable delayed reaction from the patient, what type of brain hemorrhage would you expect to find?

A. Well, the type of thing that's seen in the patient who for example would follow the first course we described, an initial injury, perhaps a knockout blow, and maybe even a minor head injury, and subsequently over a period of days or weeks would begin to slowly deteriorate, these patients have what is called a chronic subdural hematoma. It's a word meant to describe a chronic collection of blood between the brain and the surrounding membranes that grows larger with the passage of time.

Q. This is subdural?

A. Yes, sir.

Q. And this is a more slow process?

A. Yes, sir, much more.

Q. And the type of hematoma that was produced in this case was. . .

A. Intracerebral.

Q. And would you describe to us what that is as distinguished

from a subdural hemorrhage?

A. An intracerebral hemorrhage is one within the substance of the brain itself.

Q. Within the lobe itself?

A. Yes, within the hemisphere of the brain; and whereas a subdural is entirely outside the brain between the brain and the surrounding membranes.

Q. Doctor, do you have any opinion as to whether or not there could have been another causation involved in this?

A. Well, do you mean in what?

Q. From a standpoint of hypertension.

MR. FULLER: Well, if your Honor, please, that's not only leading, he's testifying and he hasn't set up any hypothetical question.

JUDGE INGRAM: Objection sustained.

Q. Assume, Doctor, that taking the initial hypothetical question, and which I thought I stated to you, that you had a patient who not only had a cirrhotic liver but was suffering from hypertension, would there be any other conceivable causation of the intracerebral hematoma?

A. Yes. Of course, the man could have had a spontaneous intracerebral hematoma.

Q. And that is in lay language what?

A. In lay language that is a hemorrhage resulting from a weak spot in a diseased small vessel, usually a small artery, a very small artery.

Q. That's what we call a stroke?

A. It produces a stroke. Yes.

MR. CARTER: Do you want to ask him anything further, Mr. Fuller?

MR. FULLER: Yes, I do.

RE-CROSS EXAMINATION

By Mr. Fuller:

Q. Doctor, if I understand you, if after this first beating the man received, his face not only became swollen, he not only spit up blood, but he lost consciousness and never did regain his alertness, and at the time he was admitted to the hospital he was semiconscious, then you would have to conclude that his injuries were a result of the first beating wouldn't you?

A. I don't really know what time intervals you're talking about.

Q. Well, you didn't have any trouble with time intervals when Mr. Carter asked you the question.

A. I stressed them. I think that they are a key factor.

Q. All right, now at 6:00 o'clock on August the 1st a man receives a severe beating.

A. Yes.

Q. His face swells and he starts spitting up blood, he looses consciousness, he's snoring as if he were asleep, he's not alert, and though he may regain consciousness off and on, he's still not alert and when he's taken to the hospital on August the 3rd he's semiconscious, shortly before he's taken to the hospital on August the 3rd he had to be helped to the bathroom and on the way back he fell while he was being helped, he couldn't stand alone, and when he fell he hit his head on a bed. That factual situation certainly doesn't apply to your conclusion that the first injury was not the cause of death does it?

MR. CARTER: If your Honor, please, what kind of a question is that?

A. I didn't understand what your. . .

JUDGE INGRAM: Wait a minute. What's your

objection, Mr. Carter?

MR. CARTER: To the last part of it, which I think had gotten completely detached from a hypothetical question.

JUDGE INGRAM: Well, I think he posed a hypothetical and asked him if his conclusion would be different based on those facts.

MR. FULLER: That's right, I did.

JUDGE INGRAM: That was the question and I think that's a proper question. So you understand the question, Doctor?

DR. KUHN: No, sir.

JUDGE INGRAM: All right, I'll ask you to restate the question.

Q. At 6:00 o'clock on August the 1st a sixty-one year old man with cirrhosis of the liver, mild diabetes, high blood pressure is hit three to five times with a fist by a hundred and eighty-five to ninety pounder, twenty-two years, within five minutes he starts swelling, he looses consciousness, he starts snoring as if he's asleep, he later starts spitting up blood, he comes and goes as far as alertness is concerned, during the night of the 1st, all day during

the 2nd, during the early morning hours of August the 3rd, unable to get to the bathroom on his own, he seeks help, is taken to the bathroom and falls, he can't stand alone, and hits his head on a bed. In that factual situation could you still say that the cause of death was the result of the second blow instead of the first?

