IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1981

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANNETTE DEE CAHILL,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
THE HONORABLE PATRICK MCELYEA, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

ALAN OSTERGREN
Muscatine County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Rules/Statutes

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the trial court err in overruling Cahill's post-trial motion to compel DNA testing?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
State v. Compiano, 154 N.W.2d 845 (Iowa 1967)
State v. Miles, 490 N.W.2d 798 (Iowa 1992)
State v. Ortiz, 766 N.W.2d 244 (Iowa 2009)
State v. Trane, 934 N.W.2d 447 (Iowa 2019)
Iowa Code § 81.10(3)(a)

II. Did Cahill raise any claim of a *Brady* violation below? If the trial court denied such a claim, did it err?

Authorities

United States v. Porchay, 651 F.3d 930 (8th Cir. 2011)
DeSimone v. State, 803 N.W.2d 97 (Iowa 2011)
Harrington v. State, 659 N.W.2d 509 (Iowa 2003)
Jackson v. State, No. 11–0944, 2012 WL 5356081 (Iowa Ct. App. Oct. 31, 2012)
State v. Belken, 633 N.W.2d 786 (Iowa 2001)
State v. Bishop, 387 N.W.2d 554 (Iowa 1986)
State v. Compiano, 154 N.W.2d 845 (Iowa 1967)
State v. Daniels, No. 14–1480, 2015 WL 9450636 (Iowa Ct. App. Dec. 23, 2015)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)
State v. Hoskins, No. 17–1797, 2019 WL 478795 (Iowa Ct. App. Feb. 6, 2019)
State v. Jefferson, 545 N.W.2d 248 (Iowa 1996)
State v. Jorden, 461 N.W.2d 356 (Iowa Ct. App. 1990)
State v. Piper, 663 N.W.2d 894 (Iowa 2003)
State v. Miles, 490 N.W.2d 798 (Iowa 1992)
State v. Techel, No. 14–1520, 2016 WL 4036111 (Iowa Ct. App. July 27, 2016)

State v. Romeo, 542 N.W.2d 543 (Iowa 1996)
Thompson v. State, 492 N.W.2d 410 (Iowa 1992)
Whitsel v. State, 525 N.W.2d 860 (Iowa 1994)

III. Did the trial court err in overruling Cahill's motion to exclude testimony from unfavorable witnesses under Rule 5.104, when Cahill's argument was that their testimony would not be credible?

Authorities

Perry v. New Hampshire, 565 U.S. 228 (2012)
Graham v. Chicago & N.W. Ry. Co., 119 N.W. 708 (Iowa 1909)
State v. Cardona, No. 19–1047, 2020 WL 1888770 (Iowa Ct. App. Apr. 15, 2020)
State v. DeWitt, 597 N.W.2d 809 (Iowa 1999)
State v. Doolin, 942 N.W.2d 500 (Iowa 2020)
State v. Hobbs, No. 12–0730, 2013 WL 988860 (Iowa Ct. App. Mar. 13, 2013)
State v. Hulbert, 481 N.W.2d 329 (Iowa 1992)
State v. Long, 628 N.W.2d 440 (Iowa 2001)
State v. Lopez, 633 N.W.2d 774 (Iowa 2001)
State v. Smith, 508 N.W.2d 101 (Iowa Ct. App. 1993)
State v. Veverka, 938 N.W.2d 197 (Iowa 2020)
State v. Voelpel, 226 N.W. 770 (Iowa 1929)
State v. Wagner, 410 N.W.2d 207 (Iowa 1987)
State v. Wehde, 283 N.W. 104 (Iowa 1938)
Iowa R. Evid. 5.602
Laurie Kratky Doré, Iowa Practice Series: Evidence § 5.104:2 (last updated Nov. 2019)

IV. Was the evidence sufficient to establish that Cahill was the person who killed Wieneke?

Authorities

State v. Bass, 349 N.W.2d 498 (Iowa 1984)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Hennings, 791 N.W.2d 828 (Iowa 2010)
State v. Jorgensen, 758 N.W.2d 830 (Iowa 2008)
State v. Liggins, 524 N.W.2d 181 (Iowa 1994)
State v. Moses, 320 N.W.2d 581 (Iowa 1982)
State v. Musser, 721 N.W.2d 758 (Iowa 2006)
State v. O'Connell, 275 N.W.2d 197 (Iowa 1979)
State v. Odem, 322 N.W.2d 43 (Iowa 1982)
State v. Polly, 657 N.W.2d 462 (Iowa 2003)
State v. Richards, 809 N.W.2d 80 (Iowa 2012)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
State v. Vesey, 241 N.W.2d 888 (Iowa 1976)
State v. Williams, 695 N.W.2d 23 (Iowa 2005)

V. Did the district court err in overruling Cahill's motion to dismiss the charges and rejecting her claim that the length of pre-arrest delay was a due process violation?

Authorities

United States v. Lovasco, 431 U.S. 783 (1977)
Ackerman v. State, 51 N.E.3d 171 (Ind. 2016)
Commonwealth v. Scher, 803 A.2d 1204 (Pa. 2002)
Johnson v. State, 810 N.E.2d 772 (Ind. Ct. App. 2004)
State v. Brown, 656 N.W.2d 355 (Iowa 2003)
State v. Cromer, 765 N.W.2d 1 (Iowa 2009)
State v. Cuevas, 282 N.W.2d 74 (Iowa 1979)
State v. Edwards, 571 N.W.2d 497 (Iowa Ct. App. 1997)
State v. Hall, 395 N.W.2d 640 (Iowa 1986)
State v. Lange, 531 N.W.2d 108 (Iowa 1995)
State v. Luck, 472 N.E.2d 1097 (Ohio 1984)
State v. Seager, 571 N.W.2d 204 (Iowa 1997)

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
State v. Trompeter, 555 N.W.2d 468 (Iowa 1996)
State v. Wagner, 410 N.W.2d 207 (Iowa 1987)
State v. Williams, 264 N.W.2d 779 (Iowa 1978)
Iowa Code § 802.1

ROUTING STATEMENT

Cahill requests retention to consider substantial issues of first impression. *See* Def's Br. at 6. She does not specify what they might be. Each claim raised in this appeal can be resolved through application of established legal principles, and this case should be transferred to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Annette Dee Cahill's direct appeal from her conviction for second-degree murder, a special Class B felony, in violation of Iowa Code section 707.3 (1992). The jury found her guilty of killing Corey Wieneke in 1992. New evidence from an unexpected source reopened the case and identified Cahill as the murderer in late 2017.

In this direct appeal, Cahill argues: **(1)** the trial court erred in overruling her post-trial motion to compel DNA testing; **(2)** the State suppressed exculpatory evidence in violation of *Brady v. Maryland*; **(3)** the trial court erred in overruling her pre-trial motion to exclude all unfavorable witness testimony under Iowa Rule of Evidence 5.104; **(4)** the evidence was insufficient to establish that she killed Wieneke; and **(5)** the court erred in overruling her motion to dismiss, which alleged that pre-accusation delay violated her due process rights.

Course of Proceedings

The State generally accepts Cahill's description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 7.

Statement of Facts

In 1992, Corey Wieneke lived with his fiancée, Jody Hotz, in Muscatine, Iowa. *See* TrialTr. 28:5–10. Wieneke worked at a local bar (Wink's Tap), and Hotz worked at a bank. On October 13, 1992, when Hotz got home from work, she immediately noticed something odd: their dog was outside (but not on a chain), and the screen door was wide open. *See* TrialTr. 196:1–198:25. The board that usually covered the missing panel of the main door was not in place; that main door had also been left unlocked. *See* TrialTr. 199:1–17. When Hotz went to the bedroom, she found Wieneke. He was facedown on the floor with visible wounds; there were bloodstains everywhere; and his body was cold to the touch. *See* TrialTr. 199:18–200:14. Hotz called 911.

Wieneke had sustained multiple blunt force injuries, "on the front of the head, the face, on the back of the head and over many areas of the right and left sides of the back." *See* TrialTr. 93:5–94:13; TrialTr. 99:8–22. The blunt force injuries that fractured his skull caused his death. *See* TrialTr. 100:3–23; TrialTr. 110:25–113:17.

On the morning of October 13, 1992, John Schneider was part of a group that was picking seed corn on a farm, near Wieneke's house. *See* TrialTr. 71:8–72:12. Around 9:00 a.m., there was a mechanical problem with one of the trucks; they had to take it to West Liberty, which meant they drove past Wieneke's house. *See* TrialTr. 72:13–74:1. When they did, they saw "a couple people standing out by a car," on the side of the road. *See* TrialTr. 74:2–25. When they drove back to the farm after leaving that truck in West Liberty for repairs, those people and their car were gone. *See* TrialTr. 75:3–19. Schneider went back to pick up the repaired truck at about 1:30 p.m. On that trip, he saw "a bat laying on the side of the road," which was not there before. *See* TrialTr. 76:4–78:4. Schneider reported his observations to police, who had already recovered the baseball bat. *See* TrialTr. 78:5–79:3.

That baseball bat had been found on the side of the road, near Wieneke's residence, and it was consistent with the "pattern of injury on [Wieneke's] left back." *See* TrialTr. 97:1–98:13; *see also* TrialTr. 25:2–26:4; TrialTr. 102:24–104:22; *accord* TrialTr. 36:14–39:2 (analyzing blood spatters). The DCI was not yet using forensic DNA analysis in late 1992—but they could tell that traces of blood on the baseball bat matched Wieneke's blood type. *See* TrialTr. 39:3–40:12.

