

In Over My Head
Benjamin Hilburn

(Musical Interlude) Ring around the rosies; A pocket full of posies; Ashes, ashes; We all fall down.

Sherry: Welcome to the Parricide Podcast. I'm Sherry...

Marie: ...and I'm Marie. Happy Holidays! We wish you the very best as we enter the holiday season.

Sherry: Just a heads up, our episode contains adult themes and adult language. These stories are not for kids.

I know we promised you a Christmas episode this time, but we couldn't do it. We haven't quite been at this for a year and when it came to creating an episode about Christmas, it was just too sad.

Marie: Okay, so who are we covering today?

Sherry: Today we're talking about Benjamin Hilburn - they call him Ben. He was 10 years old. He was also a Native American, raised Baptist - and had a younger brother and a little sister. His parents were violent and toxic when they were together, but they were divorced now. That was a recent change. He didn't do drugs and the source records didn't indicate he used alcohol at all. But he did have ADHD - and maybe a little bit of a learning disability - but I'm not sure. He was kind of a lonely kid and one of his schoolmates, Matthew Lahair, told KRQE News 13 (kind of with a shrug of his shoulder) that, "At the school he's, like, he has no friends and stuff to play with. So, I think that's why."

Marie: (light laughter) Something only a 10-year-old would say.

Sherry: Umhmm.

Marie: It's so weird when we talk about kids this young because they really - even though they're doing these scary adult things, they're still children. And the children around them have no clue what's going on or why.

Sherry: No, they don't. And we're going to talk a little bit about the data behind the really young kids today - and I think that what you just said will bear out.

Marie: Yeah. It doesn't sound to me like his family was exceptionally weird. Like, his parents had a bad marriage - but he's not a 10-year-old who's on drugs or being arrested.

Sherry: No, he doesn't seem to have any of those problems. But he did have the problem of a very toxic environment growing up.

Marie: Yeah, it sounds like it was pretty bad.

Sherry: It does. Family Services (CFS) was called on this family at least nine times. We'll talk about that a little later, too. Anyway, his parents were Brian James Hilburn - he goes by Jim - and Monica Albear. They'd married in October of 1997. There'd been a bitter divorce - and allegations of violence on both sides - but in the end, his dad had been awarded physical custody of all three of the kids.

Marie: Oh. So, it sounds like maybe mom was abusive. Because usually it ends up being joint custody.

Sherry: You're right that joint custody seems to be the popular thing anymore. But the trend back in 2009 was that physical custody would be awarded to one parent or the other - and then they would just expand the shared time.

Marie: Oh. Hmm.

Sherry: And, also, custody being awarded to Jim - rather than Monica - does indicate that Jim would be the better parent for them to live with. But it doesn't mean that he was not abusive, too. We'll get into this a little later. Child and Family Services do not show any indication that Jim was abusive.

Marie: Okay.

Sherry: So, we can talk about that a little later. But you're right; Monica does have some public records of being abusive.

Marie: So, let's talk about Child and Family Services. You said they'd been called nine times - that's a lot for one family!

Sherry: That is a whole bunch. But I do think that some of this was happening during the fight for custody.

Marie: Oh.

Sherry: And it does sound like - from what Monica says - that she was doing a lot of the calling. So, it's reported everywhere that Child and Family Services had been called those nine times - and at least one of those referrals was a complaint that Jim did not properly store his guns. This wasn't substantiated, as the guns were, indeed, properly stored when CFS went in to check.

Marie: Okay.

Sherry: Monica Albear complained, after the murder, that Family Services had done nothing. That her husband had been abusive. And that's the narrative that the attorneys for Benjamin took. But it's not true they did nothing. They actually did substantiate one claim of abuse - but it was against her - in 2003.

Marie: Woah.

Sherry: Right. She was charged with Battery for beating one of her children with a belt. Now, remember, this was six years prior to the murder.

Marie: So, the boys would have been four and three!?! Who did she beat?

Sherry: One of the two. I don't know.

Marie: That's horrible!

Sherry: Right. So, if you look at temper and you look at Battery - she's the one who has the record; not the man who is dead. But the media likes to ignore this fact and heap all of the allegations of abuse upon the dead father; because that's what the attorney for Benjamin was putting out.

Marie: Yeah. And, I mean, of course they're going to put that out because it's advantageous to their client. And it *might* be true. But it's not a favor to someone who can't defend themselves.