A. Yes.

Q. You could?

A. Yes, I could. You've left out some very, very key features.

Q. What?

A. Well, you stated that the man was knocked out, and then the implication from your continuing statement is that he remains more or less knocked out. Now a more or less knocked out patient does not stand up, does not walk around.

Q. I didn't say that. I said that he lost consciousness, he regained consciousness, he'd come and go as far as alertness was concerned.

A. Then I would say that my answer would be the same as it was before, if that's the way you're going to put it. I would say that the beating would have no

relation whatsoever to the cause of death.

Q. The beating?

A. The beating.

Q. Why is that?

A. Because you have just stated that you feel that this is the way in which the sequence of events led.

Q. You stated in your first answer that the reason you made that conclusion was because the man was alert. If he hadn't been alert, you said your answer would have been different.

A. If he hadn't been up and walking about, that's correct.

Q. Well, I'm saying that he wasn't up and walking about.

A. In other words, this is all. . .everything I've been told is untrue, that that sequence of events never happened. If so, you could be right.

Q. All right. The problem with you in answering the questions, Doctor, is you are assuming everything Mr. Carter says is true, whereas you are assuming what I'm saying is not true.

A. I'm not assuming anything. I'm. . .

Q. Well, there are several factual situations here that the Judge has got to decide. Mr. Carter's given you one situation as he sees it and I've given you another

one.

A. I understand that. I also unstand neurosurgery far better and I still say that if the patient was initially injured and steadily deteriorated, that the proximate cause of death was the blows.

Q. All right, that's all I wanted to know.

RE-RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. You may finish that up, Doctor. You started to say something else before Mr. Fuller decided he'd heard all he wanted to listen to.

A. Well, the only answer, the only thing to add is if that sequence of events was not followed, it was not the cause of death.

Q. Would that sequence of events be followed if the man came and went as to alertness? In other words, if he was alert on occasions during the hours that succeeded that?

A. No.

Q. That would not follow?

A. No.

Q. Let me ask you something. Doctor, is there any particular significance to snoring from a standpoint

of determining whether or not a man is comatose or anything of that sort?

A. Well, there could be. If a patient has a head injury and is breathing for example, and he's deeply unconscious, and he becomes stutterous, he's close to death.

Q. If he becomes what?

A. If his breathing becomes labored, snoring, the individual has had really a very, very. . .

Q. Well, do you ordinarily correlate snoring with laboring for breath and this sort of thing?

A. Yes, but I assume this was not supposed to be normal snoring.

Q. Well, I don't know what kind of snoring it was. Is there really a difference between let's say a patient who is critically ill and begins to snore from the type of snoring that my wife complains about?

A. Well, I would say the type of snoring a head injured patient exhibits is quite a bit different.

Q. Thank you, Doctor.

. . . . . .

MR. CARTER: The defense rests, if your Honor, please.

JUDGE INGRAM: All right.

DETECTIVE J. W. MARTIN, JR., who had previously testified as a witness on behalf of the Commonwealth, was recalled as a witness on behalf of the Commonwealth in rebuttal, having been previously sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Detective Martin, after this incident occurred at Mrs. Cook's house did you have an occasion to talk to her?

A. Yes, sir.

Q. Was it the same time you talked to her son?

A. Yes, sir.

Q. That would have been on August the 3rd?

A. Yes, sir.

Q. Later in the afternoon or sometime that day?

A. The same time we talked with her son we talked to her.

Q. About what time was that?

A. It was after lunch.

Q. I see.

A. I'd say.

Q. Would you tell us what, if anything, she said in regard to the defendant hitting his head?

MR. CARTER: The defendant?

Q. I mean the deceased hitting his head.

A. She stated that after Vern left she put some ice packs on Mr. Boswell's face and he went to bed. She said that at 2:30 this morning he called her and she had been sleeping on the floor; she went in there and he wanted to go to the bathroom; she took him to the bathroom and he was unable to stand and he sat down; she took him back to the bedroom and he fell on the newspaper striking the back of his head on a baby bed. And she before this. . .this was on Monday evening, Monday night he went to bed upstairs and stayed, that she put newspaper all around the floor and moved the night stand away from the bed because he was bleeding somewhat. What she said was he was spitting up strings of blood. So she had put the newspaper on the floor and she stated that when he went back to the bedroom from the bathroom he fell on the newspapers striking the back of his head on a baby bed.