Hotz did not report anything missing, and there were no signs of forced entry into the house. *See* TrialTr. 41:18–42:18. It was typical for Wieneke to come home late after a shift at Wink's Tap, which is what had happened in the early morning hours of October 12, 1992—he was asleep in bed when Hotz left for work, as usual. *See* TrialTr. 191:9–196:23. Hotz was pretty sure that Wieneke had been sleeping with other women. She had heard rumors about Wieneke and Cahill, and she had also heard rumors about Wieneke and Wendi Marshall. *See* TrialTr. 186:23–187:19. Both sets of rumors were true, and there may have been others. *See* TrialTr. 308:22–312:19; TrialTr. 321:4–19.

Marshall testified that, on the night before Wieneke died, he had been bartending at Wink's Tap. Marshall and Cahill were both there. *See* TrialTr. 312:20–313:24. After closing time, Wieneke and Marshall were both going to go back to Marshall's house; Marshall was excited about that. *See* TrialTr. 314:2–10. But when they left the bar together and walked out to Wieneke's car, they found Cahill was already in the passenger seat. Cahill refused to get out, so Wieneke agreed to take her home. *See* TrialTr. 314:11–315:20. They planned to drop Cahill at her house, then go back to Marshall's house. But while they were on the road, "[Cahill] was mad and tried to open the door, acted like she

was going to open the door and jump out of the car." *See* TrialTr. 315:21–316:19. Wieneke pulled over and stopped the car to get out and talk with Cahill. Marshall stayed in the car and tried not to watch or listen, because it was "very awkward." *See* TrialTr. 316:20–317:22. When Wieneke and Cahill got back in, Wieneke told Marshall that he was going to take her back to her car, and then take Cahill home. *See* TrialTr. 317:23–318:10. Wieneke took Marshall back to her car, and he told her that "he would go drop [Cahill] off and then come back to [Marshall's] place." *See* TrialTr. 318:11–15. Marshall drove home. Later, Wieneke came over. They "sat and talked for a little bit," and then he left. He did not seem upset. *See* TrialTr. 318:16–319:12.

Initially, investigators had many leads, including Cahill. But Cahill was cooperative, and she appeared to have an alibi: she had spent the day with her sister-in-law (Jacque Hazen) on October 13, and they had receipts from various purchases that they had made in Iowa City. *See* TrialTr. 47:20–50:20; Def's Ex. M; *see also* TrialTr. 55:4–11; TrialTr. 65:3–18. Investigators looked into other potential suspects too, but they kept coming up empty. *See* TrialTr. 57:9–24; *accord* TrialTr. 43:18–45:14; TrialTr. 59:14–67:7; TrialTr. 127:15–133:20; TrialTr. 138:13–141:22. There were theories, but no proof.

The major breakthrough came in December 2017, when DCI Special Agent Trent Vileta went to interview a victim in an unrelated case in the hospital. The ICU charge nurse was Jessica Becker, and she approached Agent Vileta to figure out who he was and why he was in her ICU. *See* TrialTr. 277:22–278:10. As they talked, Agent Vileta informed Becker that he was a DCI agent who worked on cold cases—"and for some reason [Becker] just felt comfortable with him," and she decided to share something that happened decades earlier, which she had only fully shared with her mother. *See* TrialTr. 278:11–279:2.

In October 1992, Becker was nine years old. She was friends with Jacque Hazen's daughter (Kayla Hazen), and they often had sleepovers together. *See* TrialTr. 265:7–266:5. Becker knew Cahill from spending time with Kayla and her family—she described Cahill as the "fun, favorite aunt." *See* TrialTr. 266:6–12.

Sometime after Wieneke had been killed, Kayla had Becker over for a sleepover. It was an ordinary sleepover, until Becker and Kayla decided to sneak downstairs after bedtime. *See* TrialTr. 273:1–274:15. When they got to the bottom of the stairs, they could hear Cahill in the dining room—so they stopped and listened. *See* TrialTr. 274:16–275:5. Becker could see Cahill's back, and she heard Cahill speaking:

> [W]e heard [Cahill] crying and sobbing in the dining area. And we heard her make several statements that included, Corey, I never meant to hurt you. Corey, I'm so sorry. I never meant to kill you, Corey. And Corey, I love you.

See TrialTr. 275:6–13. Becker could see Cahill had lit "black candles." *See* TrialTr. 275:14–19. Becker and Kayla "turned around and went back upstairs before [they] were caught." *See* TrialTr. 275:20–24. When Becker tried to talk to Kayla about it, Kayla defended her aunt and "didn't want to talk about it anymore." *See* TrialTr. 275:25–276:8.

Becker's mother, Cynthia Krogh, testified that Becker had told her about Cahill's statements, soon after that sleepover. Becker had asked Krogh "why people burn black candles." *See* TrialTr. 245:8–25. Krogh thought that was strange, but replied: "I've heard that people burn black candles because that will bring out the evil spirits." *See* TrialTr. 246:1–11. Becker responded: "Corey wasn't evil." *See* TrialTr. 246:6–11. Krogh asked what was going on, and Becker answered:

> She told me that [Cahill] was burning black candles and her and Kayla had snuck down and overheard her and saw her. She was in the living room, I believe, dining room/living room area of the farmhouse of Kayla's and they saw [Cahill] pacing or walking back and forth and she had lit black candles and they heard her saying that she never meant to hurt Corey, that she didn't mean to kill him, that she loved him.

See TrialTr. 246:12–24; *accord* TrialTr. 276:17–277:6.

Krogh did not take Becker to the police. At trial, she explained:

> I was scared. Ron Hazen was the Sheriff at the time and, I mean, he's a relative. Who was going to believe a nine-year old child and who was going to listen to her? Plus the fact that my ex-husband [Lester McGowan] was still friends with the Hazens, this family, and he had threatened me on a separate occasion that if I didn't keep my mouth shut that he would kill me. So I was scared. I was a single mom with two small children and I didn't know what to do.

TrialTr. 247:7–20; *accord* TrialTr. 252:21–253:25; TrialTr. 277:7–21.

Upon receiving this new information in December 2017, investigators began "actively working the investigation immediately." *See* TrialTr. 169:22–170:8. DCI Agent Jon Turbett interviewed Cahill, and recordings of those interviews were admitted as evidence. *See* State's Ex. 27 & 36 (March 26, 2018); State's Ex. 28 (April 12, 2018).

Krogh's ex-husband, Lester McGowan, worked as a contractor. On the morning of October 13, 1992, McGowan brought Cahill to work on the contracting team that he supervised, for the first and only time. McGowan introduced Cahill to his crew. This, in itself, was unusual. They were "tearing off a roof" that morning. Someone taught Cahill how to remove shingles. *See* TrialTr. 161:25–164:19. But Cahill only stayed for about an hour before "[s]ome red car pulled up" and Cahill "climbed off the roof and took off." *See* TrialTr. 164:20–165:3. The driver of that car appeared to be a woman. *See* TrialTr. 165:4–12.

Cahill had told investigators that Hazen picked her up from that job site, and she said that she and Hazen were together all day. *See* TrialTr. 48:1–15. But at some point, Cahill suggested to investigators that Hazen might have killed Wieneke. *See* TrialTr. 214:3–215:8.

During Cahill's interview with Agent Turbett on April 12, 2018, Cahill's description of events initially omitted a fact that she had told investigators in prior interviews: that she and Hazen had stopped at Wieneke's residence on their way out of town, at about 10:00 a.m. *See* State's Ex. 28, at 43:44–47:16. When confronted about this, Cahill said that she "knocked on the door," but Wieneke did not answer. She also said she did not remember if she had "left a note in his car," which was still parked there. *See* State's Ex. 28, at 47:17–47:51. Agent Turbett mentioned to Cahill that, in her prior interviews, she had stated that they intended to stop at Wieneke's on their way back from Iowa City, but passed by his place and stopped at a drugstore in West Liberty to call him from a payphone. *See* State's Ex. 28, at 59:38–1:01:38. Cahill did not remember that at all. She said that she might have tried to call Wieneke instead of stopping at his house to avoid encountering Hotz. But Cahill knew that Hotz worked "banker's hours" and would not be home in the mid-afternoon. *See* State's Ex. 28, at 59:38–1:01:38. And

as for the receipts from Cahill and Hazen's activities in Iowa City, the only one with a timestamp was from Best Buy, generated at 13:25. *See* Def's Ex. M, at 2. Muscatine is about an hour away from Iowa City.

Scott Payne used to hang out with Hazen and her husband, back in 1992. One or two days after Wieneke was killed, while Payne was at Hazen's house, he saw Cahill drive onto the property and park the car near a "burn barrel." *See* TrialTr. 294:18–294:24.

> [Cahill] got out of the car and opened the trunk and took a paper bag with clothes in it and dumped them out and . . . Jacque met her out at the burn barrel with a gas can and they lit the clothing on fire.

TrialTr. 296:25–297:5. Those clothes appeared to be bloodstained—Payne had experience "butchering hogs" and could tell the difference between blood and paint. *See* TrialTr. 297:6–19 ("So I was covered with blood all day so I know what bloody clothes look like."). Cahill seemed to be "in a hurry" and "frantic-like." *See* TrialTr. 297:20–23. Cahill told Payne that "they were clothes that had paint on them"—but Payne could tell it was really blood, not paint. *See* TrialTr. 298:14–21. Payne was a heavy user of illegal drugs in the 1990's and preferred to "avoid the police," so he did not mention this to law enforcement until Agent Vileta interviewed him in 2019. *See* TrialTr. 298:4–13.

Additional facts will be discussed when relevant.