Sherry: Right. And I think what the public often forgets, is you have two sides when you have attorneys. You have one side, who may be telling the truth - and maybe telling...twists of the truth to defend a client. And then you have another side telling the truth and maybe twists of the truth to get that conviction. And so, when you hear all of the arguing back and forth, 'Well, so-and-so said he was abusive.' You have to really look at the court case and see what was determined. If they were found guilty, you look at what the Prosecution said. If they are acquitted, you look at what the Defense said.

Marie: Yeah. I mean, by the time they get convicted there's - or acquitted - there's a lot of people who have thought very hard about what the truth really is.

Sherry: And looked at a lot of details that aren't available to the public unless you make a FOIA request.

Marie: I think it's important that we note - and take seriously that - according to the standards set by Child and Family Services, the father, Jim, (who was killed) was not abusive, but the mother was found to be abusive. So, maybe she's not the most reliable narrator.

Sherry: I completely agree with you!

Marie: Anyway, tell me the story. Exactly what happened?

Sherry: Well, on a hot night - a Thursday (August 27, 2009) - Benjamin and his dad had a problem. It was only 6:30 p.m. - and it was a very hot day - and it was still light outside. Ben's dad was disciplining him for an undisclosed indiscretion and Ben said he was sick of it. He was tired of being punished. He's...he claims his dad was too strict and he said he felt like he was in over his head. Those are his words. So, he went and got his gun. One shot from behind - he was aiming at his dad's head - and Jim was down.

Marie: Wow! That's quite the shot. I think it is kind of strange that he said that he felt like he was 'in over his head.'

Sherry: That's a strange phrase for a boy to use. But when we listen to the tape, you'll hear that that's exactly what he says.

Marie: Hmm. I wonder where he picked that up. What happened to his sister - didn't he have a little sister at home?

Sherry: Yes. Six-year-old Emily was playing video games when all of this happened. In her police interview, she said she was just playing her video game when she noticed Ben was holding the 20-gauge shotgun. She heard the shot - and then she saw her father bleeding and lying on the floor. Ben returned the gun to the gun [closet] and then he picked up the phone and called 9-1-1. We've added a transcript of the 9-1-1 call to our Patreon page if anyone would like to see this in writing - but here's the call.

(Sounds typical of the beginning of a 911 call. Phone buttons being pushed in quick succession. Ringing.)

Benjamin: Hello?

(ringing)

Benjamin: moaning and distressed breathing

(ringing)

Emily: unintelligible

Benjamin: He's sleeping.

Dispatch: 9-1-1.

Benjamin: I need a doctor. My dad's dying.

Dispatch: What's your address?

Benjamin: Huh?

Dispatch: What's your address?

Benjamin: 919 Melanie – it's a white house.

Dispatch: 919?

Benjamin: Yeah. No not 919. I forgot. We live on Vivian Street!

Dispatch: Okay. What's the address?

Benjamin: I don't know let me go check the box.

(to his sister) He's bleeding very badly. He fell asleep.

Let me go check. Oh I hope (unintelligible)

Dispatch: Is it 333?

Benjamin: (big sigh) It's a white house. It has a big – truck. Just get a doctor over here!

Dispatch: Okay. Is it 333? Is it 333 Vivian Drive?

Benjamin: Yes.

Dispatch: Does that sound right?

Benjamin: Yeah.

Dispatch: Okay. Stay on the phone. What's going on with him?

Benjamin: Umm. His head's bleeding. The back.

Dispatch: How old is he?

Benjamin: (shouting) I don't know! Just hurry and get over here!

Dispatch: Okay. Stay on the phone with me. I'm getting them enroute.

Benjamin: (moaning) Hurry up. Please!

(Dispatch can be overheard sending help.)

Hurry up.

Dispatch: Do you know how this happened?

Benjamin: Huh?

Dispatch: Do you know how this happened?

Benjamin: I...I was so over my head...I shot him in the back of the head. (pause) I got so angry at him.

(Dispatch can be heard relaying this new information to emergency personnel.)

Benjamin: Yeah. Okay. Hurry! Hurry!

(Dispatch continues relaying information to emergency personnel.)

Dispatch: Okay. Stay on the phone with me. (Dispatch continues dispatching)

Benjamin: Oh, please hurry.

Dispatch: How old is he? Do you know?

Benjamin: (frustrated) No, I don't.

(Dispatch continues doing her job in deploying emergency personnel.)

Benjamin: Hurry up! You guys, he's dying!

