IN THE SUPREME COURT OF IOWA
No. 23-1063
Cass County No. FECR016406

STATE OF IOWA,

Plaintiff-Appellee,

v.

ALISON ELAINE DORSEY,

Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR CASS COUNTY
HONORABLE AMY ZACHARIAS, PRESIDING

REPLY BRIEF OF THE APPELLANT

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REPLY TO THE STATE'S STATEMENT OF THE FACTS

In the statement of facts division of its brief, the State does not directly (or for that matter, even by indirect reference) contest any fact assertion set forth in Dorsey's principal brief. What the State does assert, and as relevant to the issues raised in this appeal, is that the State's expert witnesses (including its pathology and rebuttal witnesses) were unanimous in their respective opinions that the injury that caused L.H.'s death had to have occurred at Dorsey's daycare and that her two experts "were extensively impeached." (State's brief, at pp. 12-14.) These factual assertions simply are not the case and do not fully characterize the expert testimony presented in the record.

First, the overstatements by the State concerning the testimony of its expert witnesses as to the timing of L.H.'s fatal injury (and in its fact statement, the State goes into little factual detail of the opinions of their experts; rather, the State basically focuses only on some of its experts' bottom line conclusions these experts stated on direct examination). The State's expert witness Dr. Kruse—who performed the autopsy on L.H.—freely admitted that she could not pinpoint to any reasonable degree of medical certainty the date and time of L.H.'s injury that caused his death. (Trans. at 628:15-628:17, 629:12-631:04, 631:05-632:12, 652:15-653:08.) And that was a significant reason why Dr. Kruse, both in her autopsy report and during her trial testimony, confirmed her conclusion remained that the manner of L.H.'s death

was "undetermined" (as opposed to "homicide"). (Trans. at 631:15-632:12, 652:15-653:08.) And the State's principal expert witness from the Children's Hospital in Omaha (Dr. Kadlec) acknowledged the records indicated L.H. suffered from the DIC condition that would explain the bleeding found in L.H.'s cranium. (Trans. 519:05-519:20; 760:10-763:05.)

And matters certainly did not improve for the State from a factual standpoint during the testimony of its rebuttal expert pathologist Dr. Hefti. This pathologist did state that the iron staining and capillary formulation results from the testing from L.H.'s autopsy samples alone could not establish that L.H. died from a traumatic head injury. (Trans. at 979:06-980:24.) However, it was the opinion of the State's expert witnesses—and especially the pathologist Dr. Kruse—that a traumatic head injury was exactly the event that ultimately caused L.H.'s death (the excessive cranial bleeding that caused the infant's brain to swell). (Trans. 621:24-622:01, 627:18-628:14.) Dr. Hefti went on to state that *if* traumatic injury caused L.H.'s death (as the State's other expert witnesses so testified), *then* the methodology employed by the defense experts to determine when that injury event occurred—iron staining, capillary formulation and new membrane formation results—were appropriate means to determine the possible range of time for dating the occurrence of that event. (Trans. at 990:14-991:25.) And this explains Dr. Hefti's concluding statements, and why he would not commit to the State's position that L.H.'s fatal

injury necessarily had to have occurred at Dorsey's daycare on that fateful October 7th date. Dr. Hefti in fact testified that the new membrane formation found in the examination L.H.'s autopsy slides could indicate that L.H. suffered his ultimate fatal injury some days before October 7th. (Trans. at 990:14-991:25.) This led to Dr. Hefti's closing opinion testimony, already set forth in Dorsey's first brief, that this pathologist could not exclude the possibility that LH's injury occurred within 36 hours before L.H.'s passing but that Dr. Hefti could not include the opposite possibility either—that is, LH could have been injured before October 7th. (Trans. at 992:05-992:08, 992:17-992:19.) By the same token, Dr. Hefti also said the autopsy evidence is consistent with his findings that LH could have been fatally injured on that date. (Trans. at 992:09-992:12.) All of this testimony from the State's own experts is hardly factual (let alone opinion) evidence that L.H. must have sustained fatal traumatic head trauma while at Dorsey's daycare facility.