ARGUMENT

I. The trial court did not err in denying Cahill's post-trial motions to compel DNA testing and for a new trial.

Preservation of Error

After trial, Cahill argued that the existence of the hairs and the availability of additional DNA testing was newly discovered evidence, and that performing those tests could have generated more evidence. *See* Supplemental Motion to Compel Discovery (11/19/19); App. 304. The court ruled on the newly-discovered-evidence claim. *See* Sent.Tr. 4:16–6:6. Error is preserved to renew that claim. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). But Cahill is not doing that.

Instead, Cahill is arguing that the district court should have ordered mtDNA testing under section 81.10. *See* Def's Br. at 19–23. But the district court ruled on Cahill's motions as claims alleging newly discovered evidence, under Rule 2.24(2)(b)(8). *See* Sent.Tr. 5:10–6:6; Sent.Tr. 7:15–24. Cahill did not challenge the absence of a direct ruling on her other claims. *See* Sent.Tr. 9:16–19. This means that error is not preserved to argue that the district court erred in denying a claim under section 81.10, because it never considered or ruled on such a claim. *See Lamasters*, 821 N.W.2d at 863–64 & n.2; *Meier v. Senecaut*, 641 N.W.2d 532, 537–41 (Iowa 2002).

Standard of Review

Review of rulings on motions about newly discovering evidence is for abuse of discretion. *See State v. Compiano*, 154 N.W.2d 845, 489 (Iowa 1967). The district court has "unusually broad" discretion in assessing the hypothetical impact of newly discovered evidence on the outcome. *See State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992).

Merits

This claim involves a page from the DCI criminalistics lab that was not captioned correctly, and was left out of the investigative file. *See* Partial DCI Report (11/22/19); App. 342. It stated that hairs that were found in Wieneke's hand were not suitable for DNA STR analysis. Other materials in the file had mentioned that those hairs existed and had been collected, and Cahill's counsel had cross-examined witnesses about whether those hairs had ever been tested. *See* TrialTr. 108:21–110:15; TrialTr. 124:9–126:6; Def's Ex. F-11. After related questioning, the prosecutor reviewed the file to double-check, which led to this:

> When we broke for lunch I wanted to review the file to refresh my own memory about that, and looking at the lab reports that we had that are a part of discovery, there's additional entries that show the lab broke down that submission into the fibers that were submitted and the hair and they were trying to figure out what the lab had done with it. And not being immediately able to tell from the report, Agent Vileta called the lab and had them just pull

> the file so we could figure this out. And then in the course of doing that the lab person found a document which I've since provided to Counsel which is apparently a draft lab report showing further analysis on item K.

See TrialTr. 177:13–179:10. That draft report was not captioned with identifiers that would have caused the system to include it the file for this particular case, which is why it was not found earlier. *See* TrialTr. 178:13–23. The prosecutor thought it was favorable to the State, but he acknowledged that it would not be admissible because it was unsigned and was beyond the minutes of testimony. *See* TrialTr. 179:11–180:5. From Cahill's counsel's perspective, that concession meant there was no "fighting issue" to resolve; Cahill did not make any other requests pertaining to this report during trial. *See* TrialTr. 179:25–180:11.

After trial, Cahill argued that counsel "did not realize that there was other DNA testing that could very well be done on these hairs and was within the ability of the Iowa DCI to order," and she argued that those hairs could be tested for mitochondrial DNA (mtDNA), which does not require full hair follicle cells (unlike DNA STR testing). *See* HearingTr. (11/21/19) 4:16–6:14. Cahill's counsel stated they did not know about mtDNA testing during trial. *See* HearingTr. 16:15–17:13. But the report was very specific about the kind of DNA analysis that could not be performed: DNA STR analysis. *See* HearingTr. 18:2–21;

Partial DCI Report (11/22/19); App. 342 ("[N]one of the human hairs were suitable for DNA STR analysis."); *see also* TrialTr. 178:24–179:1 ("The report says specifically that none of the human hairs were suitable for DNA STR analysis."). The district court rejected Cahill's motion for new trial and her motion to compel post-trial discovery because it found that other discovery materials had referenced the fact that the hairs were found and collected, and Cahill's counsel was already informed enough to seek answers about whether those hairs had been tested. *See* Sent.Tr. 4:16–5:10. Moreover, on materiality, it also held that mtDNA test results that did not match Cahill would not be likely to change the result of the trial. *See* Sent.Tr. 5:10–6:6.

Cahill's challenge on appeal points out that section 81.10 enables district courts to order "DNA profiling be performed on a forensic sample collected in the case for which the person stands convicted." *See* Def's Br. at 21–22. But section 81.10 specifically authorizes a separate "proceeding for relief," not a post-trial motion in the underlying criminal case. *See* Iowa Code § 81.10(3)(a). This is because Iowa law generally seeks to minimize delay between verdict and judgment in criminal prosecutions. *See, e.g.*, *State v. Trane*, 934 N.W.2d 447, 464 (Iowa 2019) (cautioning Iowa district courts against

considering ineffective-assistance claims in motions for new trial because they "typically require additional record development" that "would likely delay judgment and sentencing"). Cahill disagrees, and argues that "failing to act promptly, with knowledge that an issue will only wait for postconviction relief proceedings, is error on the part of the trial court." *See* Def's Br. at 21–23. But Cahill's claims under section 81.10 (along with any claims that her counsel was ineffective for failing to request a continuance for mtDNA testing, during trial) will require development of a significant factual record that does not directly bear on the fairness of the trial or the legal sufficiency of the existing factual record to support the conviction. Even if Cahill had sought a ruling on a separate application under section 81.10, it would have correct to proceed to sentencing. *See Trane*, 934 N.W.2d at 464.

Cahill misconstrues *Ortiz* to create a free-standing rule that it is reversible error for a district court to take action that does not further "the public policy of this state that litigation should be final at the earliest possible date." *See State v. Ortiz*, 766 N.W.2d 244, 250 (Iowa 2009); Def's Br. at 21–22. But *Ortiz* upheld a discretionary finding of good cause for delay to file a motion to suppress *before* trial, where finding waiver would create an obvious ineffective-assistance claim.

See Ortiz, 766 N.W.2d at 250. Even if a district court has discretion to consider an untimely challenge that would otherwise be litigated in a separate proceeding, that does not mean it is an abuse of discretion to decline to find good cause to pause proceedings to do so. And those finality interests would be inverted if Ortiz raised a motion to suppress *after* being convicted at trial—at that point, there would be a verdict awaiting pronouncement of judgment, and postponing sentencing to "investigate the investigation" would subvert finality interests. *Cf. Trane*, 934 N.W.2d at 464. Similarly, postponing Cahill's sentencing to litigate a separate "application for relief" under section 81.10 would undermine those same finality interests. Thus, even if there had been a ruling that preserved this claim for review, this challenge would fail.

II. Cahill did not argue that a *Brady* violation occurred, and she cannot prove such a claim on appeal.

Preservation of Error

Cahill cross-references her previous error-preservation section. *See* Def's Br. at 23. But she does not identify any *Brady* claim that was raised or ruled upon below. *See* Def's Br. at 19. Therefore, error is not preserved for this challenge. *See* TrialTr. 179:25–180:11; TrialTr. 407:6–418:2; Sent.Tr. 4:16–6:6; *accord State v. Hoskins*, No. 17–1797, 2019 WL 478795, at *2 (Iowa Ct. App. Feb. 6, 2019).

Standard of Review

If there were a ruling on a *Brady* claim, then review would be de novo. *See DeSimone v. State*, 803 N.W.2d 97, 102 (Iowa 2011).

Merits

Cahill argues that the State violated *Brady v. Maryland* by failing to disclose exculpatory evidence until partway through trial. *See* Def's Br. at 23–26. To establish a *Brady* violation, Cahill would need to prove (1) evidence was suppressed; (2) it was exculpatory; and (3) it was material to the outcome. *See Harrington v. State*, 659 N.W.2d 509, 522 (Iowa 2003). Cahill cannot make any of those three required showings, for either of her *Brady* claims.

A. The evidence about DNA STR testing was not suppressed, not exculpatory, and not material.

First, evidence about DNA testing was not suppressed because "the defendant either knew or should have known of the essential facts permitting [her] to take advantage of the evidence." *See State v. Piper*, 663 N.W.2d 894, 905 (Iowa 2003) (quoting *Harrington*, 659 N.W.2d at 522), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010). Cahill used the other parts of the DCI lab report in cross-examining Sheriff Ryan, which elicited responses that established that those hairs were collected during the autopsy

and sent to the DCI lab. *See* TrialTr. 124:9–125:24; State's Ex. 34; App. 345 (describing laboratory exhibit K as "[b]ox containing hairs from victim's left hand"). Cahill asked Sheriff Ryan if knew whether those hairs were tested. He did not know. *See* TrialTr. 124:25–127:14. Cahill had everything she needed to ask whether DNA analysis of those hairs occurred. Indeed, the DCI lab report that listed the hairs gave the name of the DCI criminalist who authored this report, and he could have been asked about his analysis of this evidence *before* this wayward page was discovered. *See* TrialTr. 178:20–23. And even if this would have counted as suppression if the extra page had been discovered *after* trial, it was turned over to Cahill *during* trial—so it still could not have been "suppressed" for *Brady* purposes. *See State v. Bishop*, 387 N.W.2d 554, 559 (Iowa 1986) (explaining that *Brady* is not violated when evidence in question is "disclosed during trial and at a meaningful time"); *accord Jackson v. State*, No. 11–0944, 2012 WL 5356081, at *2 (Iowa Ct. App. Oct. 31, 2012) ("Because the letter was produced at trial and Jackson's attorney had an opportunity to review it and decide what course of action to take, we conclude the evidence was not suppressed."). This mirrors the court's finding on the first two prongs of Cahill's newly-discovered evidence claim: that

these hairs were discussed "in the discovery materials" and Cahill questioned multiple witnesses "about the hair and whether or not it was tested" during trial, so lack of access to this particular page "did not impact [her] opportunity to discover the hair and to discover the opportunity to test the hair." *See* Sent.Tr. 4:16–5:10; Def's Ex. F-11.