Dispatch: What's your name?

Benjamin: Ben. Hilburn.

Dispatch: What?

Benjamin: Ben Hilburn.

Dispatch: Okay. They're on their way.

(Dispatch is explaining that it is the child who did the shooting. Confusion from Ben – he isn't sure who she is addressing in the phone call.)

Benjamin: Huh?

Dispatch: How old are you?

Benjamin: Ten.

Dispatch: (aside) He's 10.

Benjamin: (moaning) Hurry up...

Dispatch: They're on their way. (more dispatch chatter/Ben sighing) How long ago did this happen?

Benjamin: I got angry at him.

Dispatch: Okay. But did this just happen? How long ago?

Benjamin: I don't know. A couple of....

Dispatch: ...minutes ago? How long?

Benjamin: -- minutes ago. Hurry up!

Dispatch: Who else is there?

Benjamin: Uhh. My little sister. (pause) Hurry up. I don't think I can hear the sirens.

(Dispatch describing what is happening to others in the room.)

Benjamin: Oh. My sister's crying her head off. I think I hear the sirens!

Dispatch: Okay. They're on their way, okay. Stay on the phone with me until they're there. Where's the gun at?

Benjamin: Uhh. The gun's in my dad's gun closet. (moaning) I don't see the ambulance.

(Dispatch reporting to unknown source that Ben put the gun back in the gun closet.)

Dispatch: Do you hear them coming?

Benjamin: Yeah. I hear them coming.

Dispatch: How old is your sister?

Benjamin: Emily, how old are you?

Emily: Six.

Benjamin: She's 6 years old.

Dispatch: (Aside) Six.

(Dispatch speaking with others at Dispatch. Benjamin moaning and saying something unintelligible to sister – and maybe to a dog?? 'Git 'em, boy.' Or 'Git away.'))

Benjamin: Okay. The police are here. But. No doctor.

Dispatch: They'll get there. They're right behind them, okay? Are you speaking to an officer, yet?

Benjamin: Right there. Hurry! He's right there.

Dispatch: Is that the officer?

(Benjamin continues to speak off line.)

Marie: Whew! That's hard to listen to every time.

Sherry: It's...It gets me right in the heart.

Marie: It's so sad. Because you can hear that he doesn't want his dad to die - which is confusing because he just shot him...in the head.

Sherry: Exactly! There seems to be so much more going on there.

Marie: Yeah. And he just - every time he says, 'I need a doctor, I need a doctor' and he's so upset when the police come instead of a doctor. He doesn't understand the situation at all; he just wants a doctor.

Sherry: Right. And he knows that his dad's still alive. Jim Hilburn won't die until about an hour after Ben had made that 9-1-1 call.

Marie: Oh, that's so sad. I noticed that he was saying that he put the gun away?

Sherry: Yes. So, I think that there must have been strict rules about putting the gun away as soon as you finish using it; because that seemed like an odd thing to have happening.

Marie: That makes sense it's just such an ingrained habit.

Sherry: Umhmm.

Marie: It's very interesting.

Sherry: Yes. Suddenly Ben found himself in the middle of a few complications. He was now the youngest person in the remembered history of New Mexico to have killed a parent - or even been charged with murder.

Marie: Which we know isn't that big of a deal – really. We already know that Andrew Churchwell was 10 when he killed his dad in Wisconsin way back in 1994 - and they got it figured out.

Sherry: That's true. I'm sure that New Mexico authorities conferred with Wisconsin as to what to do. It only makes sense; and they did follow a similar trajectory.

Marie: That makes sense.

Sherry: Yeah. And, for sure, a 10-year-old killing a parent is super rare. Killing a parent when you're under the age of 12 is actually very rare. We only have 12 kids - with Ben being the 12th in our data set with the shooting of his father. So, there was some guidance from other states, but not a lot.

Marie: Okay. Are you going to tell us about some comparisons between these offenders?

Sherry: Sure! What do you want to know?

Marie: So, do they tend to pop up in the same areas?

Sherry: No. The offenders that we have come from Texas, Minnesota, Kansas, Wisconsin, California, Ben from New Mexico, and then there were two from Ohio.

Marie: Okay. And I know that most of our offenders, on the whole, are white and male. But what about these kids? Are they all boys? Are they all white?

Sherry: Yeah. All of them are boys and - with the exception of one boy - they were all white. And the boy who killed his father who was black was defending his mother.