Second, the supposed extensive impeachment of the defense's expert witnesses Drs. Smith and Bowen (with the State citing Trans. at 780:09-787:19 and 944:15-956:10.) That's an overstatement at best. Dr. Smith was cross-examined about a website he maintains advising the public on how to engage (and not engage) law enforcement when such a member of the public is suspected of child endangerment (resulting in death of the infant or otherwise); that did not have to do with the merits of his opinion or the methodology he employed in L.H.'s case (and

see Dr. Hefti's opinion on this subject, set forth in Dorsey's first brief and above, as to the usefulness of that methodology when traumatic injury is suspected). Second, as for Dr. Bowen—a highly credentialed pathologist and one still actively practicing on behalf of the State of Nebraska—his so-called "extensive impeachment" was disagreeing with the State's pathologist Dr. Kruse concerning the efficacy of utilizing the staining test (that detects hemosiderin) in the red blood samples as an aid to dating the occurrence of a traumatic head injury; Dr. Kruse stated that her department does not utilize that means of dating while Dr. Bowen stated that in his understanding several pathology departments (including his own) do so (see cited transcript citations by the State)—at best, this is a difference of opinion of the experts (it hardly arises to the level of "extensive impeachment"). And Dr. Hefti was more in Dr. Bowen's camp than Dr. Kruse's on this issue as we have seen.

REPLY ARGUMENT

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ITS SEVERAL RULINGS IDENTIED BELOW, AND EACH ERROR PREJUDICED DORSEY SUCH THAT HER CONVICTIONS SHOULD BE REVERSED AND SHE SHOULD BE AWARDED A NEW TRIAL.

1. Venue Change Was Improper.

The State basically eschews the actual basis for its motion to transfer venue of the second trial—that singular basis was publicity and based on unverified documents taken from private/social media sites (e.g., apparently Facebook, etc.). But what the brunt of these communications say is for the people to pray for the next

jury in order for those jurors to have clarity of judgment and wisdom in reaching a just verdict—few if any of the articles say a second jury in Cass County should find Dorsey innocent (indeed, more than a few of the communications expressed concern (if not outrage) over L.H.'s death and are critical of Dorsey). (Venue Motion of 11-16-2021 and Attachment; App. 79-191.) And the State cannot deny that the district court changed venue in its ruling by employing a "better to err on the side of caution" standard, as the court itself stated—and then further compounded that error by transferring venue of the second trial to Council Bluffs; that city neighbors the Children's Hospital (located in Omaha) where L.H. was treated and the State's principal medical experts were employed. This move exacerbated the prejudice suffered by the defendant by the venue transfer as the State's principal experts worked at that hospital and indeed lived in the Council Bluffs—Omaha metropolitan area or corridor. This corridor is locally served by three network TV stations located in Omaha. The Children's Hospital advertises in this media market and holds itself out in those ads as "the very best for kids." Little wonder in the stark difference in the jury verdicts rendered in the two trials even where each trial almost entirely presented the testimony overlapping witnesses. The State in its brief accordingly gives short shrift to the demanding legal standard that its motion woefully failed to meet.

Iowa Code section 803.2(1) provides that a "criminal action *shall* be tried in the county in which the crime is committed, except as otherwise provided by law." (emphasis added). Shall is mandatory or directory; Iowa rule of criminal procedure 2.11(10) provides that venue can be changed on a "verified" "information and belief" motion submitted by a movant but only where "the evidence introduced in support of the motion" shows that "such a degree of prejudice exist[s] in the county in which the trial is to be held that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county …". In that regard, the Iowa appellate courts have consistently recognized that the moving party that relies on possible prejudice in the county where the trial is to be held, and particularly as such prejudice may have been ignited or fanned by media coverage, bears a high burden of proof indeed. *State v. Findling,* 456 N.W.2d 3, 5 (Iowa Ct. App. 1990).

The appellate courts have consistently noted that "[e]xposure to newsworthy events will not give rise to a presumption of prejudice" sufficient to support a venue transfer in a criminal case. *State v. Wagner*, 410 N.W.2d 207, 222 (Iowa 1987). Juror impartiality does not mean complete juror ignorance of issues and events. *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985). Mere community knowledge of a defendant's prior criminal history or of a prior trial does not entitle a movant party to a change of venue. *State v. Spargo*, 364 N.W.2d 203, 207 (Iowa 1985). "The crucial determination is whether, as a result of pretrial publicity or for other reasons,

a substantial number of prospective jurors hold such fixed opinions on the merits of the case that they cannot impartially judge the issues to be determined at trial." *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1980).