Second, the fact that analysts had determined that the hairs were not suitable for DNA STR testing was not exculpatory. It favored *the State*, because it meant analysts had tried to test those hairs with techniques that were available, and had not failed for lack of trying. *See* Case Report (11/19/19); App. 340 (noting that "[t]he *Ware* case in Tennessee in 1996 was the first case in the United States where mitochondrial DNA evidence was introduced at trial" and reporting that, as of 1998, "[t]he FBI Crime Lab is currently the only lab in the United States preparing this work for use in the U.S. court system"). Cahill shared that view during trial, and she was satisfied that the proper remedy for its late discovery should be that it would not be admissible as part of the State's case. *See* TrialTr. 179:11–180:11. Nothing in this record is useful for Cahill's defense, which is why she did not use it. Thus, Cahill's unpreserved *Brady* claim would fail on the last two prongs of the *Brady* analysis.

Alternatively, Cahill's claim might be that mtDNA test results would be exculpatory. But that claim would be premature, at best. Future testing may show that they *are* Cahill's hairs, which would be damning evidence on the disputed issue of identity. Arguing that DNA testing "*could* have been exculpatory is equivalent to saying such testing is merely *potentially* helpful to the defense.'" *See Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994) (quoting *Thompson v. State*, 492 N.W.2d 410, 413 (Iowa 1992)). That may be enough for a future application under section 81.10, but it cannot help Cahill prove either a *Brady* violation or a newly-discovered-evidence claim. Cahill was unable to establish any basis for her motion for new trial below, and her unpreserved *Brady* claim fails for the same reason.

The district court also determined that, even if mtDNA testing established that the hairs did not belong to Cahill, Wieneke, or Hotz, it would not create any reasonable probability of a different result. *See* Sent.Tr. 5:10–6:6. This was one of multiple alternative grounds for rejecting Cahill's newly-discovered-evidence claim. This finding referenced the State's argument, which explained:

> It is an extraordinarily speculative thing to say that these hairs must have originated in the head of Corey Wieneke's assailant. The crime scene evidence, the injuries to the body made it, I thought, quite clear that Mr. Corey

> Wieneke was struck while he was unaware, asleep in bed and rolled out of bed and was finished off while he's laying on the floor. The fact that some hairs stick to his hand along with cat fur and other fibers means nothing. This evidence just because it was seized does not mean it has the potential to be exculpatory. . . . Corey Wieneke was bludgeoned to death and laid dead on the floor of his bedroom. I think the fact that hairs were on his hand said more about how long it had been since they vacuumed than anything else.

See HearingTr. 19:10–20:12. The State does not need to establish that mtDNA results that excluded Cahill, Wieneke, and Hotz as the source of those hairs would not have a reasonable probability of changing the result of the trial, because the ruling stands on other independently sufficient grounds. *See State v. Jefferson*, 545 N.W.2d 248, 249–50 (Iowa 1996) (declining to address materiality and impact because the newly-discovered-evidence claim failed on first two prongs of the test). But Cahill could not prevail on this prong, either. The district court assesses the relative importance of evidence at trial from a superior vantage point, and rulings on materiality or impact receive deference on appeal. *See, e.g.*, *State v. Romeo*, 542 N.W.2d 543, 550–51 (Iowa 1996) ("Because the trial judge sat through the trial, he is in a superior position to decide whether the information on the tapes would have changed the result of the trial. Consequently, we give weight to his conclusion that the result would not have been altered had the tapes

been available for use at trial."); *Miles*, 490 N.W.2d at 799 ("From its closer vantage point the presiding trial court has a clearer view of this crucial question, and we generally yield to its determination."); *Compiano*, 154 N.W.2d 845, 849 (Iowa 1967) ("The trial court is generally in a better position than we to determine whether evidence, newly discovered, would probably lead to a different verdict upon retrial, and we have often said we will not interfere with its ruling unless it is reasonably clear that such discretion was abused."). The evidence was clear that there was no struggle preceding this killing, and Wieneke's dalliances meant that stray hairs could likely be found on his body or on the floor surrounding his bed. Thus, if this Court needs to reach this prong of the analysis, it should still affirm.

B. The recording of Jacque Hazen's interview only proved that Hazen lied in her trial testimony, when called as a defense witness. It was not exculpatory. It was not concealed from Cahill. And it was only offered as rebuttal evidence.

Cahill argues that prosecutors "withheld the recording of Jacque Hazen's interview with DCI until after Hazen had testified at the second trial." *See* Def's Br. at 25–26. This cannot establish a *Brady* violation because it was not exculpatory. It only proved that Hazen's testimony was false, which *undermined* Cahill's defense. *See*

TrialTr. 421:7–424:4. Moreover, no recordings were suppressed, because Agent Vileta had testified at his deposition that he knew that one of his interviews with Hazen had been recorded, and he did not know whether the other one was recorded—but he offered to check. *See* TrialTr. 417:8–418:2. Cahill had access to Agent Vileta's report, and it "clearly indicated there was a recording there." *See* TrialTr. 413:6–17; *accord* Minutes (7/23/18) at 2, 16, 23–24; App. 86, 100, 107–08. So Cahill had every reason to follow up with Agent Vileta and ask him to check whether that recording existed, which means she had all the information she needed to obtain this evidence. *See Piper*, 663 N.W.2d at 905 (quoting *Harrington*, 659 N.W.2d at 522). Moreover, that report had documented Hazen's statements, so Cahill already knew that Agent Vileta could be called in rebuttal to impeach Hazen's testimony that contradicted those specific prior statements. *See* TrialTr. 411:21–412:9. This recording was only offered on rebuttal, so concerns about exceeding the scope of the minutes of testimony or violating reciprocal discovery would be misplaced. *See State v. Belken*, 633 N.W.2d 786, 795 (Iowa 2001); *State v. Daniels*, No. 14–1480, 2015 WL 9450636, at *8 (Iowa Ct. App. Dec. 23, 2015); Reciprocal Discovery Agreement (6/25/18) at 2; App. 83 ("The State is not

required to disclose any document, statement, report or witness to be used in its rebuttal case."). And its disclosure during trial was enough to preclude claims of suppression, for *Brady* purposes—Cahill could have listened to the recording and used whatever portions of it were exculpatory to cross-examine Agent Vileta, or on surrebuttal. *See State v. Techel*, No. 14–1520, 2016 WL 4036111, at *7 (Iowa Ct. App. July 27, 2016) (citing *United States v. Porchay*, 651 F.3d 930, 942 (8th Cir. 2011)). Finally, that limited use of the interview recording also establishes a lack of *Brady* materiality: it only helped impeach Hazen's defense-friendly testimony on the State's rebuttal, so Cahill cannot show that having it earlier might have mattered. *See State v. Jorden*, 461 N.W.2d 356, 359–60 (Iowa Ct. App. 1990).

III. The trial court did not err in denying Cahill's motions to exclude prosecution witnesses under Rule 5.104.

Preservation of Error

Cahill sought pre-trial determinations of the admissibility of testimony from Becker, Krogh, and Payne. *See* Motion for 5.104 Ruling (2/15/19); App. 228; Motion for 5.104 Ruling (9/3/19); App. 262. The district court's rulings were effectively final determinations that each witness would be allowed to testify. *See* Ruling (2/28/19) at 1–4; App. 246–49; Ruling (9/6/19); App. 270. Thus, error is preserved.

Standard of Review

Cahill quotes *State v. Veverka* for the proposition that "review of the district court's ruling on a preliminary question of admissibility is for the correction of legal error." *See* Def's Br. at 26 (quoting *State v. Veverka*, 938 N.W.2d 197, 202 (Iowa 2020)). But *Veverka* goes on to state that "[w]hen the preliminary question is one of fact, 'we give deference to the district court's factual findings and uphold such findings if they are supported by substantial evidence." *See Veverka*, 938 N.W.2d at 202 (quoting *State v. Long*, 628 N.W.2d 440, 447 (Iowa 2001)). It is unclear which standard applies to the rulings that Cahill challenges, but it should not matter.

Merits

Cahill, like any defendant, would prefer the wholesale exclusion of all evidence against her. She argues that, based on their interviews and depositions, the trial court should have prohibited the State from presenting any testimony from Becker, Krogh, and Payne. *See* Def's Br. at 27–34. But Cahill cannot cite any Iowa case that held that it was an abuse of discretion to permit any fact witness to testify. Even in *Graham v. Chicago & N.W. Ry. Co.* and *State v. Smith*, the witnesses were permitted to testify. The remedy in those cases was to sustain a

later challenge, at the close of the evidence (or renewed on appeal), that attacked their testimony as legally insufficient to prove elements of a claim or charge. *See Graham v. Chicago & N.W. Ry. Co.*, 119 N.W. 708, 710–12 (Iowa 1909); *State v. Smith*, 508 N.W.2d 101, 103–05 (Iowa Ct. App. 1993). And even "the use of this doctrine to vacate a conviction 'is exceedingly rare.'" *See State v. Cardona*, No. 19–1047, 2020 WL 1888770, at *2 (Iowa Ct. App. Apr. 15, 2020) (quoting *State v. Hobbs*, No. 12–0730, 2013 WL 988860, at *3 (Iowa Ct. App. Mar. 13, 2013)). Indeed, the State cannot find a single Iowa case after *Smith* where an appellate court reversed a conviction based on a finding that witness testimony could not be found credible enough to support it.