Marie: Okay. So, like in the heat of a moment killing.

Sherry: Right.

Marie: Okay. Um. Let's see. What else can we compare about them...did they all kill their fathers? Or did some of them kill their mothers?

Sherry: Most of them killed their dad at this age. Six of them killed their dad, one of them killed their mom, and one of them tried to kill both (but mom lived).

Marie: Good for her! Ummm...

Sherry: (awkward laughter)...I guess.

Marie: (awkward laughter) I know. I guess. I'm...it's not like she got off easy.

Sherry: And it changes a little bit. Ten-year-olds are very different from 11-year-olds. I pulled everything by 10-year-olds - and then up to 12 - because I know that most Children's Codes start treating children like sentient beings when they're 12.

Marie: Okay.

Sherry: They can hold them in detention, they have rules for when they can be waived into Adult Court, and so forth. But if you look - something changes at 12. And look, you can see it right here. The 10-year-olds, the 8-year-olds, the 9-year-olds, the 10-year-olds. They pretty much kill dad.

Marie: Okay.

Sherry: And then, all of a sudden, it switches. And at age 11, you have the majority of them killing mom.

Marie: That's interesting.

Sherry: So - yeah. So - 11 and 12 - mom's more at risk. Before then; dad's more at risk. I don't know if it has to do with autonomy - or who they see is in control - or what it is. But I thought that was very interesting.

Marie: Yeah, that is interesting. So, we talked about the reason for the one child who was 10 and who was black - he was defending his mom. But why did the other ones kill?

Sherry: Three of them killed out of anger.

Marie: Okay.

Sherry: One of them killed out of control. One of them killed over custody issues - he said his father was abusive and didn't want to go to visitation with his father. And the mom and the Court said, 'No, you have to go. That's the rules.' And so he jumped in the car and put six bullets through the back seat one day. Jumped back out of the car and took the gun and handed it to his mom. He knew he was in trouble but he also knew that this wasn't what he was going to do the rest of his life.

Marie: Yeah. I guess he just decided it was worth it.

Sherry: Umhmm. So, we have one other - and it's a predator. That's something we haven't really talked about much in this podcast. Sometimes kids murder a parent because of a predator who's involved. And a predator is an adult who mentors the child to the murder for reasons of their own. In this case it was a stepmother who had adopted the boy after she had married his father - and she made him kill his father so she could collect insurance money.

Marie: Oh! That's horrible!

Sherry: Yeah. We'll talk about that one in a different episode.

Marie: Yeah. For sure. Let's see...did they...were these premeditated murders? Or do they all happen, kind of, in the moment – when they're 10?

Sherry: Other than the boy who killed to defend his mother, they were premeditated.

Marie: Wow! That's surprising. They're so young!

Sherry: Yeah. And all of them that planned, used a gun. And the one boy who didn't plan, used a knife. That's something that's different with young kids, too, is the murder weapon of choice tends to be a gun.

Marie: That makes sense. They're so small. I'm surprised that a ten-year-old was able to stab someone to death. Must have been the adrenaline.

Sherry: It must have been. He wanted his mom to be alive, for sure.

Marie: So, I noticed it's mostly dads. Are the parents mostly married - or not married?

Sherry: Well, it's kind of interesting. Because people say, 'Oh, divorced homes are what's causing children to kill their parents' and that's absolutely not true; anymore than abuse is causing kids to kill their parents.

Marie: It's never that simple.

Sherry: No. It's not. So, in this data set of kids who are just 10 years old - four of them were married and four of them were not married. And I don't mean *just* married; I mean married to the parent of the child.

Marie: Okay.

Sherry: And the one exception was the predator one - and that's a stepmom who had adopted the boy.

Marie: Okay.

Sherry: So, we did count the dad as married to the mother.

Marie: Yeah. Because she was the legal mother. And if he's willing to kill for her - presumably his emotional mother.

Sherry: Right, right.

Marie: Okay. And then, I guess, the last uh demographic category we looked at is religion. Were they all religious - not religious?

Sherry: I can't tell you about piety - how religious they were - but I can tell you the religious affiliation they had; which gives you a little bit about the mental training that they received.

Marie: And their culture.

Sherry: Yeah - and their culture - if you understand the different religions. So, two of them - religion wasn't found, so I'm assuming that they weren't religious. There wasn't a religious affiliation. Five of them were Evangelicals and one was a Baptist.

Marie: I wouldn't have expected that based on where they lived. Because they lived in so many different places.