The State did not even base its motion on any showing that a substantial number of jurors had a fixed opinion—let alone against the State's case. And the district court's opinion concerning jury selection from the first trial only affirms that a fair and competent jury was selected right from the county of venue; that jury selection in one particular case may take more time than the aggregate average of cases does not even begin to constitute the demanding showing that a substantial number of jurors, let alone potential jurors, have a fixed opinion on the case; and the State's submission (the attachment) in fact demonstrated just the opposite. No substantial proof, let alone the demanding proof required by the rule and case law to support the extraordinary relief of venue transfer, was shown here. And the State itself in response to Dorsey's principal brief does not even go through the motions of claiming prejudice did not result to Dorsey.

2. The Verdict Was Not Supported By Substantial Evidence.

The evidence was not substantial enough to prove beyond a reasonable doubt that Dorsey inflicted the injury that caused LH's death. As Dorsey factually showed in her first brief, she historically provided daycare services for some 120 children, and for many of those children from the time of their infancy. Some of these children

had problems—such as eating disorders and other issues—yet Dorsey never harmed a single one of them. Even the Hodges before the October 7th incident justifiably believed Dorsey was a great daycare provider, and their two oldest children thrived under her supervision (including the middle son K.H., who had breathing issues). Even under the State's own timeline of October 7th, Dorsey had adult visitors or speaker phone calls from the time she opened her daycare before 8:00 a.m. until the conclusion of her call with Ticknor at 10:36 a.m. Dorsey's call to L.H.'s mother about L.H.'s breathing pattern occurred at 10:53 a.m., only thirteen minutes after her call with Ticknor ended. And Dorsey then immediately called L.H.'s father and he arrived at the daycare within minutes (by 11:00 a.m.).

The State really drops the ball on its characterization of the medical evidence and concerning the timing of L.H.'s injury that resulted in his death. The medical evidence further cast more than reasonable doubt on whether substantial evidence supported the second jury's verdict. Drs. Smith and Bowen showed that the autopsy specimens conclusively established that L.H. was well advanced in the healing process from his head injury, and that injury would have occurred at least two days before L.H. made his first and only appearance at Dorsey's daycare on October 7th. Two of the State's own witnesses—the pathologist Dr. Kruse and the rebuttal expert pathologist Dr. Hefti—did not commit to the position that L.H. must have suffered the fatal injury on October 7th and while he was at the daycare—and that testimony

was cited in Dorsey's principal brief and is further noted in the reply statement of facts of this reply brief.. Dr. Kruse determined that the manner of death was "undetermined" instead of resulting from a "homicide," while Dr. Hefti, based on the stage of L.H.'s capillary formulation (and the iron staining results on it), agreed that L.H.'s head injury could have occurred before October 7th (at the conclusion of his testimony, he could not and did not commit one way or the other as to when and where L.H.'s head injury resulting in death occurred). And do not forget that persuasive evidence showed L.H. suffered from the blood clotting disorder DIC—both the defense experts stated that the infant did (and gave the medical support for it) and one of the State's own expert witnesses agreed there was medical evidence that suggested L.H. had this condition (which would explain the profuse bleeding around the brain). The State is not entitled to ignore this evidence simply because it does not support its preferred position; indeed, much of this evidence came from its own experts.

And it is these facts that distinguish Dorsey's case from the case law cited by the State, including its principal citation to *State v. Davis,* 2023 WL 6291570 (Iowa Ct. App. 2023). The issue in Dorsey's case, unlike *Davis* and the other cases cited by the State, is not whether the infant involved suffered an injury; it was when that injury event occurred. And the substantial evidence showed that L.H.'s injury likely

occurred days before he was dropped off for his first day of daycare at Dorsey's facility.