Some preliminary questions are appropriate for determination under Rule 5.104 and may preclude a witness from testifying—but the ultimate credibility determination is not one of them.

> Because Rule 5.601 affirmatively states that "[e]very person is competent to be a witness" as a general matter, preliminary questions concerning witness competence do not arise frequently. Nonetheless, the issue may be presented, for example, where the age or mental condition of the witness is questioned. . . . [O]nce a trial judge determines there is sufficient evidence on which a finding of personal knowledge can be made, the question whether a witness possesses the requisite personal knowledge is a matter to be decided by the jury rather than the court.

Laurie Kratky Doré, Iowa Practice Series: Evidence § 5.104:2 (last updated Nov. 2019). None of these witnesses were incapable of testifying about their observations, and none offered testimony that did not sufficiently explain the basis for their personal knowledge. *See* Iowa R. Evid. 5.602 ("Evidence to prove personal knowledge may consist of the witness's own testimony"). The district court correctly found that all of Cahill's arguments against their expected testimony went to the weight of that evidence—and not to its admissibility. *See* Ruling (2/28/19) at 1–4; App. 246–49; *State v. DeWitt*, 597 N.W.2d 809, 811 (Iowa 1999). Even if Cahill's arguments were factually valid, they could not entitle her to a preliminary ruling that would have prevented the jury from hearing Becker, Krogh, and Payne testify.

Factual problems with Cahill's arguments about Becker and Krogh will be discussed in the next division. For now, it is sufficient to note that materials before the district court when it issued its ruling matched Becker and Krogh's trial testimony and included additional relevant details that established their basis for personal knowledge and supported a finding that they could offer credible testimony. *See* Exhibits A–D (2/18/19); App. 235–44. It was correct to permit both witnesses to testify, and to let jurors decide if they were credible. *See*

State v. Lopez, 633 N.W.2d 774, 785–86 (Iowa 2001); *cf. State v. Doolin*, 942 N.W.2d 500, 509 (Iowa 2020) (quoting *Perry v. New Hampshire*, 565 U.S. 228, 245, 248 (2012)) (rejecting argument that potential inaccuracy of eyewitness identification testimony required "a preliminary judicial inquiry in to the reliability" of that testimony, and explaining that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a court to screen such evidence for reliability before allowing the jury to assess its creditworthiness").

As for Payne, Cahill argues that inconsistencies between Payne's statements in his 1996 interview and his 2019 testimony are so vast that his testimony is a "nullity" and is inadmissible. *See* Def's Br. at 32–34. Certainly, there are inconsistencies. On cross-examination, Payne explained that his 1996 interview occurred while he was still drinking heavily and using drugs (and Payne was especially prone to self-destruction during that time of the year, around the birthday of his deceased younger brother). *See* TrialTr. 331:4–16. However, by the time of trial in late 2019, he had been sober for "[a]lmost 20 years." *See* TrialTr. 292:12–22; TrialTr. 331:13–16. Jurors could reasonably treat Payne's testimony with caution, but credit parts of it anyway.

Cahill argues that, in 1996, Payne "identified Jeff Murdoch" as the murderer. *See* Def's Br. at 30. But what Payne said in 1996 was that "Murdock should be looked at," because Payne had heard that "Murdock had supposedly bragged about killing Wieneke on several different occasions." *See* Attachment 1 (1/25/19) at 2; App. 180. Payne did not recall who it was who told him that, even in 1996. *See id.*; App. 180. At his deposition, Payne could not remember much of the gossip that he apparently told investigators in 1996. *See* Exhibit BBB (9/3/19); Attachment 1 (1/25/19); App. 179. But jurors could take that into consideration when deciding whether they found Payne credible. And they could assess Payne's explanation for why, in 1996, he made bizarre statements and claimed to be investigating the killing. Payne honestly admitted that he could not explain why he would have said those things, until he realized that the 1996 interview happened on his deceased brother's birthday, which meant he was likely drunk. *See* TrialTr. 328:25–329:7; TrialTr. 331:2–10.

The truth is that, even in 1996, Payne was never really able to "identify" someone as the murderer, because he did not know who killed Wieneke. But he did see Cahill disposing of bloody clothing, in the days after the killing—and she seemed "frantic-like." *See* TrialTr.

296:10–298:21. Payne had been reluctant to come forward with that information while he was still an active drug user, because he did not want to be mixed up in a murder investigation—but when interviewed years later, he was comfortable disclosing it. *See* TrialTr. 298:4–13.

Cahill called Agent Vileta as a defense witness, to ask him about what Payne said during his most recent DCI interview in July 2019. Agent Vileta read from his written report: "Payne said that the day it happened, and then in parentheses I have (Corey Wieneke's murder,) he was at Jacque and Denny Hazen's house." *See* TrialTr. 353:2–10. Cahill argued that this contradicted Payne's timeline. But Agent Vileta clarified: he had inferred that "it" was the murder, but "[w]hen you look at the report and listen to the recording you could certainly say that he was referring to the day he saw the clothes burning." *See* TrialTr. 356:3–11. The rest of the paragraph from Vileta's report said:

> . . . . Payne stated he saw Annette roar through the driveway back to the burn barrel where Jacque met her. Payne stated he saw Jacque and Annette burning what appeared to be bloody clothes. . . . Payne stated that the clothes appeared to be bloody because they had red on them and the burn barrel the clothes were being thrown into was in the backyard. Payne stated he gave the private investigator this same information last year before trial. . . . Payne said Jacque and Annette told him to mind his own business. . . . . Payne said at the time he didn't want to get involved with the investigation. Payne stated he had never seen them burn clothes there before.

See TrialTr. 353:22–354:23; *accord* Minutes (8/7/19) at 3; App. 87. This was entirely consistent with Payne's testimony. And if it was inconsistent with Payne's statement to Cahill's private investigator, Cahill could have called that investigator to testify about it, either at trial or at the pretrial hearing on this issue—but Cahill did not.

The purported inconsistency between Payne's interview statements to Agent Vileta and his trial testimony was exhaustively explored at trial, and Agent Vileta agreed that it was likely that the statements were not inconsistent at all. *See* TrialTr. 353:2–356:11. And the inconsistencies between Payne's 2019 statements and his 1996 DCI interview were susceptible to plausible explanations that jurors could evaluate for themselves. *See, e.g.*, *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992) ("Assessment of a witness's credibility is uniquely within a lay jury's common understanding.").

Finally, Cahill asserts that Payne's testimony was "tainted by bias" because he loaned $5,000 to Denny Hazen and Jacque Hazen in the 1990's, and it was never repaid. *See* Def's Br. at 34 (citing TrialTr. 329:8–16). But he was testifying at Cahill's trial, not Hazen's—and his testimony would have put him no closer to recovering whatever money that he believed he was owed. And no rule or case enables defendants

to exclude otherwise relevant testimony from witnesses they stiffed. Certainly, any evidence of potential bias could be presented to attack Payne's credibility. But the role of deciding whether it meaningfully detracted from his credibility was for the jury—not for the trial court, and certainly not for Cahill. *See State v. Wehde*, 283 N.W. 104, 105 (Iowa 1938) (quoting *State v. Voelpel*, 226 N.W. 770, 771 (Iowa 1929)) (explaining that "it is for the jury to determine, from all the facts and circumstances, the credibility that shall be given to the witness" and the weight to give impeaching evidence "proving previous contradictory statements or acts, or a bad reputation for truth and veracity").

There was no basis for granting the extraordinary remedy that Cahill requested. The trial court was correct to overrule both motions. *See* Ruling (2/28/19) at 1–4; App. 246–49; Ruling (9/6/19); App. 270; MotionTr. (9/6/19) at 7:24–8:13.

IV. The evidence was sufficient to prove identity.

Preservation of Error

Cahill moved for judgment of acquittal on the issue of identity. *See* TrialTr. 335:23–336:7; Motion (9/15/19); App. 272. The court denied the motion. *See* TrialTr. 339:9–341:9. That preserved error. *See State v. Williams*, 695 N.W.2d 23, 27–28 (Iowa 2005).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

Merits

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). In this context, a reviewing court will "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). Here, testimony about Cahill's statements and corroborative evidence were sufficient to support a conclusion that Cahill was the killer.

A. Becker's testimony was sufficient to establish that Cahill admitted that she killed Wieneke.

Becker testified that, during a sleepover at the Hazen house in late 1992, when Becker was nine years old, she and Kayla Hazen were sneaking downstairs when they saw Cahill, alone in the dining room. Becker watched from the bottom of the stairway and she listened to Cahill "crying and sobbing," and Cahill said: "Corey, I never meant to

hurt you. Corey, I'm so sorry. I never meant to kill you, Corey. And Corey, I love you." *See* TrialTr. 273:19–275:13. Krogh testified that, soon after that sleepover, Becker reported that she had heard Cahill "saying that she never meant to hurt Corey, that she didn't mean to kill him, that she loved him." *See* TrialTr. 245:8–246:24.

Cahill argues that neither Becker nor Krogh were credible. *See* Def's Br. at 14–17 and 27–32. But Cahill cross-examined both Becker and Krogh at trial; she had a fair opportunity to try to convince jurors not to believe their testimony. Jurors could still decide they believed Becker and Krogh, notwithstanding Cahill's attacks, if they concluded that any inconsistencies were explainable or unimportant, and if they ultimately concluded that Becker and Krogh were telling the truth. *See State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006) (quoting *Williams*, 695 N.W.2d at 28). Cahill cannot establish that Becker and Krogh's testimony should not have been admitted, believed, or relied upon as critical evidence that she implicated herself in Wieneke's killing.