Q. That was Monday night after this happened late Monday afternoon?

A. Yes, sir.

Q. That's all.

CROSS EXAMINATION

By Mr. Carter:

Q. All of this happened what, on Monday?

A. This was. . .

Q. According to the sequence of events that you recorded then?

A. Yes, sir.

Q. Well, what day of the week was it that you were interrogating Mrs. Cook?

A. Sir?

Q. What day of the week was it you were interrogating Mrs. Cook?

A. This was the 3rd, which would have been Tuesday. I think Monday was the 1st. Wednesday, Monday was the 1st.

Q. This was on Wednesday?

A. Yes, sir.

Q. What time of day or night did she say this occurred according to the notes that you recorded there?

A. He went to bed Monday night. . .When he struck his head?

Q. Uh-huh.

A. She said, "About 2:30 this morning."

Q. This morning?

A. Yes, we were talking about Monday when it happened, so 2:30 would have been. . .after 12:00 o'clock would have been Tuesday morning.

Q. Not Nednesday morning?

A. No, not Wednesday.

Q. Are you sure of that? I mean that's the way you recorded it?

A. Yes, sir.

Q. I think that's all.

. . . . . .

RONALD D. PRUITT, the next witness called on behalf of the Commonwealth, in rebuttal, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Fuller:

Q. Would you state your name, please?

A. My name is Ronald D. Pruitt.

Q. Mr. Pruitt, are you a member of the Danville Life Saving Crew?

A. Yes, sir, I am.

Q. Were you called to go to Westhampton Avenue during the early morning hours of August the 3rd of this year?

A. Yes, sir, I was.

Q. What did you find when you arrived there?

A. I found a man laying face up in the floor who appeared to be very badly beaten.

Q. Why did he appear to be very badly beaten?

A. His face was bruised very much, it had dried blood on it, swollen severely.

Q. All right, now what was his condition when you arrived there?

A. He was asleep.

Q. He was asleep?

A. Yeah.

Q. All right, and what. . .Did you make any inquiry as to the situation?

A. Yes, sir, I did.

Q. And what were you told?

MR. CARTER: By whom and by. . .

Q. Who did you talk to?

A. I talked to the woman that was there at the residence.

Q. And what did she say?

MR. CARTER: Who was the woman who was there? I think we'd better identify somebody before . . .

JUDGE INGRAM: Let's have him identify who he

talked to.

Q. Do you know who the woman was?

A. She didn't tell me the name at the time, but I know who it is, but she didn't tell me her name.

Q Well, who is it?

A. It was Mrs. Cook.

Q. All right, and what did she tell you?

A. She told me that. . .At first, you know, I thought it was her husband, and I asked her was it her husband; and she said, "No," that it was her lover. And I went on to ask her, you know, what had happened. She told me that he had been beaten by her son, and she went on to explain the situation. Do you want me to explain. . .

Q. Yeah.

A. She went on to tell me that, you know, I just asked her well, what had happened, and she went on to tell me that, you know, they had been living together for sometime and that she wanted. . .he had a key to her house and she wanted it back, and that he came over on Monday and had been drinking, and she wanted the key back and they started arguing when her son came in, and then he beat him and took the key.

Q. All right, and what, if anything, did she tell you was the reason for the fight?

A. All I know is that he had a key to the house and that she didn't want to see him anymore.

Q. All right, now when you got there he was asleep. What did you do?

A. Well, we told her, you know, that. . .She told me, you know, that. . . .We went to get the stretcher. We brought in a first aid kit and a black bag, and he was asleep, and she told me that he didn't, you know, before that day he didn't want to go to the emergency room. So we went to get the stretcher, and I told her to wake him up because I didn't want to wake him up, if he didn't want to go and he'd raise up and tear up on me. So, you know, I asked her to wake him up while we went to get the stretcher. And when I went to get the stretcher I called the police department and told them, you know, about it, and I thought they should send a unit over, at what time he told me that they was in a shift change and they would get back to it as soon as they. . .

Q. Well, don't tell us what they said, but what did you do? You got the stretcher.

A. We got the stretcher and went in, and she had woken him up, and I tried to talk to him but he couldn't respond to me. He kind of moaned a little bit but it was nothing, you know, you could understand. And we helped him up and walked him to the stretcher because the stretcher wouldn't go between the doorway to the bed and the room, the front room.