The non-medical evidence further is persuasive that the injury was prior to that October 7th date as well (the State outside of medical testimony presented no evidence that even suggested Dorsey historically would have harmed L.H.; she had not done so for any of the some 120 children she had cared for over the years). The State's entire case rested on expert testimony, with important parts of that testimony—and as we have seen—actually giving credence to the conclusion that L.H.'s injury occurred before his first day of daycare on October 7th.

3. The Verdict Was Not Supported By The Weight Of The Evidence.

First, for the reasons stated in the immediately preceding division of this brief, even if the second jury's verdict is supported by substantial evidence it is not supported by the greater weight of the credible evidence and when the record is considered as a whole. This is the case because of the factual evidence (concerning Dorsey and her daycare history) and the medical evidence (as discussed in the substantial evidence reply brief division).

Second, more on the medical evidence—the basis for the State's entire case. Dorsey will not repeat in a reply brief her arguments made in her principal brief. The State in its brief, however, claims that Dorsey mischaracterizes the testimony of its pathology experts Drs. Kruse and Hefti; but that is not true. The central issue in

this case was timing—when did the injury occur to L.H.? Dr. Kruse—who performed the autopsy on L.H.—concluded that the infant's manner of death was "undetermined" (not "homicide") and confirmed that ultimate opinion in her testimony (Trans. at 631:15-632:12, 652:15-653:08.) Dr. Kruse further testified that she could not pinpoint the time of death to an exacting degree. (Trans. at 629:12-631:04.) As for Dr. Hefti, as we have seen he did not exclude the possibility that L.H.'s trauma resulting in the infant's death occurred before October 7th—his testimony is just not so unequivocal as the State in its brief would wish us to believe. (Trans. at 992:05-992:08, 992:17-992:19.)

Considered as a whole, the greater weight of the evidence supports Dorsey. *State v. Ellis,* 578 N.W.2d 655, 658-59 (Iowa 1998).

4. Evidence Of K.H.'s Rib Injury, And The Purported Source Of It, Was Improperly And Prejudicially Admitted.

The State asserts that Dorsey invited the error because she was the one that brought out this evidence in the first place. But that ignores the record that shows, over defense objection, the State presented evidence that L.H.'s older brother, K.H., suffered a rib injury/fracture and that furthermore that injury (likely) happened while K.H. was at Dorsey's daycare and under her singular supervision. (Trans. at 972:15-974:04.) (The purpose of Dorsey's reference to K.H. had to do with the DHS soliciting parents of other children in Dorsey's daycare to be X-rayed to determine whether Dorsey had inflicted injury upon those children; it was the DHS (i.e., the

State) that did this, not Dorsey.) The State used this evidence to improperly show prior bad conduct committed by Dorsey against the H. family. As shown in cases such as *State v. Cox,* 781 N.W.2d 757, 760 (Iowa 2010), prior bad acts evidence is prejudicial and should not be admitted unless a recognized exception applies. The State showed no such exception for the purpose of its use of that evidence.

5. Dorsey Was Unfairly Deprived Of Her Right To Call Witnesses Respecting Material And Critical Aspects Of Her Relevant Character Traits.

The State agrees the six witnesses in question were excluded from testifying by the trial court, but it states their testimony would have been cumulative of the testimony of other witness who testified to Dorsey's relevant character traits and in any event the exclusion ruling amounted to "no harm, no foul" (i.e., Dorsey was not prejudiced). The problem with the State's conclusory analysis is that this case was hardly one-sided in favor of the State. The first trial ended in a hung jury in favor of a complete acquittal by a 10-2 vote. And the second trial at the least showed a real dispute as to when L.H. suffered his injury. And the State itself throughout its brief attacks Dorsey's credibility. Under these circumstances, it was essential that these witnesses should have been permitted to testify—and it is telling why the State so vigorously objected to their testimony (the State knew it would damage their position in such a contested case).

CONCLUSION

For the reasons stated and authorities cited by Dorsey in her submissions, the court should reverse Dorsey's convictions and remand this case to the district court for further proceedings.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,275 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word format 2010 in Times New Roman 14-point style.

/s/ Trever Hook
Trever Hook

February 28, 2024
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on February 28, 2024, a copy of this Reply Brief of the Appellant was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access to and service of the Brief on that same date to:

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