Becker told Krogh about Cahill's inculpatory statements in 1992, which undermines any claim that Becker made this up in 2017. Cahill argues that Krogh fabricated her testimony to get revenge on Cahill for her dalliances with Krogh's abusive ex-husband (Lester McGowan).

See Def's Br. at 17. But Krogh disavowed any malice towards Cahill or towards Hazen (or towards McGowan, with whom Krogh reconciled in 2004 or 2005). *See* TrialTr. 243:24–244:7; TrialTr. 253:8–23. And for Krogh to frame Cahill using a false report from Becker, she would need to convince Becker to perjure herself as well. There is no evidence that Becker had any motive to frame Cahill. A reasonable jury could find that Krogh was not perjuring herself to frame Cahill for murder as part of a convoluted plot for revenge, years after the fact.

Cahill also argues that the layout of Hazen's house made it physically impossible for Becker's testimony to be true, because there was a door at the bottom of the stairs and "[w]hen opened, this door would obscure a person's line of sight between the base of the stairs and the dining room." *See* Def's Br. at 16 (citing TrialTr. 220:1–7). She is wrong. Even if there was a door on this frame, an open door would allow a line of sight into the main room, especially if Becker was peeking around the corner. *See* Motion Ex. H (2/18/19); App. 245. And it would be enough if the girls peeked around the corner, saw Cahill, and ducked back behind cover—they would not need to maintain line of sight to *listen* to Cahill, especially if they were afraid of getting caught. *See* TrialTr. 273:18–275:24. Becker testified that

she could not see Cahill's face—the evidence was what she *heard*, not what she saw. *See* TrialTr. 284:9–15. And Becker testified that she did not remember a door at the bottom of that staircase at all. *See* TrialTr. 287:9–14; *accord* Motion Ex. H (2/18/19); App. 245. Even if the door had existed, Becker would still be able to see into that adjacent room while that door was open. Cahill's placement of the door in her sketch (with hinges on the inside corner and opening into the landing) would block most access to the stairway whenever the door was open, making it wildly inconvenient to walk upstairs from the dining room. *Compare* Def's Ex. H; App. 361, *with* State's Ex. 33; App. 344. Indeed, the fact that Cahill drew that particular door in that specific way on the map she sketched during her March interview—as the only door she labeled with a direction of motion—strongly suggests that Kayla had reported what they heard to *her* mother (Jacque Hazen), who had warned Cahill. *See* State's Ex. 36, at 36:50–41:00; *accord* TrialTr. 218:14–221:1 ("I just asked her to draw me a picture if she remembered the house."). If Becker had been lying, there would be nothing for Kayla to tell, and it would have been strange for Cahill to draw and label that door—so Cahill's drawing effectively corroborates Becker's testimony that this really happened. *See State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982).

Becker was only nine years old when she heard Cahill's apology to Wieneke; it is understandable that, 27 years later, she would not recall the precise date of the sleepover (although she could give an approximate date by referencing contemporaneous events). *See* Def's Br. at 31; TrialTr. 273:1–9. Becker's response (and her description of Kayla's response) made sense. *See* TrialTr. 275:25–277:21. Krogh's testimony about how Becker told her about what she heard in 1992 was a credible account of a nine-year-old's reaction, and Krogh gave a common-sense explanation for her hesitation to upend their lives by coming forward. *See* TrialTr. 245:19–247:20. And Becker's testimony about her encounter with Agent Vileta also made sense: Becker was doing her job as a "charge nurse" and making sure that Agent Vileta posed no threat to any of her patients—and when Becker learned that Agent Vileta was a professional investigator who handled "cold cases" and who was already familiar with Wieneke's murder, her desire to "share that burden" and "get it off [her] chest" motivated Becker to tell Agent Vileta what she knew. *See* TrialTr. 277:22–279:2.

Becker's testimony and Krogh's testimony established that Cahill admitted to killing Wieneke, when she thought she was alone. *See* TrialTr. 245:8–246:24; TrialTr. 273:19–275:13. That is sufficient

to establish identity and sufficient to support conviction if there is corroborating evidence—which is a low bar. *See State v. Polly*, 657 N.W.2d 462, 467 (Iowa 2003) ("Corroboration need not be strong nor need it go to the whole case so long as it confirms some material fact connecting the defendant with the crime.").

B. Evidence of Cahill's motive, opportunity, and other actions was sufficient to corroborate Cahill's admissions and support this conviction.

Cahill is right that there is no direct evidence from a witness who saw her kill Wieneke. *See* Def's Br. at 37. But direct evidence and circumstantial evidence are equally probative. *See State v. O'Connell*, 275 N.W.2d 197, 204–05 (Iowa 1979). And circumstantial evidence may satisfy corroboration requirements. *See State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994) (citing *State v. Vesey*, 241 N.W.2d 888, 890–91 (Iowa 1976)). There is ample corroborating evidence here.

On motive: Wendi Marshall testified that, on the evening before Wieneke was killed, Cahill waited in Wieneke's car to surprise and confront him, and she refused to get out. *See* TrialTr. 314:11–315:23. During the drive home, Cahill threatened to jump out of the car and effectively forced Wieneke to pull over and have a "very awkward" conversation with her, then and there. *See* TrialTr. 316:1–317:22.

Cahill succeeded in convincing Wieneke to drop Marshall off first—but she could not stop Wieneke from leaving her to visit Marshall, or from going home to the bed that he shared with Hotz. *See* TrialTr. 317:23–319:15. Cahill's jealously offered a strong motive that helped corroborate her admissions and prove identity. *See State v. Richards*, 809 N.W.2d 80, 94 (Iowa 2012); *O'Connell*, 275 N.W.2d at 201–02. Of course, nine-year-old Becker would not have known any of that.

Evidence of opportunity is "circumstantial evidence that may be considered" and may be given "great weight." *See State v. Bass*, 349 N.W.2d 498, 501 (Iowa 1984); *accord State v. Moses*, 320 N.W.2d 581, 586 (Iowa 1982) (finding sufficient circumstantial evidence to uphold murder conviction, in part because the killing "could have occurred between 7:00 a.m. and 8:00 a.m., the period for which defendant's conduct was unexplained"). Schneider testified that he drove past Wieneke's house at about 9:00 a.m. on October 13, 1992, and he saw two people "standing out by a car like visiting, you know, across a car." *See* TrialTr. 73:16–75:3. Minutes later, they were gone. *See* TrialTr. 75:4–15. Schneider did not see anything unusual on the side of the road, at that point. But on his next trip, around 1:30 p.m., he saw the baseball bat that was used to kill Wieneke—"it stood out."

See TrialTr. 76:4–77:8. This matters because the bat was deposited *after* those two people left. And it matters because Cahill and Hazen knew they needed to explain their presence at Wieneke's house, when they subsequently concocted their story. *See* TrialTr. 455:20–458:7. And nine-year-old Becker would not have known that Cahill was seen near Wieneke's house, before the murder weapon appeared in that general area and before Hotz discovered that Wieneke had been killed.

Payne saw Cahill burn some bloody clothing, in the days after Wieneke was killed. *See* TrialTr. 296:10–298:21. The blood spatters in Wieneke's bedroom suggested that whoever killed him would have been hit with some spattering blood, as well. *See* TrialTr. 36:14–39:2. If Cahill changed her clothes before getting back into Hazen's car, she would need to stash those clothes somewhere—which would align with Payne's testimony that Cahill arrived at the burn barrel with a sack of bloody clothes in the trunk of a car. *See* TrialTr. 296:25–297:8. And Schneider's testimony undercuts any claim that Wieneke had already been killed when Cahill and Hazen went to his house: on Schneider's trip back to the farm after leaving the truck in town, the people that Schneider saw there had driven off, but the murder weapon had not yet been discarded on the side of the road. *See* TrialTr. 73:16–77:8.

In her interview with Agent Turbett, Cahill pretended not to remember going to Wieneke's before leaving for Iowa City. *See* State's Ex. 28, at 43:49–47:15. Jurors could listen to that recording and decide that her exaggerated responses to Agent Turbett's correction were a contrivance, and that she would have remembered that she went to Wieneke's house to try to speak with him on the day that he was murdered there, especially given her other statements about her attachment to Wieneke and the significance of his death in her life. *See Odem*, 322 N.W.2d at 47 (noting that "an intentional untruth" told to "mislead the investigators" is substantive evidence of guilt).

In Cahill's earlier interviews, she described stopping to use a pay phone on the way back from Iowa City, to call Wieneke. But in her April 2018 interview with Agent Turbett, Cahill stated that she could not remember that at all, and she did not know why she would have tried to call him. *See* State's Ex. 28, at 59:38–1:01:38. And Hazen did not mention such a call during her testimony in Cahill's defense.[1] That story about the payphone had never made sense—it would have been out of their way to drive *past* Wieneke's house, just to call him.

[1] This was likely because Hazen had already admitted that her prior statements about this call were lies. *See* Minutes (7/23/18) at 18, 30; App. 102, 114; *but see* Minutes (6/7/18) at 25, 61; App. 31. 67.

See TrialTr. 210:19–212:3. But any mid-afternoon visit to his house would have raised questions about why they would have left without checking on Wieneke, when his dog was running loose and when his screen door was wide open. *See* TrialTr. 196:1–199:17. That was why Cahill invented this detail in her initial interviews: it implied that she did not already know Wieneke was dead, without placing her at the scene of the crime after it was committed (but before it was reported). But her subsequent failure to recall it and her inability to explain it raised a strong inference that Cahill had lied to investigators in 1992, which only the killer would need to do. *See Odem*, 322 N.W.2d at 47.