Q. Could he walk without your help?

A. No, sir.

Q. All right, what did you do then?

A. We helped him to the stretcher, me, and Mrs. Cook and the boy that was with me.

Q. Who was the boy that was with you?

A. Butch Hart.

Q. Okay, go ahead.

A. And we walked him and got him on the stretcher, and strapped him down securely to the stretcher, put him in the ambulance and transported him to the emergency room.

Q. Were you able to communicate with him?

A. I talked to him all the way in and he kept going back to sleep, so I was talking to him so that he wouldn't go to sleep, but he couldn't never communicate with me.

I was talking to him about the whole time though.

Q. All right.

A. Telling him what I was doing and where we were going.

Q. He never did respond?

A. Huh-uh.

Q. Answer Mr. Carter's questions.

CROSS EXAMINATION

By Mr. Carter:

Q. You recorded none of this, this is just what you recall from memory. Is that right?

A. How's that?

Q. You didn't write any of this down, this is just what you recall from memory?

A. Yes, sir.

Q. Just what you recollect as the sequence of events and the conversations that happened that morning on August the 3rd?

A. As far as who he was and all this stuff, it would have been on the report. That was filled out on the report.

Q. But I mean these conversations that you had there at the house?

A. Yes, sir.

Q. Were not reported or recorded. I think that's all

RE-DIRECT EXAMINATION

By Mr. Fuller:

Q. Mr. Pruitt, you did have an interview with the police department and give a written statement didn't you?

A. Yes, sir.

MR. FULLER: Do you want to see that statement, Mr. Carter?

RE-CROSS EXAMINATION

By Mr. Carter:

Q. Is that what you're testifying from today? Was somebody showing you this statement before you came in here to testify?

A. No, sir, this is what. . .I mean, I know what I said.

Q. Yes, I know, but did you refresh your memory from that statement?

A. Did I refresh my memory from it?

Q. Yes, before you testified today?

A. I haven't got it. I'm just saying, you know, what I know.

Q. When was the last time you saw the statement?

A. When it was made.

Q. Hum? You haven't seen it since then?

A. They brought something. Let me see, it was something brought to the house last night.

Q. Yeah. How about this statement, have you been over that today?

A. Yes, sir.

Q. With whom?

A. With myself, nobody.

Q. I think that's all.

. . . . . .

MR. FULLER: The Commonwealth rests at this stage.

JUDGE INGRAM: All right, any further evidence?

MR. CARTER: Sir?

JUDGE INGRAM: Any further evidence?

. . . . . .

BETSY COOK, who had previously testified as a witness on behalf of the defendant, was recalled as a witness on behalf of the defendant, in rebuttal, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. Mrs. Cook, did you have occasion to go to your mother-in-law's home at any time between August the 1st of

of this year and August the 3rd?

A. Yes, sir, I did.

Q. Do you remember what day it was?

A. Yes, sir, it was August the 2nd, which is my father's birthday. I remember that.

Q. That would have been Tuesday?

A. Right.

Q. About what time of day was it?

A. I would say that I was there between 11:30 and 12:30 in the afternoon, early afternoon.

Q. 11:30 in the morning?

A. Right.

Q. And did you see or hear Mr. Boswell that day?

MR. FULLER: If your Honor, please, I object to this. This is rebuttal. He's got her in here on rebuttal and she's got to be rebutting something.

MR. CARTER: She is rebutting something, and that is the testimony that you've put on that this man was comatose and couldn't locomote during the period of time following the altercation on the 1st, and that's exactly what she's in here for, to rebut

came from Mr. Carter's own witness. The only thing that I brought the boy from the Life Saving Crew to testify to was to rebut what Mrs. Cook said.

JUDGE INGRAM: The point he's making, Mr. Carter, is a technical rule of evidence. I think that the rule is one that is clearly within the discretion of the trial court, however; and I think that in view of the fact that the Court is trying this case without the intervention of a jury, I'm going to apply a more liberal ruling and permit the testimony. Bring the witness back to the stand.

BETSY COOK, who was testifying as a witness on behalf of the defendant, in rebuttal, at the time Mr. Fuller objected to her testimony, resumed the witness stand and her direct examination by Mr. Carter continued as follows:

Q. I don't know where we last left you, Betsy, but I believe you recounted to us that you were at your mother-in-law's home sometime between about 11:30 in the morning and about 12:30 in the afternoon.

A. That's right.

Q. On August the 2nd. What did you observe or hear from Mr. Boswell, if anything, during that period of time?

A. During that period of time I heard Mr. Boswell. . .

MR. FULLER: If your Honor, please, I object to anything he said.

JUDGE INGRAM: Just tell us what you saw and observed. Don't tell us what you heard somebody say.

A. I heard Mr. Boswell's footsteps at the time I was there. Would you like me to describe the circumstances surrounding this?

Q. Yes, if you would.

A. I was sitting in the kitchen speaking with my mother-in-law briefly at which time I stood up to go to the bathroom down the hall. I got about halfway into the dining room at which time I heard Mr. Boswell. I was aware he was the only one home, or in the house, other than we at the time. I heard him leaving the bathroom and heard his footsteps on the wooden floor going from the bathroom back into the bedroom.

Q. Did he have any assistance?

A. No, sir. Mrs. Cook was in the kitchen.

Q. With you?

A. Pardon?

Q. She was in the kitchen with you?

A. Right.

Q. Right.

MR. CARTER: You may examine.

CROSS EXAMINATION

By Mr. Fuller:

Q. You didn't see him, you just heard him?

A. That's correct.

Q. So you don't know who it was do you?

A. I knew that the three of us were the only people in the household at the time.

Q. You didn't see him walking around, you don't know who it was do you?

A. Yes, sir, I do. I knew that it was Mr. Boswell.

Q. Not unless somebody told you?

A. I was aware that Mr. Boswell was the only other person in the house aside from Mrs. Cook and myself.

Q. You didn't see him did you?

A. No, sir, I heard his footsteps.

Q. Okay, that's all.

. . . . . .

MR. CARTER: We rest.

JUDGE INGRAM: You rest?

MR. CARTER: Yes, sir.

JUDGE INGRAM: All right, is there any further evidence? All right, at this time we can release the witnesses and there are some medical records that the Court is going to have to review before I hear your argument, and I would also like to see counsel before argument in order that we might lay down some ground rules relative to that.

MR. CARTER: You want to see us when, if your Honor, please?

JUDGE INGRAM: In Chambers relative to some ground rules of argument.

MR. CARTER: All right, sir.

The Court, all counsel and the defendant returned to the courtroom following the recess. Opening argument was waived by Mr. Fuller on behalf of the Commonwealth, arguments were made by Mr. Carter on behalf of the defendant and by Mr. Fuller on behalf of the Commonwealth, to which there were no objections, after which the following occurred:

JUDGE INGRAM: Let the defendant stand. This is a difficult case both factually and legally. The testimony, and especially some of that relating to the medical testimony, is conflicting and confusing in parts. Based upon the evidence which the Court has heard in this case, taking into consideration the demeanor of the witnesses as they have testified on the witness stand, the capability of knowing the truth and the things to which they have testified, it is the opinion of this Court that the defendant be found guilty of voluntary manslaughter, which is the unlawful killing of another without malice, express or implied. The Court is of the opinion that here it was done upon a sudden heat of passion, that while the Court is of the opinion that the defendant did not intend to kill Luther Boswell, that is no defense. When a person assaults another he takes that person as he finds him. The victim here was not in good physical condition, but the Court is

of the opinion based on the evidence which it has heard in this case that the victim, Luther Boswell, died as a result of multiple blunt force injuries which were received to his head resulting in a cerebral hemorrhage thereafter complicated by liver failure. Before the Court pronounces sentence upon you is there any statement that you wish to make or advance any reason why judgment should not be pronounced upon you at this time?

MR. CARTER: If your Honor, please, before the Court pronounces any sentence in this matter could I have a moment for a conference with my client?

JUDGE INGRAM: Yes, sir.

Following a conference between Mr. Carter and the defendant, the proceedings continued as follows:

MR. CARTER: If your Honor, please, in view of his Honor's judgment in this matter which we, of course, except to. . .

JUDGE INGRAM: Yes, sir.

MR. CARTER: . . .we would go ahead and ask

the Court to pronounce sentence at this particular time. I hope the Court will take into consideration the tragic situation that this young man has found himself in and the fact that he has always enjoyed an excellent reputation, he's behaved himself and lived within the realm of law. He has his whole life to look forward to and has had a pretty rough one up until now.

JUDGE INGRAM: All right, sir.

MR. FULLER: Judge, I can say this. I know the purpose of a presentence report is to inform the Court both pro and con as to the record of a person. The Commonwealth has checked this out, and the defendant has no record, any criminal record whatsoever, and from what we've heard until this incident he's been a good citizen.

JUDGE INGRAM: All right, sir. Mr. Cook, is there any statement that you wish to make before the Court pronounces sentence upon you?

MR. COOK: No, sir.

JUDGE INGRAM: All right, sir. There appearing to be no further reason for delay, it is the judgment of this Court that you be placed on probation for a period of one year and that during such term of probation you comply with the general terms and conditions of probation of this Court which are prescribed by the Probation Officer. I will advise you that you have a right to petition the Supreme Court of Appeals of Virginia from the decision and the sentence of this Court, and that should you be unable to afford the assistance of counsel, the Court would give you the assistance of court appointed counsel. I would like to state, Mr. Cook, that you are guilty of the offense with which the Court convicted you, that the Court is of the opinion that you had no intention to kill Luther Boswell on the day in question. The Court is fully aware that this is a very tragic occurrence and the Court feels that this sentence is commensurate with the factual findings of the

Court. Mr. Carter?

MR. CARTER: If your Honor, please, there is one circumstance that his Honor may not be apprised of, and that is that Vern and his wife are now operating a motel in Augusta, Maine, and I would like. . .Quite obviously we intend to appeal this. I don't know whether the probation will take place after a decision has been made by the court of appeals or whether it would go into effect immediately. I'm not entirely sure of that.

JUDGE INGRAM: Well, I think as long as the bond is posted the sentence of the Court is deferred until that time. There's a $5,000.00 bond I believe in this case. We'll continue that bond.

MR. CARTER: I trust it's adequate.

JUDGE INGRAM: Are you indicating your notation for an appeal here?

MR. CARTER: Yes, sir.

JUDGE INGRAM: All right, sir. Let the record show that the defendant indicates

his intention to appeal the decision of this Court. Let the record also show that the defendant was personally present during each and every stage of this proceeding, as was his attorney, Mr. Carter, who ably and capably represented him throughout.

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VIRGINIA:

In the Circuit Court of Danville on Wednesday, the 23rd day of November, in the year 1977.

Commonwealth of Virginia, Plaintiff,

vs. Felony -- Indictment for Murder

John Vern Cook, Jr.,

This day came the Attorney for the Commonwealth, and the defendant, John Vern Cook, Jr., D.O.B. 5/16/55, who stands indicted for murder; and came also John W. Carter, the attorney for the defendant.

After private consultation with his counsel, the accused was arraigned and personally pleaded not guilty to the indictment. And the accused then, having been advised by his attorney and by the Court of his right to trial by jury, knowingly and voluntarily waived trial by a jury, and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and heard all the evidence adduced on behalf of the Commonwealth.

Thereupon, the defendant, by counsel, moved the Court to strike the Commonwealth's evidence on the ground it is insufficient to sustain a conviction against the defendant; that the Commonwealth has failed to carry the burden of proof of the cause of death, which said motion, upon consideration by the Court, is overruled and the defendant, by counsel, excepts.

Whereupon, the Court having heard all the evidence adduced on behalf of both parties and having heard arguments of counsel doth find-

the said John Vern Cook, Jr., guilty of voluntary manslaughter as charged in the indictment, but doth suspend the imposition of a sentence against the defendant and doth place the said John Vern Cook, Jr., on probation to the Probation Officer of this Court for a period of One (1) year, under the general conditions of probation as heretofore adopted by this Court.

The Court then advised the defendant and his attorney of the defendant's right to appeal this conviction to the Supreme Court of Virginia.

The Court orders that the transcript of the proceedings of this trial be made a part of the record of this case.

The Court certifies that the defendant and his attorney each were personally present at all times during the trial of this case and that his attorney capably and ably represented him.

The Court orders that the Commonwealth of Virginia do recover against the said John Vern Cook, Jr., its costs by it about its prosecution in this behalf expended.

The said defendant intimating his intention to apply to the Supreme Court of Virginia for a Writ of Error and Supersedeas to the judgment herein, the Court doth postpone the execution of its sentence until final disposition is made of this case by the Supreme Court of Virginia; and the defendant is released from custody under the same bond and surety as before.

Enter: November 23, 1977

James F. Ingram
Judge