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CAUSE NUMBER F15-00411-L

APPELLATE CAUSE NO. 05-17-00235-CR

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|----------------------|---|----------------------|---|
| THE STATE OF TEXAS   | * | IN CRIMINAL DISTRICT | FILED IN<br>5th COURT OF APPEALS<br>DALLAS, TEXAS |
| VS.                  | * | COURT NUMBER 5       | 8/9/2017 6:02:55 PM<br>LISA MATZ<br>Clerk         |
| CHRISTOPHER DUNTSCHE | * | DALLAS COUNTY, TEXAS |   |

\*\*\*\*\*  
 REPORTER'S RECORD  
 2 FEBRUARY 2017  
 VOLUME 8  
 \*\*\*\*\*

BE IT REMEMBERED that on the 2nd day of  
 February, 2017, the above-styled and numbered cause came  
 before the HONORABLE CARTER THOMPSON, Judge presiding, in  
 Criminal District Court Number 5, held in Dallas, Dallas  
 County, Texas, and the following proceedings were had:

Proceedings reported by machine shorthand

KELLY SIMMONS, CSR 214-906-4715 K.SIMMONSCSR@YAHOO.COM

A P P E A R A N C E S

MICHELLE LEE SHUGHART - 24044559  
STEPHANIE COLE MARTIN - 24031963  
JACLYN O'CONNOR-LAMBERT - 24049262  
JUSTIN LYN MCCANTS - 24046380  
JUSTIN TYLER JOHNSON - 24054522  
ASSISTANT DISTRICT ATTORNEY.  
133 N. Riverfront Blvd.  
LB 19  
Dallas, Texas 75207

FOR THE STATE;

MELINDA JOAN LEHMAN - 24043957  
ATTORNEY AT LAW  
701 Belknap  
Fort Worth, Texas 76102

RICHARD FRANKLIN - 24053209  
ROBBIE SAYLE MCCLUNG - 00789772  
MCCLUNG & FRANKLIN  
2150 S. Central Expressway  
Dallas, Texas 75070

FOR THE DEFENDANT.

CHRONOLOGICAL INDEX  
2 FEBRUARY 2017  
VOLUME 8

|    | <u>PAGE</u><br><u>NUMBER</u> | <u>VOLUME</u><br><u>NUMBER</u> |
|----|------------------------------|--------------------------------|
| 1  |                              |                                |
| 2  |                              |                                |
| 3  |                              |                                |
| 4  |                              |                                |
| 5  | 5                            | 8                              |
| 6  | 7                            | 8                              |
| 7  |                              |                                |
| 8  |                              |                                |
| 9  |                              |                                |
| 10 |                              |                                |
| 11 |                              |                                |
| 12 |                              |                                |
| 13 |                              |                                |
| 14 |                              |                                |
| 15 |                              |                                |
| 16 |                              |                                |
| 17 |                              |                                |
| 18 | 190                          | 8                              |
| 19 |                              |                                |
| 20 |                              |                                |
| 21 |                              |                                |
| 22 |                              |                                |
| 23 |                              |                                |
| 24 |                              |                                |
| 25 |                              |                                |

EXHIBIT INDEX  
2 FEBRUARY 2017  
VOLUME 8

| <u>STATE'S</u><br><u>EXHIBIT</u> | <u>DESCRIPTION</u> | <u>OFFERED</u>                   | <u>ADMITTED</u> | <u>VOL</u> |   |
|----------------------------------|--------------------|----------------------------------|-----------------|------------|---|
| 6                                | No. 1              | Picture of Dr. Duntsch           | 34              | --         | 8 |
| 7                                | No. 2              | Picture-Mary Efurd Body          | 34              | 37         | 8 |
| 8                                | No. 3              | Picture-Mary Efurd Face          | 34              | 37         | 8 |
| 9                                | No. 4              | Picture-Mary Efurd Scar          | 34              | 37         | 8 |
| 10                               | No. 5              | Symptoms Chart-Efurd             | 33              | 33         | 8 |
| 11                               | No. 12-22          | Photo-spinal anatomy             | 49              | 49         | 8 |
| 12                               | No. 23             | Animated video                   | 60              | 60         | 8 |
| 13                               | No. 24             | Photo-spinal anatomy             | 49              | 49         | 8 |
| 14                               | No. 25             | CD                               | 108             | 108        | 8 |
| 15                               | No. 26-31          | Photos from SX No. 25            | 117             | 117        | 8 |
| 16                               | No. 34             | Email                            | 130             | 130        | 8 |
| 17                               | No. 37             | Symptoms Chart-Passmore          | 182             | 182        | 8 |
| 18                               | No. 38             | Photo-Passmore (face)            | 179             | 179        | 8 |
| 19                               | No. 42             | X-ray Passmore (frontal)         | 179             | 179        | 8 |
| 20                               | No. 90             | Peer review file                 | 129             | 129        | 8 |
| 21                               | No. 181            | Model of Spine (DPO)             | 102             | 102        | 8 |
| 22                               | No. 182            | Efurd Medical Report             | 133             | 133        | 8 |
| 23                               | No. 192-195        | Photo-spinal anatomy             | 49              | 49         | 8 |
| 24                               | No. 196            | Images from SX No. 7             | 74              | 74         | 8 |
| 25                               | No. 197            | Model of cervicle spine<br>(DPO) | 55              | 55         | 8 |

1  
2  
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4  
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P R O C E E D I N G S

THE COURT: Ladies and gentlemen, before we start official proceedings, I have a couple of announcements to make. First of all, if anyone here is familiar with or conversant with someone who is going to be testifying, I don't want anyone in the public to communicate what's been going on in court to someone who will be testifying. All right?

You are free to talk to other non-witnesses, but witnesses or perspective witnesses to this trial should not be having conversations about what's transpired during trial.

Does anyone have an issue with that?

(No response)

THE COURT: Okay. Do not talk to a witness about what's been going on in court. All right. Let's line them up.

THE BAILIFF: All rise.

(Within the presence of the Jury)

THE COURT: Thank you. Please be seated. Ladies and gentlemen, before we proceed any further, I need to have you sworn in as members of the Jury.

Raise your right-hand.

(Jury sworn by the Court)

THE COURT: Thank you very much. Ladies

1 and gentlemen, before we start testimony, I need to go  
2 through some housekeeping details. First of all, it's  
3 permissible to bring into the jury box whatever soda,  
4 coffee, water you like. Just keep up with it in the jury  
5 box.

6 Also, you're permitted to take notes  
7 during the course of the trial, with two provisos, one of  
8 which is you keep your notes to yourself. The notes that  
9 you take are to refresh your own memory, not somebody  
10 else's memory.

11 Secondly, during deliberations you're not  
12 allowed to take notes back in the jury room with you.

13 The Court has a computer program called  
14 realtime, actual transcriptions of the testimony as it's  
15 happening. That helps the Court pick out points of law  
16 that might crop up during the course of the trial and  
17 address those later on and speed things up. So if you  
18 see myself or any other judge looking at a computer  
19 screen a lot, that's what's going on.

20 Lastly, we're going to be taking  
21 mid-morning and mid-afternoon breaks, so you're not going  
22 to be in the jury box for more than an hour, hour and ten  
23 minutes at a time.

24 Lastly, you may have noticed there is a  
25 lot of publicity in this case, TV cameras, that kind of

1 thing. Please rest assured that no one is going to film  
2 you. The cameras are here to photograph the lawyers and  
3 the witnesses, not the Jury, so you're not going to be on  
4 television. The media has been instructed not to film  
5 you.

6 All right. State may proceed.

7 MS. SHUGART: Thank you.

8 MS. MCCLUNG: At this time defense would  
9 invoke the rule.

10 (Rule invoked)

11 THE COURT: The rule has been invoked.  
12 Both sides are to instruct their witnesses accordingly.

13 ARRAIGNMENT

14 MS. SHUGART: Good morning, Ladies and  
15 Gentlemen. I'm going to read you the indictment. It  
16 tells the State what it is we have to proffer, and it  
17 alerts the defendant to what he has been charged with.

18 (Reading) "In the name and by the  
19 authority of the State of Texas, the Grand Jury of Dallas  
20 County, Texas, duly organized at the July term, A.D,  
21 2015, of the 363rd Judicial District Court of said  
22 county, upon it's oath do present that in and to said  
23 court at said term that Christopher Daniel Duntsch,  
24 hereinafter called the defendant, on or about July 25th  
25 of 2012, in the County of Dallas, State of Texas, did

KELLY SIMMONS, CSR 214-906-4715 K.SIMMONSCSR@YAHOO.COM

1 unlawfully then and there intentionally, knowingly,  
2 recklessly and criminally negligently cause serious  
3 bodily injury to Mary Efurd, an elderly individual of 65  
4 years of age or older, hereinafter called the  
5 complainant, by mal-positioning an interbody device and  
6 mal-positioning a pedicle screw and amputating the left  
7 L5 nerve root, and said defendant did use a deadly  
8 weapon; to wit, hands and surgical tools and a pedicle  
9 screw, during the commission of the offense."

10 Signed by the Foreman of the Grand Jury  
11 and by then District Attorney of Dallas County, Texas."

12 THE COURT: To that indictment how does  
13 the defense plead?

14 MS. MCCLUNG: Dr. Duntsch pleads not  
15 guilty, Judge.

16 THE COURT: Proceed.

17 OPENING STATEMENTS

18 MS. SHUGART: Five years ago Mary Efurd  
19 had back pain. At the age of 75 she went to the doctor,  
20 and she ended up at the Texas Neurosurgical Institute,  
21 the offices of one Dr. Christopher Daniel Duntsch.

22 Ultimately, on July 25, 2012, Mary ended  
23 up having surgery and being operated on by the defendant  
24 at the Dallas Medical Center. But what happened there  
25 nobody could have conceived of.



1           You see, her doctor, the man she put her  
2 trust into to cut into her back, put spinal fusion  
3 hardware in the muscle, not in the bone where it belongs  
4 but in the muscle.

5           And he didn't stop there. He cut off a  
6 nerve so her foot hangs there, and he put one of these  
7 pedicle screws to where it's touching the spinal canal.

8           The hospital was so appalled by what he  
9 had done that they removed him from the case, brought in  
10 another surgeon to fix it, and kicked him out of the  
11 hospital.

12           Now, the other surgeon who came in, Dr.  
13 Robert Henderson, when he saw what the defendant had  
14 done, he was so disgusted by it that he didn't think the  
15 person who had done it was even a doctor. He thought it  
16 was an imposter who had done this, and he had to go check  
17 to find out.

18           After you hear from Mary Efurd and Dr.  
19 Robert Henderson, we're going to go back in time, and I'm  
20 going to show you patient after patient that the  
21 defendant injured and knew he was injuring, before he  
22 even ever got to Mary Efurd.

23           Lee Passmore is going to come in here and  
24 tell you that he had a sharp pain in his back, but after  
25 his surgery with the defendant he woke up, and he was

1 numb from the waist down, and he was in more pain than he  
2 was before the surgery.

3           The very next surgery was Barry  
4 Morguloff. Barry Morguloff is going to come in here and  
5 tell you that when he woke up from his surgery, he  
6 couldn't control his foot, and he was in so much pain  
7 that he would wrap a towel around his foot and was trying  
8 to pull it up to alleviate the pain, and when he tried to  
9 tell the defendant about it, the defendant didn't do  
10 anything.

11           Another surgeon had to eventually come in  
12 and remove that hardware because it was loose, it wasn't  
13 tightened down, and that surgeon had to remove bone  
14 fragments that were pushing on Barry Morguloff's nerves  
15 causing him that pain.

16           After Barry, you're going to hear from  
17 Jerry Summers. Jerry Summers will not be here in person  
18 like the rest of the witnesses. You will see him on the  
19 screen from a deposition that we took a few weeks ago in  
20 Memphis, Tennessee.

21           You see, Jerry could not come to Texas.  
22 Jerry could not walk. Jerry cannot dress himself or feed  
23 himself because of what the defendant did.

24           They were friends. They grew up together  
25 in Memphis, Tennessee. They played football together.

1 And when the defendant finished his medical training and  
2 his residency and his fellowship, he came here to Texas  
3 to start his practice. Jerry came with him to help him.  
4 Jerry worked for him, Jerry lived with him, Jerry ran his  
5 errands.

6 But Jerry had a back problem, and on  
7 February 2, 2012, Jerry walked into Baylor Plano  
8 Hospital, but when he woke up from his surgery with the  
9 defendant, he could not feel his arms or legs, but he  
10 could feel the pain.

11 You see, Jerry became an incomplete  
12 quadraplegic, meaning he couldn't move anything, but he  
13 can still feel everything.

14 Right after his surgery the defendant did  
15 not take care of him, did not take him right back into  
16 surgery and fix it. Instead, he went to operate on  
17 somebody else.

18 Jerry lay there for hours until the  
19 defendant came back and decided, yeah, he probably needs  
20 another surgery, so let's take him back in. By then it  
21 was too late.

22 A few weeks later the defendant operated  
23 on Kelly Martin, his very next surgery after Jerry  
24 Summers. Kelly Martin was a schoolteacher, and she  
25 wanted to get her back fixed before they went on a

1 cruise. At the age of 54, she walked into Baylor Plano  
2 Hospital. She never made it out.

3           You see, the doctor she trusted to cut  
4 into her back cut through the skin, and he cut through  
5 the back muscles, and he cut through his entire spinal  
6 column, and he cut through the ligament on the other side  
7 of the spinal column that holds it together, and he  
8 slashed a major blood vessel, and she bled to death.

9           Her husband will come in here and tell  
10 you that when they delivered the news, the defendant  
11 would not look him in the eye.

12           Baylor Hospital forced the defendant to  
13 take a leave of absence from operating, and he knew he  
14 was never going to operate there again.

15           He resigned from the hospital, so that it  
16 wouldn't have to be reported to the national databank  
17 where everybody could see it, and he covered his tracks  
18 by hiring an attorney.

19           A few months later he finally found  
20 another hospital to take him, but he didn't tell them  
21 about his last two patients and those results, and his  
22 very first week there he had two catastrophic outcomes on  
23 the same day.

24           On July 24, 2012, Floella Brown, at the  
25 age of 64, walked into Medical Center, and she also never

1 walked out. The defendant took off too much bone on her  
2 spine and cut her vertebral artery, depriving her brain  
3 of the oxygen-rich blood that it needed, and over night  
4 she had a stroke.

5 And the next morning the defendant was  
6 called in early to take care of her. He didn't take care  
7 of her. He decided he needed to go operate on Mary  
8 Efurd, that first patient that I told you about so -- as  
9 well as brain is swelling, and she is beginning to die.

10 He goes into Mary Efurd's surgery, and he  
11 is arguing with hospital personnel because he wants to  
12 drill a hole in her brain, something that he had never  
13 shown them that he was even qualified to do and that  
14 they, under no circumstances, were going to allow him to  
15 do.

16 Seven hours later he finally transferred  
17 Floella Brown to another hospital that could do this  
18 procedure, and at the end of the day Floella was,  
19 essentially, brain dead, and Mary could no longer walk.

20 For seven days doctors and patients and  
21 nurses, medical advisers and other hospital personnel are  
22 going to come in here and tell you everything the  
23 defendant knew before he picked up a scalpel and touched  
24 Mary Efurd with it.

25 You're going to hear the carnage he

1 caused was not a mistake or an accident or just  
2 malpractice but that he ignored 17 years of medical  
3 training and continued to operate, and he was aware of  
4 all the injuries that he had caused these patient, and he  
5 knew what he was capable of, and he knew that the next  
6 patient he walked into he was going to maim or paralyze  
7 or kill.

8           At the end of the trial, you're going to  
9 find him guilty. We're all going to agree as a group  
10 that he intentionally operated on Mary Efurd and that he  
11 knowingly caused her serious bodily injury. That's not  
12 going to be the question. The question that you're going  
13 to have is why didn't he stop? Why didn't he stop?

14           You may be able to find the answer, and  
15 you may not, but whatever his motivation was, when he  
16 stepped into that operating room, he knew that he was  
17 hurting Mary Efurd while he was operating on her, and  
18 before he even went in there, he knew that he was almost  
19 certainly going to cause her injury.

20           THE COURT: Defense.

21           OPENING STATEMENTS

22           MS. MCCLUNG: May it please the Court,  
23 counsel for the state.

24           Ladies and gentlemen, you knew when some  
25 of you came in here on Monday, some of you came in here

1 on Tuesday, and some of you came in here yesterday and  
2 filled out those questionnaires, you knew this was not  
3 going to be a typical criminal case. There were some  
4 issues with this.

5 There had been publicity about this,  
6 there had been talk about this, and that's why it took us  
7 three days to finally get down to the 14 of you to listen  
8 to all the evidence, and that's the point, Ladies and  
9 Gentlemen.

10 Ms. Martin gave a very interesting  
11 hypothesis, or metaphor, that's probably a better word,  
12 for what a case is. She called it a cake. She said that  
13 the elements that are in that indictment that was just  
14 read to you, again, are just the ingredients of a cake.

15 Well, we all know from common sense that  
16 cakes are made two ways, and that's not any different in  
17 the way a criminal case comes to the District Attorney's  
18 Office.

19 Criminal cases can come two ways. They  
20 can come from a police officer investigation, getting a  
21 911 call, or a citizen complaint, and a police officer  
22 goes out and starts talking to witnesses, does an  
23 investigation, brings them in, videotapes interviews,  
24 takes notes, goes out and finds facts, finds evidence,  
25 issues search warrants, all sorts of things like that,

1 and then brings an entire package, kind of like that box  
2 of different kinds of cake mix you find at the store,  
3 brings it all and lays it on the desk of an assistant  
4 district attorney. That's one way.

5           There is another way. A citizen can come  
6 and complain to the District Attorney's Office and say  
7 there needs to be an investigation. And so on their own  
8 they can begin to put that cake together, with what few  
9 ingredients they can pull from that interview from that  
10 citizen complaint.

11           One of the things we also know about  
12 cakes is when you rush them, when you don't have all the  
13 ingredients or the ingredients aren't very good anymore,  
14 or maybe it's just not really all there, that sometimes,  
15 when you pull that cake out of the oven, there is a big,  
16 huge gap. It's just not enough. It can't stand by  
17 itself.

18           And what I'm referring to is the case  
19 that's actually in front of you, the indictment that was  
20 actually read. It's not enough.

21           Their concern is they can't get to  
22 criminal negligence, they can't get to reckless, they  
23 can't get to knowing, and now you know that's where they  
24 want to be, if you haven't figured it out.

25           They want to be at knowing and



1 intentionally, and to do that they're going to bring you  
2 Mr. Summers. To do that, they're going to bring you Mr.  
3 Morguloff. They're going to bring you other individuals  
4 who have had surgery with him, character evidence, other  
5 extraneous, so that you can push yourself up that hill,  
6 just the way you would take frosting and fill in that  
7 hole or maybe add another layer of cake to cover up the  
8 deficits in the first layer and make it really look  
9 pretty.

10                   Because the indictment alone you might  
11 not think is that big a deal, so they can't wait 'til  
12 punishment. They're going to do it before you ever get  
13 there so they can be sure that this beautiful cake that  
14 they've given you is exactly what you decide you want to  
15 take to your party without checking it out, without  
16 looking at how the ingredients are put in, without  
17 listening to the people and deciding, do they have a  
18 reason to tell me the truth? Do they have a reason not  
19 to? Is this an adequate enough investigation? Is this  
20 enough to call someone a criminal or not?

21                   Ladies and Gentlemen, I don't believe  
22 that you're that gullible. I don't believe you're those  
23 kind of people, or you wouldn't be sitting here right  
24 now. I think you're all individuals with intelligence,  
25 common sense and the ability to discern what is criminal

1 and what is not, to discern what is put in there to  
2 influence your sympathies, to play on your emotions, to  
3 get you to be concerned about the public instead of  
4 facing the facts.

5           Because remember what we said. There is  
6 a difference between punishment and guilt or innocence.  
7 Guilt or innocence is supposed to be about the facts. Do  
8 they have the facts to get you to those?

9           Because what you can tell is it's not  
10 about the who, because they -- they know that Dr. Duntsch  
11 is the one that did the surgery on Ms. Efurd. They know  
12 that. That's a done deal. They know the surgery was  
13 done. They know that Ms. Efurd is the one that it was  
14 done to. They know the problems that went wrong with the  
15 surgery.

16           But you have to remember back to some of  
17 the things that were said in voir dire. When we're  
18 talking about surgery and we're talking about consent,  
19 there are risks in surgery.

20           They don't want you to think that this is  
21 just one of those risks that failed, so they bring you  
22 more to persuade you it's not a risk, to persuade you  
23 that he knew, that he did it intentionally. They want to  
24 keep pushing you with the emotion and draw you away from  
25 the facts.

1                   The fact that you're supposed to be  
2 focusing on is Mary Efurud and whether or not it was  
3 criminal negligence, reckless, knowingly or intentional.

4                   You have to be able to adjust your mind  
5 and not just start glopping on that frosting that they're  
6 going to want you to you put on. You're going to have to  
7 look at it as it's being made and determine whether or  
8 not any those other surgeries mean anything to you or not  
9 or whether it's just what it is. It's just stuff. It's  
10 distracting you from the case itself.

11                   Ladies and Gentlemen, this case is going  
12 to be more about you using your reason and common sense  
13 and weighing the evidence. As things come in and are  
14 admitted in front of you, you're going to have to look at  
15 each piece of evidence and decide whether, to you, that  
16 is important or not, because they're going to want you to  
17 believe that everything they say is important.

18                   But you have got to have your own mind,  
19 because as we said in voir dire, you are the exclusive  
20 judges, exclusive judges, of each and every fact that is  
21 put in front of you.

22                   You get to decide the weight. The Judge  
23 decides the admissibility, but you get to decide the  
24 weight you want to give it, each one of you, and you  
25 decide whether it means what they say it means, and you

1 get to throw out what you think is not a tool anymore,  
2 that it's just gunk, it's just trash, and it doesn't have  
3 anything at all to do with your determination.

4 It's not like the tool box that Ms.  
5 Martin kept talking about in punishment. You actually  
6 can say, you know what, I'm putting this right over here.  
7 It doesn't mean anything. That's your job.

8 They're going to give you enough to cover  
9 you up. They're going to give you enough to hide what's  
10 really there. It's your job to scrape away the frosting,  
11 scrape away the decorations and really look and see, as  
12 Ms. Martin said, if they've got a guilty cake.

13 THE COURT: Thank you. State, call your  
14 first witness.

15 MS. SHUGART: Your Honor, the State calls  
16 Mary Efurd.

17 MARY EFURD,

18 A witness called by the State, having been duly sworn  
19 by the Court to tell the truth, testified on her oath  
20 as follows:

21 DIRECT EXAMINATION

22 BY MS. SHUGART:

23 Q. Can you please introduce yourself to the jury?

24 A. My name is Mary Efurd.

25 Q. Mary, can you tell us how old you are?