Corroborative evidence need not prove each element of a crime, and it need not eliminate all other potential explanations that compete with the theory supported by the inculpatory statements. It is enough that it "confirms some material fact connecting the defendant with the crime." *See Polly*, 657 N.W.2d at 467. This corroborative evidence proved Cahill's motive, her opportunity, and her actions establishing consciousness of guilt: destroying evidence and lying to investigators. And it fortifies the truth of Becker's testimony—Becker could not have known *any* of that when she told Krogh what she heard Cahill saying. This was sufficient to prove identity, and Cahill's challenge fails.

V. The trial court did not err in denying Cahill's motion to dismiss the prosecution for pre-accusation delay.

Preservation of Error

Cahill raised this issue in a motion to dismiss, and the district court ruled on it. *See* Motion to Dismiss (1/11/19); App. 115; Ruling (2/14/19); App. 215. That ruling preserved error.

Standard of Review

The ruling on Cahill's claim alleging that pre-accusation delay violated due process is reviewed de novo. *See State v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996).

Merits

Cahill committed this murder in 1992. Becker did not come forward until December 2017. Cahill was charged in June 2018. *See* Trial Information (6/7/18); App. 79; Minutes of Testimony (6/7/18) at 4; C-App. 10. Becker provided the lead that re-opened the case.

There is no statute of limitations on murder under Iowa law. Cahill could prove a violation of due process if she could carry "the heavy burden of proving both (1) the defendant's defense suffered *actual* prejudice due to a delay in prosecution and (2) the delay causing such prejudice was unreasonable." *See State v. Brown*, 656 N.W.2d 355, 363 (Iowa 2003). But she did not make either showing.

A. Cahill did not show actual prejudice from a delay in the prosecution.

"To establish actual prejudice, a defendant must show loss of evidence or testimony has meaningfully impaired his ability to present a defense." *Id.* (quoting *State v. Edwards*, 571 N.W.2d 497, 501 (Iowa Ct. App. 1997)). Cahill hired a private investigator, who interviewed a number of people who were referenced in the DCI's investigative file. Apparently, a number of potential witnesses had passed away, and others had stated that they could not remember what they told the DCI during their interviews, in the 1990's. *See* MotionTr. (1/28/19) 14:17–24:5; Affidavit (1/14/19); App. 124. Still, the district court found Cahill was not prejudiced, because she could "pursu[e] her defense of a flawed investigation without these witnesses by cross-examining the investigators at trial as to why they did or did not pursue certain leads included in the witnesses' statements." *See* Ruling (2/14/19) at 6–7; App. 220–21. And indeed, Cahill did just that. *See, e.g.*, TrialTr. 58:25–65:2; TrialTr. 124:24–137:12. Cahill cannot establish actual prejudice because her evidence stops there: she has nothing to suggest that people who made those statements to the DCI could have offered admissible evidence to show that someone else had killed Wieneke. Indeed, that is precisely why the investigation stalled.

Cahill argues about three specific sources of actual prejudice: (1) "[Scott] Payne would have testified that [Jeff] Murdoch admitted to murdering Mr. Wieneke had his memory not been diminished"; (2) "[Megan] Kauffman would have testified regarding the possible involvement of [Mark] Rodriguez and [Joey] Brockert had her memory not been diminished"; and (3) "[Jaime] Marin would have testified regarding Mr. Brockert's involvement had he not had a stroke." *See* Def's Br. at 47–49. None of those statements are true.

(1) Scott Payne's recollection of Jeff Murdoch's supposed confession was only hearsay—and, when asked in 1996, Payne could not identify any firsthand witnesses. *See* Attachment 1 (1/25/19) at 2; App. 180; *accord* Resistance (1/25/19) at 3; App. 166. The passage of time did not diminish his memory—he was never able to identify anyone who could have testified to anything but double hearsay.

(2) Megan Kauffman, similarly, had "no direct knowledge about Joey Brockert being involved in any way with the Corey Wieneke homicide." *See* Attachment 2 (1/25/19) at 4; App. 185. She said that she believed Brockert and Rodriguez were involved, but she also acknowledged that rumors about their involvement were attributable to the fact that particular members "liked being associated with a

group that had a 'bad ass' type of reputation." *See id.*; App. 185. In any event, Kauffman's hunch that Brockert and Rodriguez committed the killing was not based on personal knowledge, and her testimony about that hunch would have been inadmissible. *See State v. Cromer*, 765 N.W.2d 1, 10–11 (Iowa 2009).

(3) Jaime Marin told investigators that "a kid" at a party had told him that "there were some kids bragging and being cocky about doing a murder" and implicating Joey Brockert as one of the killers. *See* Attachment 4 (1/25/19); App. 190. Marin had already forgotten the name of that "kid" by the time he was interviewed in 1997. *See id.* at 4–5; App. 193–94. And Marin said the kid at the party "immediately backed off after he had been confronted about the validity or source of the information." *See id.* at 5; App. 194. Again, this is (at least) double hearsay, and it does not help prove any third party's guilt.

Cahill also argues that she demonstrated actual prejudice by showing that a laundry list of witnesses would have testified to facts that would show Kenneth Hammons committed the killing. *See* Def's Br. at 49–51. But none of their statements help Cahill. As the State said in its resistance, evidence that Hammons possessed a gun (or even a markedly different baseball bat) does not help establish that he killed

Wieneke using the baseball bat that was found by the side of the road. *See* Resistance (1/25/19) at 5–6; App. 168–69; MotionTr. (1/29/18) at 40:8–25. The only real fact that Cahill mentions is that Hammons "admitted to [Jeffrey] Lobdell that he had dropped Mr. Wieneke off at home on the morning of the murder." *See* Def's Br. at 50; *see* Motion Ex. J (2/4/19) at 4; App. 213. But Jody saw Wieneke in their bed, asleep, before she left in the morning—so Hammons could not have killed Wieneke while dropping him off. *See* TrialTr. 192:16–194:9.

Another issue is that Cahill's only proof that any of these people (other than Payne) were unable to recall any relevant underlying facts came from the testimony of her private investigator. Cahill did not offer testimony or other sworn statements from any of those people, which is problematic because her investigator would have incentives to overrepresent the problem. *See* MotionTr. (1/28/19) at 48:8–24. Cahill has never proven that these witnesses really cannot remember what they told DCI interviewers, nor can she point to anything in the DCI investigative file that would have been useful and admissible if the speaker had testified at Cahill's trial with perfect recall. This is a "heavy burden," and Cahill failed to carry it. *See Brown*, 656 N.W.2d at 363; *Edwards*, 571 N.W.2d at 501–02.

The ironic part is that, other than Cahill, the only witness who could prove that Becker was lying would be Kayla Hazen—she was Becker's childhood friend, who snuck downstairs with Becker. *See* TrialTr. 246:16–24; TrialTr. 273:19–276:8. Jacque Hazen is Kayla's mother, and would probably know where to find Kayla. But there is nothing in Cahill's filings about any attempts to interview Kayla, or any suggestion that Kayla was unable to testify. If Becker were lying and if Cahill had not apologized to Wieneke for killing him, then Cahill would know who to call to the stand: a family friend in her mid-30's. And Cahill was still able to use the DCI's investigative file to question the investigators at every stage, to advance her theory that follow-up on available leads would have led to the real killer. *See* TrialTr. 58:25–65:2; TrialTr. 124:24–137:12; TrialTr. 345:14–349:13. Thus, Cahill cannot establish actual prejudice. *See State v. Williams*, 264 N.W.2d 779, 783–84 (Iowa 1978) (rejecting similar claim where allegation of actual prejudice was that "two witnesses who might have helped [defendant] were unavailable because of the delay" and noting that "one of these testified" while "[t]he record before us does not show the other [witness] was actually unavailable" nor "any plausible reason to believe his testimony would have helped defendant").

B. The delay in the prosecution was reasonable. Becker was an improbable witness, and nobody involved in the investigation knew what she knew until she came forward.

The second component that Cahill must establish is that "[t]he actual prejudice must result from the State's 'intentional attempt to gain a tactical advantage by delaying the initiation of charges.'" *See State v. Lange*, 531 N.W.2d 108, 111 (Iowa 1995) (quoting *State v. Wagner*, 410 N.W.2d 207, 210 (Iowa 1987)). Iowa courts will not "presume impropriety or bad faith on the part of the State in its delay in bringing charges"—Cahill must affirmatively prove bad faith. *See State v. Hall*, 395 N.W.2d 640, 643 (Iowa 1986).

Cahill disagrees with that. She argues that *State v. Luck* is "instructive." *See* Def's Br. at 42–44. But the Ohio Supreme Court's decision in *Luck* is contrary to Iowa law, and it is an extreme outlier among American jurisdictions. *See State v. Luck*, 472 N.E.2d 1097, 1101–02, 1104–05 (Ohio 1984). As the district court noted, "[t]he negligence standard employed by the Ohio Supreme Court [in *Luck*] is not the law in Iowa." *See* Ruling (2/14/19) at 10; App. 224. Rather, reasons for delay must offend "fundamental conceptions of justice," which requires intentional delay or some other bad faith conduct. *See State v. Cuevas*, 282 N.W.2d 74, 77 (Iowa 1979) (quoting *United*

States v. Lovasco, 431 U.S. 783, 790–96 (1977)); *accord Edwards*, 571 N.W.2d at 502 n.4 (declining to reach issue of reason for delay because of defendant's failure to show actual prejudice, but noting "nothing in the record suggested the State delayed filing charges to intentionally gain a factual advantage over Edwards").