Sherry: Umhmm. I thought that was super interesting.

Marie: That is interesting. Okay, did they have anything else in common - like certain months or times of the year?

Sherry: Well, I saw some trends that I thought were kind of interesting - so I pulled the data for everyone from 12 years old on down. And this is what I found. Most of the murders will occur between noon and bedtime and that's very different from older kids.

Marie: Okay, they're cranky.

Sherry: I think they're just - they know what bedtime is and bedtime's a real thing to them. Where the older kids will get up in the middle of the night and do things or stay awake later than their parents - these kids are still following these strict rules that the parents have set about bedtime.

Marie: Oh. Okay.

Sherry: So, I think that has a lot to do with it. There were a couple that were in the middle of the night, but most of them happened between noon and bedtime. Most of them *after school* and bedtime - but there was one that happened just after noon.

Marie: Okay.

Sherry: So, I thought that was interesting - that they're murdering their parents but still following bedtime rules.

Marie: It is interesting.

Sherry: And the other thing was no one was killed in January.

Marie: Okay.

Sherry: We had people killed in February, one killed in March. People killed in April, May, August, October, November.

Marie: No December?

Sherry: No December; because it's Christmas and these kids want their presents, I think. And none in the summer - until late August.

Marie: Interesting.

Sherry: Summer break seemed to be okay. And Christmas.

Marie: I wonder if stress is a factor here - if the kids are less stressed in the summer and in December, so they're less likely to kill their parents.

Sherry: It might be. I know that most of the kids were killing in this age group out of issues of control. The number one reason was issues of control. 'I didn't like that you were punishing me.' 'You took away my watch.' You know, things like that. There were a couple that were protecting themselves from abuse

– one. Actually, one was a girl who was protecting herself from a father who was preying on her sexually. And five were kids who were protecting their mothers from their abusive fathers. So the kids may or may not have been abused, but the children were seeing themselves as the protector of their mother. And two of them were because of predator adults - which is huge when you look at how young these kids are and the kind of access that these adults had to these children.

Marie: That's so sad!

Sherry: Yeah.

Marie: So, what ended up happening to him? Did the police come and arrest him while his dad was being taken away in an ambulance? I just don't know how I would handle arriving on a scene with this ten-year-old who's begging for help for his father - but also just admitted that he shot him.

Sherry: Right. I think the police weren't sure what to do with him. First, he was so very young. They weren't used to dealing with really young children in this situation.

Marie: And now there's no adult in the house. It's just him. He's the oldest person in the house.

Sherry: Right. And he was too young to be charged with murder in adult court because he's 10.

Marie: Umhmm.

Sherry: Hence, his case would remain in the Juvenile Court System. In the Juvenile System, he could be held until he was 21 if he was found responsible. If you recall, we talked about this in a prior episode. The Juvenile system doesn't give you the rights of an adult or the responsibilities of an adult. And rehabilitation is the focus.

Marie: Yeah.

Sherry: And so that probably was very very appropriate. Much like Andrew Churchwell, Peter Zimmer, some of these younger kids that we've talked about before - 21 would be the oldest. They didn't do blended sentences, yet.

Marie: Okay.

Sherry: But. He couldn't be held in the Juvenile System in New Mexico, because they didn't have any Youth Corrections systems that could hold him there. They didn't hold children - or detain children - under the age of 12 and he's only 10. So, here's a kid who's too young for the adult system - appropriate fit for being tried in the Juvenile system - but they couldn't put him anywhere because he's too young to be detained.

Marie: Yeah. They don't have anywhere to hold someone of this age.

Sherry: Right. That's based on their Children's Code.

Marie: Which, I'm grateful they don't have a place to put a 10-year-old, because that means it's so uncommon. But it's kind of a pickle to be in.

Sherry: Umhmm. It really is!

Marie: So, was he allowed to just...go home?

Sherry: Well, like we were just talking about, the New Mexico Children's Code did not presume they would ever be faced with a 10-year-old murderer. The law at the time stated that children under the age of 11 couldn't be detained - therefore he was allowed to go home with his mother.

Marie: Wow! Even though she was the one that they'd found there was substantiated abuse against - that's where they decided he was best off?

Sherry: Yes. It's kind of interesting - but if you recall, that abuse had been substantiated four years prior.

Marie: Okay.

Sherry: So, perhaps she was able to convince them that she was the best place for him at the time. Or maybe they just found that that was the most expedient place to put him at the time.

Marie: Yeah. Because I remember with the Duttons, um, they had family who could have taken them, but they put them in foster care. Which worked out pretty well for them.

Sherry: Right, right.

Marie: Well, skilled foster homes - not just the general system.

Sherry: Right.

Marie: So, all of the children went home to live with Mom?

Sherry: No. Actually, Children's Services took custody of the other two children; said they were possibly in danger. So, his sister was sent to live with their grandfather, and his brother was sent to stay with other relatives - but only for a short time. By December, she had all three children in her home again.

Marie: Okay. So, maybe they were worried that he was the danger to the other children?

Sherry: That's possible. I'm not sure what the issues were there.

Marie: Umhmm.

Sherry: So, anyway, what happened after that?

Marie: When we get to the part where they're trying to decide what to actually do with him, long-term, they decide to charge this ten-year-old - who is obviously distraught that shooting his dad was going to kill him. They charged him with first degree murder - which I found very surprising. He's so young. He obviously didn't have the intent, in the moment, to kill his father because he didn't want him to die. It's hard to explain why he shot his dad. It's hard to understand how you can shoot someone, and in the next breath (because it was only moments later that he called 9-1-1) be distraught that the doctors aren't coming fast enough and he's going to die.

Sherry: And I wonder if, after shooting him, he didn't anticipate him being alive.

Marie: Ohhh.

Sherry: I've wondered about that. If you shoot someone and they die, I think - in your head as a 10-year-old - it would be different than if you shoot them and you see your father lying there in pain and asking

for help; suffering. So, that might have played into it a bit. I've wondered about that. That's actually haunted me.

Marie: Yeah. It's just such a strange call.

But his attorney raised a competency issue - which we often think of as like a mental health issue - but it can be just basically not understanding or not being able to participate in the process. And he said Ben; he has ADHD, and he's too young, and he's too immature to understand the legal proceedings well enough to assist in his defense. There were no claims of insanity, like you often see in adult court, and what happened is the judge granted the motion and the proceedings were stayed.

Sherry: Well, I wondered when I first listened to it if, maybe, he had – like - a learning disability in listening. Because he was 10 years old and he didn't know his address.

Marie: Yeah.

Sherry: And I thought, 'Oh, well, okay. Maybe they were talking about competency because he was a little slow.'

Marie: Yeah.

Sherry: He didn't know his sister's age. He didn't know his address.

Marie: Umhmm.

Sherry: But after doing more research and looking into it some more, I realized that this family had just moved.

Marie: Oh. Okay.

Sherry: So, I think the divorce was just getting finalized. They probably were still a little bit unstable. They had been living at a home that he knew the address, and when he panicked, he gave them that address. But they had moved.

Marie: Okay. So, yeah, maybe he...maybe it was just that he was young, you know. And I think it's hard for a ten-year-old - even a very bright ten-year-old - to understand legal proceedings and what's happening and how to assist counsel.

Sherry: Right.

Marie: Because it's supposed to be somewhat client-driven and they're supposed to, like, your attorney is supposed to be someone you are working with - not someone who is making decisions for you. Um, and obviously that's difficult with a 10-year-old client.

Sherry: Yeah. And I'm glad that the judge granted that Motion. I think that - even if he's a child of normal intelligence - he's a bit young to be understanding that. And if 12 years old is when they start detaining them for crimes, I think they were wise to wait until, at least, then to let him kind of grow up a little bit.

Marie: Yeah. And, kind of, learn about what's happening and understand better the impact on his future.

Sherry: Right.

Marie: Yeah. So, anyway it wasn't stayed forever. In June of 2011 the Judge declared Benjamin competent and the case was back on.

Sherry: Oh. So, when he was 12.

Marie: Umhmm. Exactly. Um. And I think at that age - of course you're still a child - but it's, you know, a little bit more life experience and especially if you know a trial is coming you can learn about the courts and what it means.

Sherry: Right. And in New Mexico, once the trial's on in Juvenile, they have four months to reach a resolution.

Marie: That's quite the clock.

Sherry: So, it's really weird that this one dragged on and on and on anyway.

Marie: And it was a case that dried on forever. In fact, it dragged on so long that his mom moved.

Sherry: Oh. (laughter)

Marie: In 2013 she had to ask permission from the Court to take him to live in Oklahoma with her. She had remarried, and her husband was already living and working there, and they wanted to be a family. So, they wanted to move out. Because Benjamin was in this legal process - and needed to be tried for murder - he couldn't just leave the state and they had to ask permission. So, the Motion was granted, and he moved to Oklahoma with his family. But he did have to meet in person with his pre-trial parole officer each month.

Sherry: I remember the District Attorney was really mad about that ruling.

Marie: I think it would be a difficult position for a District Attorney. Because the District Attorney's job is to defend the public and anytime you have a murderer - it doesn't matter what age - you don't want them running around. And you certainly don't want them leaving the state.

Sherry: True.

Marie: Um - and I don't think Benjamin was a risk to others - but it's very hard for someone whose job it is to protect people to go, 'Oh, yes. We're going to let him run around.' Um.

Sherry: And that's one thing the District Attorney said. 'If he can kill someone over not thinking he should be punished this much, what will he do in school or in the community when he's decided he's been sanctioned too often.'

Marie: Yeah. It's very disturbing, and they really - it doesn't sound like they really knew enough about why this happened to guarantee it wouldn't happen again.

Sherry: Right.

Marie: Which is what the District Attorney is trying to do. That's why they prosecute people - to keep other people safe.

Sherry: That must have been really frustrating.

Marie: Yeah. So, that's more evidence than we've seen in most of these cases where they get convicted, right?

Sherry: Right.

Marie: Like, it's so many kinds of evidence. Great. You know, confession evidence. You've got eyewitness. You've got forensic evidence. I don't know how much more evidence you could possibly have.

Sherry: Right. They've got it in the bag.

Marie: Well, they don't. Because, piece by piece the evidence is deemed inadmissible.

Sherry: Oh no!

Marie: I know. So, first – Emily - she was only six years old and so, of course, she was deemed unreliable due to her age and a fragile mental state. She was reported to be susceptible to flights of fancy and mixing her facts with fantasy. Which - she's a six-year-old.

Sherry: Who just went through trauma.

Marie: Yeah. Of course, she's an unreliable witness. So, her testimony would not be allowed. And that's probably for the best for her, because I can't imagine how traumatic that court would be for her to have to go up there and testify about the worst day of her life.

Sherry: I agree.

Marie: So, they lost a witness. Well, okay. Big deal - she's a six-year-old. She probably wasn't going to be that compelling anyway.

But then we have the 9-1-1 call, right? Which is recorded. It's in the moment – um.

Sherry: And you'd think that they would want that in the Defense because he sounds so confused that his dad's dying.

Marie: The thing about Defense is - the best thing you can do is not have to be in the courtroom at all. Um, the second-best thing is to have evidence that is sympathetic to your client - but the first best thing is to not be there at all.

Sherry: Aha! So, strategy.

Marie: Yeah. I mean - it just doesn't make sense to play that for people and let them decide what they think if you can keep them from hearing any evidence that makes it sound like he killed his dad.

Sherry: Okay.

Marie: So, anyway, New Mexico's Children's Code came in on this one. We talked about it a lot in the Zimmer case - it's in Episode 16 if you want to go back and listen - but New Mexico's Children's Code gives children under the age of 13 protection; stating that "not any statement, confession, or admission made by a child under the age of 13 can be admitted into evidence in a delinquency proceeding."

Sherry: Ohhh.

Marie: That's a confusing sentence, but what it means is you cannot admit a statement against their own interest. You cannot take a child's confession to a 9-1-1 operator (or something they said to a friend) and say, "Oh, look! They admitted it! We're going to admit this into evidence and use it as part of our decision-making."

Sherry: So, that's what we were talking about with being in the Juvenile system - at least until they're 13.

Marie: Yeah.

Sherry: Is they have extra protections - not just the protection of the Juvenile system; but an extra layer of protection.

Marie: Yes. And I think this is because - in my mind - this is because children say a lot of things, and not all of them are true - especially 10-year-olds. And they might be bragging to a friend about something that's not true - and we don't want to admit that into evidence.

Sherry: That's true.

Marie: Um. With an adult, if they say something that makes them look bad - you assume that that's the truth or they wouldn't admit that. But children are just funny that way.

Sherry: Well, and they can be pressured differently, too - if they had been interrogated.

Marie: That's true. Yeah. Or pressured by an outside source. Um, but, anyway, so - under this Code, both his statements to the police and the 911 call were inadmissible as evidence. So, this was another protection under the Code.

Sherry: Oh, okay. So now they don't have Emily's testimony (the eyewitness). They don't have his 911 call. They don't have what he said to the police. But they had the gun, they had the bullet, they had the dead man. So, isn't that enough evidence to move the case forward?

Marie: Well, it could have been. But someone messed up along the way. According to the news station, KRQE, the investigators tested the bullet and proved it came from the gun.

Sherry: Oh good!

Marie: Well, but then they checked Jim's fingerprints against the gun and ruled him out as the shooter - in case they wanted to argue it was suicide.

Sherry: Oh. Uh huh.

Marie: ...in the back of their head.

Sherry: I thought that was super weird.

Marie: I mean, we've seen it before. But then they dropped the ball. No one thought they needed to compare the fingerprints and DNA on the guns to Ben.

Sherry: Eh!

Marie: Because he confessed! And, we had a witness! And they just went, 'Oh there's no reason to do this.' Um.

Sherry: Money-saving tactics.

Marie: Yeah. Or maybe they just went - oh, you know, they didn't even think of it. This was a mistake with the investigators that ended up costing them the case. There was no evidence directly tying Ben to the shooting. And then...

Sherry: Whew.

Marie: Yeah, I know. And so, what happened is that, after all this time, charges were dropped for lack of evidence. All the witness statements were deemed inadmissible because the only witnesses to the murder were 10 and younger and the case was dismissed.

Sherry: Wow!

Marie: I know. So, after six years, he was free to go home and begin his life without the specter of incarceration hanging over him. Which probably disturbed the District Attorney deeply. But I will say - I think that he feels worse about shooting his dad than most people do. Most of the people we've covered do.

Sherry: Possibly. I'm not sure. The police said that it was remarkable; the lack of emotion that he showed when they turned up. So, I'm not sure where Ben really was on it. But he did sound like he was upset that his dad was dying when he made that call. You're right

I do think back to the Herman Dutton case which we covered in Episode 8 - Herman and Druie Dutton. Their father was hugely abusive, and they killed him - and they went into the Juvenile system and they received the treatment they needed to understand what they did, why it happened, and how to move forward from it. Because killing someone isn't easy for these kids. A lot of times they are left with huge amounts of grief and guilt and remorse that they have to work through.

Marie: Yeah, and they - especially in the Dutton case - they didn't have an example of how to grow up into someone who wasn't like their father.

Sherry: And that would be the case here; where they had two adults who were - at least one was abusive - and they had a toxic relationship. These kids don't have the tools or the skills. So, to send him home with his mother - they couldn't do anything else by law at the time, but they had him in the system for six years. At some point they could have put him into a care situation where he could get something other than out-of-home therapy. Because I know that they put him in therapy, but I'm not sure that the greatest service was given to him - even though I'm sure his mom and he were very pleased that he got off.

Marie: Yeah. And that he got to grow up with them, but sometimes sometimes you need some help. And it sounded like they may need some help.

Sherry: They might. And I did do some digging through the source materials - he has been staying out of trouble and working on becoming a good adult, from what I could find. But he's only 22 years old. So, it will be interesting to follow that and see if it turned out okay for him. I hope it does.

Marie: Me, too. He seemed like - I know he's a murderer - but he seemed like a sweet kid.

Sherry: A lot of these kids seem like sweet kids. I think that we always have to remember that no one's a silo. Even someone like Peter Zimmer isn't all good or all bad.

Marie: Yeah. It's always complicated.

Sherry: Umhmm. It really is.

Marie: Okay. Well, that's it for today. And, remember, we're taking a short hiatus to celebrate the holidays and do some planning for our upcoming episodes.

We know we owe you a Christmas parricide episode, and we'll deliver on that sometime after the holidays. Christmas is difficult enough for those of you who have difficult children of your own.

Sherry: So, go have a happy holiday! Oh, and Happy Late Hanukkah to those of you who celebrated that holiday. And we'd like to give a million thanks to Jason, Olivia, Julia, and David for your generous support on Patreon. Without your support, this podcast wouldn't exist. If you haven't, yet, head on over to check out the Parricide Podcast on Patreon; where each Patron Tier carries a small token of our deepest gratitude.

Marie: We'd also like to thank the Albuquerque Journal, KRQU News13, and the folks at the Dreamin' Demon for a host of information and the pictures we used for this podcast. This has been the Parricide Podcast. Good night, and remember to always sleep with one eye open.

Sherry: Bye!

Marie: Bye!

(xylophone playing We Wish You A Merry Christmas.)