The best Iowa case to illustrate this is *State v. Hall*, which involved a murder where prosecutors did not move forward until they had sufficient evidence to establish that Hall committed the murder. *See Hall*, 395 N.W.2d at 642–43. The first witness to implicate Hall had vacillated between statements, and Hall was only prosecuted after investigators received new evidence, in the form of a statement from a jailhouse informant—they had "promptly reopened the case" upon receiving that new information. *See id.* The Iowa Supreme Court explained that "[t]he decision to delay prosecution of Hall until further evidence was found was clearly within the discretion of the prosecutor" acting in good faith, and that delay was "both reasonable and justified." *See id.* at 642–43. After all, the State cannot and should not prosecute without evidence, and "[t]here was no evidence in this case that the State delayed in order to gain a tactical advantage over Hall." *See id.* In the absence of bad faith, there was no due-process violation.

Here, the delay was even more reasonable because investigators were still trying to figure out who the real culprit was—unlike in *Hall*, where they had narrowed it down. Cahill knows why it took so long: Becker came forward in 2017 with evidence of Cahill's inculpatory statements, which gave investigators a reason to re-open the case and, ultimately, gave prosecutors a reason to charge Cahill. *See* Def's Br. at 16 (citing Exhibits GG and HH (2/4/19); App. 200–09). Even if Iowa had adopted *Luck*'s approach where investigative negligence would be sufficient to establish unreasonable delay, it is not negligent for investigators to decline to interview a nine-year-old without any apparent connection to the killing or the victim.

Indeed, this case illustrates why *Luck* should remain an outlier. Cahill worked hard to conceal any evidence of her involvement, and she only let down her guard when she thought she was alone. If the legislature had enacted a statute of limitations for murder, then any investigations would cease after that period elapsed, and police would need to deliver results by the end of the limitations period (and even acting reasonably would not save an untimely charge from dismissal). *See, e.g.*, *State v. Tipton*, 897 N.W.2d 653, 671–72 (Iowa 2017). But the legislature deliberately set no statute of limitations for murder.

See Iowa Code § 802.1. That expression of community values must be given effect. Even if Iowa police are unable to crack a murder case, Iowans *want* them to be able to reopen the case and try again when new leads emerge, or when an officer makes a critical deduction from already-known evidence. After all, there is no statute of limitations on the pain and loss that Wieneke's family still suffers, to this day. *See* Sent.Tr. 11:14–12:20. But *Luck* would effectively create a statute of limitations for murder, retroactively calibrated to judicial expectations about what a non-negligent investigation would have looked like and how long it would have taken to crack the case. This would be unjust. It also bears no relationship to the constitutional right to due process that Cahill is asserting. Of course, if the State unreasonably delays the prosecution as a dirty trick to gain a tactical edge, Cahill can allege a due-process violation. But she cannot assert a constitutional right to be investigated by detectives who would have deduced her identity by seeing through her careful attempts to conceal her crime (which had included burning the bloody clothes and instructing Hazen to lie to police about what happened), without Becker's fortuitous assistance. *See* TrialTr. 296:10–298:21; TrialTr. 393:23–398:1; Minutes (7/23/18) at 28–30; App. 112–14.

Luck is an outlier—a weighty majority of jurisdictions use an approach "requiring a showing of intentional or bad faith conduct to establish a due process violation." *See Commonwealth v. Scher*, 803 A.2d 1204, 1233–34 & n.3 (Pa. 2002) (Castille, J., concurring). Iowa precedent takes the same approach, because the Due Process Clause does not guarantee that police investigators will successfully identify culprits within any given amount of time. Rather, it "assure[s] that the State will not employ tricks" to gain an unfair advantage over a defendant. *See Lange*, 531 N.W.2d at 111; *accord State v. Seager*, 571 N.W.2d 204, 210 (Iowa 1997) (quoting *Trompeter*, 555 N.W.2d at 470).

Also, even if *Luck* were compatible with Iowa law, it would be factually distinguishable. In *Luck*, "[w]hen the state finally decided to commence its prosecution of the defendant herein, it did so without one shred of new evidence—its case being substantially the same as it had been since 1968." *See Luck*, 472 N.E.2d at 1105. That was the critical fact that caused *Luck* to hold that "the pre-indictment delay in the instant case is unjustifiable." *See id.* Here, Becker came forward with new information in December 2017, when she seized a chance to tell a DCI investigator who said that he worked on "cold cases." *See* TrialTr. 277:22–279:2; Minutes (6/7/18) at 4; App. 10.

Cahill argues that Becker and Krogh's deposition testimony showed that Becker had disclosed this information to a police officer in West Liberty in 2001. *See* Def's Br. at 57–58. But Becker testified that she did not report the *contents* of Cahill's inculpatory statement:

> **DEFENSE**: And you didn't tell anyone between telling your mother in 1992 and telling Agent Vileta in 2017?
>
> **BECKER**: I — I thought that I had said something to a West Liberty Officer at some point about the case, but not the exact details.
>
> **DEFENSE**: When would that have been?
>
> **BECKER**: I don't recall exactly.
>
> **DEFENSE**: When you were an adult or when you were a child?
>
> **BECKER**: I would have been an adult.
>
> **DEFENSE**: And how did you encounter that officer?
>
> **BECKER**: I believe I was down there over an issue with a pet of mine and just in conversation, but — I don't recall what the officer said to me, and it was shared detailed as to what I'd overheard.
>
> **DEFENSE**: So — I'm sorry. So you just asked him about the case, in general?
>
> **BECKER**: Um-hum. Yes.
>
> **DEFENSE**: And did you tell him that you knew anything about the case?
>
> **BECKER**: I – I said something about Annette, and I believed that the officer dismissed me, and I couldn't even tell you which officer it was.
>
> **DEFENSE**: Do you think this was within the last five years?
>
> **BECKER**: No. It would have been shortly out of high school.

DEFENSE: What year did you graduate from high school?

BECKER: 2001.

DEFENSE: So sometime in the early to mid 2000's?

BECKER: Yes.

DEFENSE: Did you tell that officer that you'd seen Annette Cahill say she killed Corey?

BECKER: No.

See Attachment 7, Becker Depo. (1/25/19), 35:1–36:7. Cahill argues that Krogh's deposition testimony establishes that Becker *did* tell that officer what Cahill had said. *See* Def's Br. at 58 (quoting Attachment 8, Krogh Depo. (1/25/19), 31:8–14). But Krogh was not certain about what Becker told that officer, and for good reason: she was not there. *See* Attachment 8, Krogh Depo. (1/25/19), 28:11–31:14; *accord* TrialTr. 254:1–258:6. Becker had firsthand knowledge of what she had said, and she denied that she revealed that critical kernel of information. *See* Attachment 7, Becker Depo. (1/25/19), 35:1–36:7; *accord* TrialTr. 283:24–284:8. And Becker had this conversation with an officer who was helping resolve an issue about pets—it was unclear if this officer even knew about Wieneke's death, nine years earlier. And there is no evidence that the officer grasped what Becker was trying to say, or that he made any record that would have enabled another officer to infer that Becker could provide a new lead on this already-cold case.

The most analogous case that the State could find is *Ackerman v. State*, involving a 1977 murder that was not charged until 2013. *See Ackerman v. State*, 51 N.E.3d 171, 189 (Ind. 2016). *Ackerman* rejected the defendant's attempt to establish actual prejudice because none of the now-deceased witnesses that the defense had identified as people whose testimony had been lost "were present when [the victim] died," and the sole eyewitness was "available to testify at Ackerman's trial." *See id.* at 190–91. Moreover, the delay was reasonable because that pivotal eyewitness (who was a young child in 1977) did not report her observations to investigators until 2013. On that issue, *Ackerman* rejected an argument that is very similar to Cahill's present claim:

> . . . Ackerman attempts to emphasize that I.W. contacted police several years prior to Detective Ellison beginning his investigation. At trial, I.W. testified that she had made such a call, but had no recollection of who she spoke to. I.W. could not even recall if she had identified herself during the conversation. There was no paper record of her call. She did not file a police report. She did not call 9–1–1, under which circumstances there would be some record of her contacting police. I.W. only remembered calling someone at the police station and asking about her brother's death, at which point she was informed that she could look into the death by examining whatever was on microfilm. However, I.W. did not testify to what she specifically said in that first call or what she asked for. . . .
>
> It was not until February 5, 2013, that I.W. called the Indianapolis Police Department and specifically asked for the Cold Case Unit. . . .

> The mismanagement of a single tip made to an unidentified individual at the police station is insufficient to show that the State had no basis for delaying prosecution. . . .
>
> Thus, because an eyewitness to the incident unexpectedly came forward, decades after the offense, requesting that an investigation be conducted into an unsolved murder, we decline to find that the State's delay in prosecution lacked justification.

Id. at 191–92 (citing *Johnson v. State*, 810 N.E.2d 772, 774–76 (Ind. Ct. App. 2004). Just like in *Ackerman*, investigators were unaware of Becker's key observations until her *actual* report in 2017, so this delay was reasonable—even if someone had mismanaged her "tip" in 2001.

"The negligence standard employed by the Ohio Supreme Court [in *Luck*] is not the law in Iowa." *See* Ruling (2/14/19) at 10–11; App. 224–25. And even if it were, nobody who was part of the investigation in this case knew about Becker's observations, and none of them would have any reason to suspect that Becker—who was nine years old when Wieneke was killed—would have any potentially relevant information. And there was no showing that Becker revealed the critical facts to the West Liberty police officer in 2001, or that failing to investigate Cahill between 2001 and 2017 was negligent (much less a bad-faith tactic, as Iowa law requires for this claim). Therefore, even if Cahill had shown prejudice from pre-arrest and pre-accusation delay, her claim would still fail because the delay was not unreasonable.

CONCLUSION

The State respectfully requests that this Court reject Cahill's challenges and affirm her conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **13,174** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 6, 2020

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov