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

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

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ROUTING STATEMENT

The Iowa supreme court should retain this appeal under the criteria set forth in Iowa R. App. P. 6.1101(2)(c), (d) and (f). This is a case presenting a substantial issue of first impression as well as of broad public purpose. Among other important issues is a question of how a venue change motion should be approached where it is the State that is the movant party. The first trial in this criminal case was tried in the county of venue—where the purported crime occurred. And the jury in that proper venue hung 10-2 in favor of a complete acquittal. Before the second trial, the State prevailed on a venue transfer motion that moved that trial nearly all the way across the judicial district to a venue where the county population was much higher than the original rural county venue and the State's expert witnesses lived but within miles of where the second trial was held. The other issues raised likewise warrant retained review by the Iowa supreme court.

STATEMENT OF THE CASE

Nature of the Case. On February 26, 2020, the appellant Alison Dorsey was charged in a two-count trial information with first degree murder in violation of Iowa Code §§ 707.1 and 707.2(1)(e) and child endangerment resulting in death in violation of Iowa Code §§726.6(1)(a) and 726.6(4). (Trial Information of 02-26-2020; App. 70-72.) The State generally alleged that Dorsey's actions on October 7, 2019 resulted in L.H.'s (an infant of eleven weeks old) death at Dorsey's daycare

facility (as the result of being violently shaken and/or his head impacting with a solid surface). (Id.) Dorsey's daycare was located in Massena, Cass County, Iowa. (Id.)

Course of the Proceedings. Dorsey submitted her written arraignment and plea of not guilty on March 4, 2020. (Written arraignment of 03-04-2020; App. 73-74.) Following extensive pretrial motions practice, a seven day jury trial commenced beginning on October 26, 2021 and concluding on November 3, 2021. (Court reporter certificate of 11-03-2021; App. 7.) The jury was hung on the conviction, standing at a 10-2 vote in favor acquittal5-76. (Order of 11-04-2021; App. 77-78.) The district court declared a mistrial and referred the matter to court administration for further scheduling. (Id.)

Extensive pretrial motion practice again occurred before the second trial. (Docket sheet; App. 30 et seq.) Pertinent to this appeal is that the State on November 16, 2021 filed an orally resisted motion to change venue from Cass County to a different county. (Motion for Venue Change of 11-16-2021 with attachment; App. 79-191.) The State requested the trial be transferred to Pottawattamie County, and a hearing on the motion was held on April 19, 2022. (Order of 04-19-2022; App. 192-93.) On April 27, 2022, the court granted the motion and transferred venue of the case to that county. (Order of 04-27-2022; App. 194-200.)

The second trial occurred over a seven day period commencing on May 1, 2023. (Court Reporter Certificate of 05-09-2023; App. 201-03.) On May 9, 2023,

the jury returned a verdict of guilty on the lesser included offense charge of murder in the second degree and the offense charge of child endangerment resulting in death. (Verdict of the Jury of 05-09-2023; App. 203.) Dorsey filed a resisted motion to dismiss and for new trial on June 21, 2023. (Motion to Dismiss and for New Trial of 06-21-2023; App. 204-16; Resistance to Motion of 06-21-2023; App. 217-22.)

Disposition of the Case. The new trial hearing and sentencing was held on June 28, 2023; the court granted that part of the motion that contended Dorsey could not be separately sentenced on the child endangerment offense conviction as it had merged with the second degree murder conviction under the "one homicide rule"; all other aspects of the post-verdict motion were overruled. (Sentencing Order of 06-28-2023; App. 223-25; Sentencing Trans. of 06-28-2023 at 15:01-17:04.) Dorsey was sentenced to the 50-years' incarceration period with the mandatory 35-years' prison sentence minimum, the $150,000 restitution penalty, other fines and requirements. (Sentencing Order of 06-28-2023; App. 223-25.) Dorsey timely perfected her appeal on July 5, 2023. (Notice of Appeal of 07-05-2023; App. 226.)

STATEMENT OF THE FACTS

The appellant Alison Dorsey has run an in-home day care business since 2002 and after she graduated from high school. (Trans. at 819:05-819:11.)[1] While she

[1] The notation "Trans." in this brief refers to the transcript of the second jury trial that began on May 1, 2023 and comprises transcript pages 1 – 1077. Any other

was in school, she also frequently babysat infants and young children. (Trans. at 819:12-820:01.) Over the years, she has had in daycare a total of some 120 infants and children. (Trans. at 823:01-823:06.) At the time in question, she operated her day care center at 408 Pine Street in Massena, a residential property owned and occupied by her father. (Trans. at 311:02-311:09, 821:01-821:09.) Until the incident involving LH, Dorsey never had any meaningful incident concerning her daycare, let alone any complaints. (Trans. at 848:23-849:15.)

Nicholas and Kaitlin Hodges have four children—a school age daughter, a middle boy and two twins who were eleven weeks old at the time of the incident in question—and one of those twins was LH. (Trans. at 319:14-320:25.) The Hodges family had used Dorsey's daycare for their oldest two children, and on October 7, 2019 they dropped their middle son off for his day care there, as well as their infant twins; this was the first day of daycare for the twins. (Trans. at 321:13-323:06, 34:24-343:04.) Their father Nicholas dropped them off on or shortly before 8:00 a.m. that day. (Trans. at 326:10-327:24, 691:05-691:20.) The Hodges, like all of the other families whom Dorsey provided daycare services for, thought very highly of Dorsey—indeed, the Hodges had asked, or intended to ask, Dorsey to be the godmother of the twins. (Trans. at 344:03-344:18.)

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transcript referred to in this brief will set out the specific name of the transcript (such as Sentencing Transcript) and the date of that transcribed proceeding.

Around 9:00 a.m., Dorsey snapchatted a picture to the parents of the twins having their first day at daycare. (Trans. at 328:23-330:23.) Dorsey was on speakerphone with Diana Harrison from 9:10 to 9:33 and 10:11 to 10:33 a.m. (and it was Harrison who made the calls; during each instance, Dorsey provided daycare services to ten children that were at her daycare that morning). (Trans. at 377:11-377:23, 697:05-699:07, 836:09-838:16.) Dorsey also received a call from Robert Ticknor that morning, and that call lasted from 10:33 to 10:36 a.m. (Trans. at 377:11-377:23, 699:18-701:23, 838:24-839:25.) The telephone conversations were pleasant; neither Harrison nor Ticknor heard anything (through the speakerphone) that was out of the ordinary let alone the least bit alarming, and Dorsey was her normal self. (Trans. at 697:05-699:07, 699:18-701:23.)

Dorsey had never cared for LH or the other twin before they were dropped off by their father on that October 7th day—but Dorsey was informed that LH was a "slow" eater and had been prematurely born and in breech (as is sometimes the case with twins). (Trans. at 322:13-323:24, 370:02-370:14, 832:04-834:20.) Shortly after the three youngest Hodges' children were dropped of that morning, Cynthia Gossman, who has her own child in Dorsey's daycare and is employed as an LPN at a local hospital, arrived. (Trans. at 689:17-690:16, 691:02-691:07.) Gossman held LH and tried to bottle feed him but all LH did was "abnormally" stare at the wall. (Trans. at 691:15-693:07.)

Dorsey called Kaitlin Hodges at 10:53 a.m. and informed Kaitlin that LH was not eating well and seemed to be breathing oddly. (Trans. at 358:18-359:20, 841:12-842:01.) Nicholas Hodges' place of employment was only a few blocks from Dorsey's daycare, so Dorsey also called Nicholas and inquired if LH had a breathing issue as LH seemed to be breathing in a different manner. (Trans. at 331:02-332:03, 842:02-842:19.) Nicholas was on break at this time, so he arrived at Dorsey's daycare within some four minutes of the call. (Trans. at 344:12-335:02, 842:17-843:19.) Dorsey was holding LH, and when Nicholas arrived LH went limp in Dorsey's arms. (Id.) Nicholas took LH and applied CPR, and Dorsey called 911. (Trans. at 336:11-339:01, 842:25-843:10.) Officer William Ayers arrived within but minutes thereafter, and he and an EMT (Michelle Williams) took over the CPR. (Trans. at 305:22-306:03, 316:14-317:01, 702:24-703:04, 704:08-705:05.) LH was not breathing and did not have a heartbeat at this time; another EMT inserted an IO into LH's leg but missed the correct location in LH's shinbone (accordingly, the adrenaline needed to revive LH's heartbeat did not administer properly—it was some 90 minutes after that the local hospital to where LH was originally transported inserted the device correctly and quickly reestablished LH's heartbeat). (Trans. at 708:02-708:08, 739:04-740:05.) After initial testing and treatment, LH was then air transported to the Children's Hospital and Medical Center in Omaha. (Trans. at

340:02-341:02.) After approximately 24 hours on life support, LH was removed from life support and pronounced dead. (Trans. at 341:03-342:19.)

Three physicians from the Children's Hospital testified—Dr. Sandra Albery (pediatric radiologist), Dr. Kelly Kadlec (pediatric ICU physician) and Dr. Suzanne Haney (child abuse pediatrician). (Trans. at 435:10-436:05, 478:17-479:06, 532:17-533:04.) Each noted that LH had subdural and subarachnoid hemorrhaging, and that the bleeding was profuse (that is, all around the brain). (Trans. at 440:23-441:22, 448:15-448:19, 493:05-496:16, 555:04-563:09.) That resulted in brain swelling. (Id.) LH also had detached retinas and retinal hemorrhaging. (Id.) These physicians believed the diffuse pattern of the blood in LH's skull, combined with the other findings, indicated in their opinions that LH died from an acute injury (head trauma), that was either caused by rapid acceleration-deceleration (commonly referred to as shaken baby), or impact of LH's head with some flat surface object, or both. (Trans. at 464:16-465:17, 505:22-508:01, 559:02-559:08.) These physicians on their indicated findings believed LH's distress symptoms would have started within minutes to hours (and not days) of the event that caused or resulted in the head injury. (Trans. at 523:21-524:06, 526:17-526:22, 565:25-567:13.)

Dr. Kelly Kruse is an associate state medical examiner with the Iowa Medical Examiner's office; she performed the autopsy on LH. (Trans. at 598:16-598:22, 604:14-604:20.) Dr. Kruse noted that LH had subdural and subarachnoid

hemorrhages, and that the subdural hemorrhages resulted in bleeding completely around the brain. (Trans. at 613:18-618:03.) That bleeding caused LH's brain to swell and was the cause of his death. (Trans. at 621:24-622:01.) Dr. Kruse also noted the retinal detachment and bleeding. (Trans. at 622:16-624:01.) Unlike the physicians with Children's Hospital, Dr. Kruse opined that it was blunt force injury to LH's head that resulted in the head trauma—LH's head had to have impacted with a flat service (Dr. Kruse speculated this impact could have occurred while LH was being shaken). (Trans. at 627:18-628:14.) Dr. Kruse conceded she did not locate any such physical impact point on LH's head, and that no skull fracture or other acute head impact injury location was discovered. (Trans. at 628:15-628:17, 631:05-631:10.) As for the manner of death, Dr. Kruse in her autopsy report concluded it was "undetermined." (Trans. at 631:15-632:12, 652:15-653:08.) As for the timing of the death, Dr. Kruse could not pinpoint an exact time but she did state that her office did not recognize blood staining methodology to date the time of a fatal injury as reliable. (Trans. at 629:12-631:04.)

The defense called expert witnesses as well. (Trans. at 726:05-726:06, 927:15-927:17.) Dr. Douglas Smith graduated from the UI Medical School in 1976 and also has a PhD is pathobiology (the study of human diseases). (Trans. at 727:03-728:21.) His medical specialty is pathology, in both anatomical and clinical fields. (Id.) He has been the pathologist or consultant on nearly 100 cases of head trauma,

including over 30 involving suspected child abuse. (Trans. at 732:14-732:18.) Dr. Smith reviewed the autopsy report, the specimens and samples obtained from the autopsy, and other relevant medical findings concerning LH's death. (Trans. at 748:14-753:16.) Important to his review were autopsy slides identified as exhibits 506-09. (Exhs. 506-09; App. 229-30; Trans. at 748:14-753:16.) These slides were of red blood cells and macrophages—more on that in a moment. (Id.) What the specimens revealed is that LH was midway through the healing process from his injury that caused the bleeding within his skull and around his brain—what is medically known as the granulation stage of healing (the stage of forming tissue in the skull where the injury occurred). (Trans. at 748:14-754:03, 756:01-759:20.) This healing process is essential to dating when the injury occurred. (Id.)

There are three key markers here: First, the breakdown of the red blood cells from LH's autopsy samples clearly revealed iron pigment in those cells (that is the result of the cell breakdown from injury); that process is known as hemosiderin. (Trans. at 750:14-751:03.) Second, macrophages had appeared that contained the hemosiderin—and macrophages are membranes that form in the skull following the injury. (Trans. at 751:04-753:03.) Third, the membranes that had formed were relatively thick—and that signals an advanced stage of the healing process. (Trans. at 753:04-753:23.) All of this takes time to occur—it takes much longer than minutes or hours from the occurrence of the head injury that resulted in the cranial

bleeding and ultimately the death of LH. (Trans. at 756:01-756:17.) Dr. Smith opined that studies showed hemosiderin-laden microphages do not appear for at least three days and several hours following the injury event, and that membrane formulation does not occur sooner than five days from the injury occurrence. (Id.) Accordingly, Dr. Smith opined that LH's fatal injury did not occur until at least three to five days before his death, and accordingly well before LH spent his first day at Dorsey's daycare facility. (Trans. at 759:21-760:09.)

Dr. Smith further stated that what actually happened in LH's case was the occurrence of two separate injuries. (Trans. at 775:09-775:25.) First, a head injury that occurred at least two days before the October 7th daycare date, and then an additional injury on that very day caused by LH's being in cardiac arrest for some 90 minutes—that resulted in oxygen deprivation to his brain (the result of the misplaced IO needle into his leg). (Trans. at 775:09-779:17.) The amount of the bleeding found in LH's brain was easily explained by the fact that LH suffered from a condition known as DIC, a blood clotting disorder that can result in spontaneous bleeding including subdural hematomas and retinal hemorrhaging (even a State's witness, Dr. Kadlec, conceded that DIC "was an issue" for LH). (Trans. at 519:05-519:20, 760:10-763:05.)

Dr. Robert Bowen is a pathologist who has performed thousands of autopsies in Nebraska and Iowa; he mainly is a witness for the prosecution as a result of this

work. (Trans. at 927:22-928:01, 930:01-930:25.) He is an adjunct professor at Creighton and the University of Nebraska Medical Center, and has staffing privileges in two Iowa hospitals; he is board certified in pathology. (Trans. at 928:22-930:03.)

Dr. Bowen reviewed LH's autopsy report, Children's Hospital's medical records, and the neurologic pathology slides from the autopsy. (Trans. at 931:04-931:20.) Exhibits 514 to 516 reveal the results of what is called the Prussian blue stain test of some of the autopsy specimens taken from LH's dura. (Exhs. 514-516; App. 233-35; Trans. at 931:24-936:21.) The specimens turned blue during the staining process; that indicated the presence of iron in the red blood cells and shows LH's healing process was in the oxidation stage—where macrophages had begun to form (what is known as the "healing reaction"). (Trans. at 936:04-937:17.) The presence of hemosiderin—the iron in the red blood cells—takes two to three days to appear after the occurrence of the injury event. (Id.) In addition, capillary cell formation was detected in these same samples contained in the autopsy slides, which takes three to five days to become present after the injury event. (Trans. at 937:18-938:17.) Dr. Bowen opined to a reasonable degree of medical certainty that LH's cranial bleeding that ultimately resulted in the infant's death commenced several days before October 7th, and accordingly the causative head injury occurred some days before he was dropped off for his first and only time at Dorsey's daycare.

(Trans. at 941:16-942:11.) In addition, Dr. Bowen opined that LH had the DIC condition which explains the amount of bleeding present during the hospital examination and autopsy, as well as the retinal hemorrhaging. (Trans. at 940:09-941:08.)

In rebuttal to this defense expert testimony, the State call Dr. Marco Hefti, an assistant professor of pathology at the University of Iowa. (Trans. at 976:15-976:22.) Dr. Hefti was present in the courtroom when Dr. Bowen testified. (Trans. at 979:04-979:05.) Dr. Hefti did dispute whether the iron staining and capillary formulation results present in LH's autopsy samples necessarily arose from a traumatic injury as Dr. Bowen (as well as Dr. Smith) testified to (Trans. at 979:06-980:24); however, Dr. Hefti did state that capillary formation and iron staining can be used to determine a range of time for dating the occurrence of a traumatic head injury (Trans. at 990:14-991:25)—and so can the detecting and measuring of new membrane formation in the dura as Dr. Smith noted (Id.). In the latter case (new membrane formation), Dr. Hefti stated that the injury if caused by trauma would then be at least be several days old. (Id.) In concluding his testimony, Dr. Hefti agreed that he could not exclude the possibility that LH's injury occurred within 36 hours before his passing but 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.) But 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.)

Dorsey denied injuring LH. (Trans. at 848:23-849:16.) A number of witnesses who have placed their own children in Dorsey's daycare testified that Dorsey is peaceful, calm, loving, kind, careful and truthful. (Trans. at 712:18-715:07, 715:18-716:21, 718:12-718:16, 720:04-720:25, 875:10-876:01, 907:01-908:11, 909:08-910:18, 911:08-912:16.) Several of the other children who attended the daycare on the October 7th incident date had bone scans of their bodies conducted (at the investigatory request of the DHS) and none were found to have any present or past injuries. (Trans. at 873:20-874:25, 900:20-901:14, 903:06-904:04, 904:15-906:10.) The only injury to a child in Dorsey's daycare was purportedly to the Hodges' middle son KH—an old rib fracture; but the diagnosed cause of that injury was not consistent with the single accident that happened to him at the daycare (falling after climbing onto a toy barn); what was of historical note is that KH had breathing issues and used a nebulizer—a device that is placed over his mouth and distributes medicine to help him breathe (and Dorsey's call to LH's parents on that October 7th date involved LH's breathing pattern as not being normal). (Trans. at 820:13-831:11, 972:15-974:25.)

Additional facts are set forth in the argument section of this brief.

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.

Error Preservation and the Standard of Review.

Dorsey preserved error; she objected to the State's motion for venue change on the grounds that the motion was insufficiently supported; she obtained a ruling on the motion. (Ruling on Venue Change Motion of 04-27-2022; App. 194-200; Change of Venue Trans. of 04-19-2022 at 02:01-22:08.) Obtaining the ruling preserved error. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (error is preserved where the issues raised on appeal were first raised before the district court and ruled upon by that court); *see also Metz v. Amoco Oil Co*., 581 N.W.2d 597, 600 (Iowa 1998) ("issues must be presented and passed upon by the district court" in order for appellate error to be preserved); *Peters v. Burlington N. R.R*., 492 N.W.2d 399, 401 (Iowa 1992) (same).

The standard of review for a change of venue in a criminal case where a motion for change of venue is challenged is abuse of discretion with the appellate court reviewing the record de novo. *State v. Evans,* 671 N.W.2d 720, 726 (Iowa 2003); *see also State v. Harris,* 436 N.W.2d 364, 367 (Iowa 1980); *State v. Wagner,* 410 N.W.2d 207, 210 (Iowa 1987). That said, there appears to be few if any cases

discussing the review standard where the State successfully obtains venue transfer; the cases nearly universally involve defense motions for transfer (and those motions when resisted by the State are typically denied).

The Merits.

The first trial was held in Cass County (Atlantic); the jury hung 10-2 in favor of acquittal. Prior to the start of the second trial, the State submitted an unverified motion for venue change that the district court ultimately granted—moving the trial to Pottawattamie County (Council Bluffs). The district court in its written ruling granted the motion on the grounds of pretrial publicity and under the review lens that "it is better to err on the side of caution". (Ruling on Venue Motion of 04-27-2022, at page 6; App. 199.) Venue should not have been transferred under this flawed reasoning, let alone to Council Bluffs, and accordingly Dorsey should be granted a new trial.

The State attached to its venue change motion pages of 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.) The State never made a sufficient showing for a change of venue and that motion should not have been granted, let alone at the early stage it was granted at (before any surveys were taken, let alone submitted, to establish pretrial publicity was of such an extent to even likely, let alone possibly, prejudice the jury pool, panel and ultimate venire). The district court applied an incorrect test in approving the venue transfer—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.

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; for example, in *State v. Findling,* 456 N.W.2d 3, 5 (Iowa Ct. App. 1990), the court summarized the applicable case law under the criminal venue transfer rule as follows:

> Iowa Rule of Criminal Procedure 10(10)(b) [now 2.11(10)] provides that a court shall grant a change of venue where the evidence demonstrates that "such degree of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county...." In seeking a reversal of a conviction based on the denial of a change of venue, the defendant must show "'either actual prejudice on the part of the jury or ... that the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed.'" *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989) (citing *State v. Spargo*, 364 N.W.2d 203, 207 (Iowa 1985)). Upon our de novo review of the record, we will not overturn a trial court's decision rejecting a motion for change of venue unless we find an abuse of discretion. *Harris*, 436 N.W.2d at 367; *State v. Wilson*, 406 N.W.2d 442, 445 (Iowa 1987).

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. *Wagner*, 410 N.W.2d at 222. 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." *Harris*, 436 N.W.2d at 367.

The State's venue transfer submission was entirely inadequate to meet the demanding standard of the venue statute's command that venue "shall be" in the county where the criminal offense occurred. The State's submission basically consisted of social media pages that at best showed the first trial—and the basic transactional factual allegations revealed during it—may have been of some general knowledge in Cass County but there was a dearth of evidence showing such a degree of prejudice against the State's position (as the movant party) that there was a substantial likelihood a fair and impartial trial could not be held there; in fact, quite the contrary. The brunt of the social media postings by the State described at most people praying for solemnity and clarity by the next jury panel; there is nothing

wrong with this (in fact, it is conduct that should be encouraged). There were little to no attachments to the motion stating that the second jury should find in favor of Dorsey; indeed, more than a few of the submissions were laments over L.H.'s death and the purported circumstances of it. And the demanding venue standard is not met by a district court's choosing to error on the side of caution; under the actual standard, erring on the side of caution requires venue to remain in the county of offense commission as set forth in the statute and the exception to it set forth in the criminal procedural rule. The change of venue constituted both factual and legal error that prejudiced Dorsey and deprived her of a fair trial by a jury of her peers; this defendant should be granted a new trial.

2. The Verdict Was Not Supported By Substantial Evidence.

Error Preservation and the Standard of Review.

Dorsey preserved error as she moved for a judgment of acquittal on both offense charges—murder and child endangerment—for insufficient evidence and renewed that motion at the close of all the evidence. (Trans. at 660:20-663:24, 975:14-975:25.) *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011); *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). In any case, error was preserved on the substantial evidence issue irrespective of whether Dorsey even moved for judgment of acquittal at trial. In *State v. Crawford*, 972 N.W.2d 189, 198 (Iowa 2022) the Iowa supreme court held a defendant "can challenge the sufficiency of the evidence" to

support a criminal conviction "without first filing a motion for judgment of acquittal". *See also id.* at 200 ("We conclude a defendant whose conviction is not supported by sufficient evidence is entitled to relief when he raises the challenge on direct appeal without regard to whether the defendant filed a motion for judgment of acquittal.")

The standard of review is for the correction of errors at law—this is because the appellate court "uphold[s] the denial of a motion for a judgment of acquittal if there is any substantial evidence in the record supporting the charges." *State v. Schooley*, 804 N.W.2d 105, 106 (Iowa Ct. App. 2011) (citing *State v. Boleyn*, 547 N.W.2d 202, 204 (Iowa 1996)); *see also State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2021) (substantial evidence review is for correction of errors at law). Substantial evidence is a quality of evidence sufficient to convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id*. The appellate court is to view the evidence in the light most favorable to the State, including all "legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence." *Id*. (quoting *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005)). "Evidence is not insubstantial merely because [the court] may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding." *Raper v. State*, 688 N.W.2d 29, 36 (Iowa 2004).

The Merits.

Dorsey was found guilty of second degree murder and child endangerment resulting in death. The crime of murder in the second degree contains two elements—a person kills another person, and does so with malice aforethought. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Second-degree murder is a general intent crime. *Id*. The crime of second-degree murder requires proof of malice aforethought. *Id*.; *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986). That is a state of mind that leads one to intentionally do a wrongful act to injure another out of hatred or with an evil or unlawful purpose as distinguished from the act being done in the heat of passion. *Id.* The offense elements of child endangerment resulting in death are the defendant had custody or control of a child under 14 years of age and that defendant acted with knowledge that she was creating a substantial risk to the child's physical health or safety resulting in death of the child. Iowa Code §726.6A. That is, "[b]oth offenses require[] proof [beyond a reasonable doubt that the defendant] committed that act resulting in injury to the child, and the child died as a result"; in sum, "the evidence [must] prove beyond a reasonable doubt [defendant] inflicted the injury causing the child's death." *State v. Porter,* No. 12-0170, 2013 WL 2146543 (Iowa Ct. App. 2013).

The evidence was not substantial enough to prove beyond a reasonable doubt that Dorsey inflicted the injury that caused LH's death. Dorsey historically provided

daycare services for some 120 children, and 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 is under an awfully condensed timeline here—a daycare provider with a decade of experience and no complaints of how she cared for the infants and children under her supervision suddenly and completely out of character—and within at most a thirteen minute time period—fatally injured a toddler (and for all reasons that he was a fussy eater; as if that never happened with any of the previous 120 children Dorsey cared for at her daycare).

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 a 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. 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 that 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).

All of this, considered under the record as a whole, shows that there was insubstantial evidence to support the conclusion, let alone to the applicable standard of proof beyond a reasonable doubt, that L.H. suffered his ultimately fatal head injury at the hands of Dorsey on October 7th.

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

Error Preservation and the Standard of Review.

Dorsey submitted a motion for new trial on, among other grounds, that the weight of the evidence showed that she should be granted a new trial. (Motion for New Trial of 06-21-2023; App. 204-16). Dorsey received a ruling from the trial court on the motion, and hence preserved error. (Sentencing Order of 06-28-2023; App. 223-24; Sentencing Trans. of 06-28-2023 at 15:01-17:04.) *Meier*, 641 N.W.2d at 537.

The standard to review the district court's denial of a new trial motion is for abuse of discretion. *State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996); *State v. LaDouceur*, 366 N.W.2d 174, 178 (Iowa 1985). The district court must view the evidentiary sufficiency of the guilty verdicts under the "weight [not sufficiency] of the evidence," including whether the verdicts are contrary to such evidentiary weight and whether a miscarriage of justice has occurred. *State v. Ellis,* 578 N.W.2d 655, 658-59 (Iowa 1998). The weight of the evidence refers to a determination that "a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* at 658.

The Merits.

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 amount 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 brief division).

Second, the State's theory of the case, and as presented by its expert witnesses (principally its pathologist Dr. Kruse), was that L.H. sustained a "soft" head trauma injury by being violently shaken and/or having his head strike a flat object; yet these same experts admitted that no such impact injury was discernible by the medical and autopsy examinations. That is, admitted speculation—in the sense of not being backed-up by physical observation of an actual head impact—underpinned the opinion of all of the State's experts.

And to address this, the prosecution had to attack the opinion of its own expert pathologist—the very one that performed the autopsy on L.H.—that the manner/cause of death was "homicide" as opposed to "undetermined" (the latter manner of death was the actual conclusion of the pathologist). (All of this is set forth in the trial transcript at pages 632:05-640:09.) To get around the problem that even the pathologist was unable to identify any actual traumatic head injury suffered by L.H. at the time he was in Dorsey's daycare (other than speculation that such injury must have occurred even if of the "soft" variety; otherwise, even by the State's own testimony from its other experts its theory of the case—L.H. suffered fatal injury

while in the singular care of Dorsey—would not hold up) the State resorted to asking the pathologist to assume the truth of a broadly stated hypothetical questions. (Id.) Those questions asked the pathologist to conveniently assume all "accidental sort of trauma [for the supposed head trauma injury to L.H.] were removed" from the equation—that is, only an intentionally inflicted head trauma existed to explain the cause of death. (Id., at above transcript cites.) Well then, how could that not possibly move the manner/cause of death from "undetermined" to "homicide," and further in the sense that intentional act had to have occurred under these assumptions while L.H. was in the singular care of Dorsey (after all, the mechanism of death under these presumed circumstances would have commenced nearly instantaneously). And as if by magic, the pathologist answered this series of improper questions that the manner/cause of death would or could have had to have been homicide and during the time L.H. was in Dorsey's daycare. (Id.)

Contrast this with the testimony of the defense's expert witnesses, including the expert pathologist called by the defense out of the State of Nebraska. Each of these witnesses identified a prior (before L.H. went to day care) traumatic head injury suffered by L.H.—and each of these witnesses described in detail how that injury was dated (indeed, from a biophysical standpoint that injury had to have occurred days, before L.H. was dropped off at Dorsey's daycare for the first time), and that this was the actual head trauma (not the assumed phantom "soft" head

trauma speculated by the State's expert witnesses to fit the State's theory of the case) that ultimately resulted in L.H.'s unfortunate death. Even the State's rebuttal expert witness (Dr. Hefti) on this point conceded the recognized use of the injury dating technique employed by the defense experts (specifically, as it concerned capillary formation and iron detected in it by staining), that in fact L.H.'s cranium slides presented to the jury and as explained by the defense expert witnesses showed an existing (before day care) head trauma injury, and that that injury mechanism could have well existed and been in process prior to the time L.H. had been delivered for his first and only time into the daycare center run by Dorsey.

The verdict is not supported by the weight of the evidence; Dorsey should be accorded a new trial.

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

Error Preservation and the Standard of Review.

Dorsey preserved error by objecting to the questions pertaining to K.H.'s rib injury and its purported link to Dorsey committing injurious acts against children in her daycare, and particularly to the injury to L.H. (Trans. at 969:22-972:14.) The objections were overruled. (Id.)

A district court's evidentiary ruling regarding admission of prior bad act testimony is for abuse of discretion. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). "An abuse of discretion occurs when the trial court exercises its discretion

`on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001) (quoting *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)). However, to the extent a challenge to a trial court ruling on the admissibility of evidence implicates the interpretation of a statute or a rule of evidence, review is for correction of errors at law. *State v. Stone*, 764 N.W.2d 545, 548 (Iowa 2009).

The Merits.

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.) But that was entirely speculative—indeed, the injury mechanism was not a fall (as claimed by the State; Dorsey at the time informed K.H.'s parents that K.H. had taken a tumble) but rather squeezing (where there was no evidence that any such act occurred to K.H. while he was at Dorsey's daycare). The State over objection got this evidence admitted before the jury to show propensity—that Dorsey injured K.H. and therefore also (likely) injured his younger brother L.H. This evidence—and the conclusion the State argued it showed—is that Dorsey has a history (propensity) of intentionally injuring children in her care (or minimally the children in the H. surname family). That was improper and prejudicial propensity evidence that resulted in Dorsey receiving an unfair trial; she should be accorded a

new trial. As the Iowa supreme court noted in *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:

> Under Iowa Rule of Evidence 5.404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Iowa R. Evid. 5.404(b). Therefore, such evidence "is not admissible to demonstrate the defendant has a criminal disposition and was thus more likely to have committed the crime in question." *State v. Reynolds*, 765 N.W.2d 283, 289 (Iowa 2009). The public policy for this rule
>
> > "is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds."
>
> *State v. Sullivan*, 679 N.W.2d 19, 24 (Iowa 2004) (quoting *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C.Cir.1985)).
>
> However, prior bad acts are admissible if offered for the purpose of establishing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 5.404(b).

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

Error Preservation and the Standard of Review.

The district court excluded Dorsey from calling six witnesses at trial who would have testified to her peacefulness, kindness, anti-violence, careful, loving and similar traits. (Trans. at 913:08-927:06.) In response, Dorsey put on an offer of

proof for each of these witnesses, and that preserved error as the district court excluded this testimony from being given before the jury. (Id.) *State v. Schutz*, 579 N.W.2d 317, 318-19 (Iowa 1998) (offer of proof preserves error); *State v. Harrington*, 349 N.W.2d 758, 760 (Iowa 1984) (same).

A district court's evidentiary rulings (at least those not based on hearsay) are generally reviewed for abuse of discretion. *Hall v. Jennie Edmundson Mem'l Hosp*., 812 N.W.2d 681, 685 (Iowa 2012). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Maghee*, 573 N.W.2d at 5. "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). A district court's ruling excluding a party's proffered evidence will be reversed when it impacts the substantial rights of the complaining party. Iowa R. Evid. 5.103(a); *McClure v. Walgreen Co*., 613 N.W.2d 225, 235 (Iowa 2000).

The Merits.

The district court excluded six defense witnesses, each of whom had the requisite knowledge to testify as to relevant traits of Dorsey: peacefulness, kindness, anti-violence, careful, loving and similar traits: that is, traits that directly negated the State's contention that Dorsey violently shook to death, and inflicted ("soft") head trauma, on an infant (L.H.) that had only been delivered to her daycare for the first

time a couple of hours before emergency services were called. And each of these excluded witness had their own children under Dorsey's day care supervision either before or on the date of the October 7th incident. (Trans. at 913:08-927:06.)

While it is true that district courts have general authority to set time limits and limit the number of witnesses at trial, that discretion must be reasonably exercised. *In re Marriage of Vidal*, No. 09-1608, 2010 WL 3324939, at *4 (Iowa Ct. App. Aug. 25, 2010); *see also* Iowa R. Evid. 5.611(a)(2) (giving the trial court reasonable control over "the mode and order of examining witnesses and presenting evidence so as to . . . [a]void wasting time"). *In re Marriage of Diercks*, No. 21-0896, 2022 WL 951047, *10 (Iowa Ct. App. 2022). The additional six witnesses should have been allowed to testify in this case, and their exclusion was error and further deprived Dorsey of a fair trial. As shown in Dorsey's referenced offer of proof (where each of these excluded witnesses testified), their testimony was brief and would not have unduly prolonged the proceedings; indeed, the State's objection and resolution of it took much more time (and transcript pages) to resolve than the time the witnesses testified in the offer of proof phase. (Trans. at 665:12-687:16, 913:08-927:06.)

Second, this evidence was crucial—it formed a crux of Dorsey's defense position; that it would be completely out of character for her to have intentionally harmed L.H. (let alone within a couple of hours after his first admission to her daycare premises) and the evidence was further important to rebut the State's

evidence that Dorsey had supposedly injured L.H.'s older brother in the past (the rib injury incident).

The State itself understood the importance of this evidence (and its effect on the jury in the first trial, that split 10-2 in favor of acquittal on all charges); that is why it so vociferously objected to this critical evidence that, if believed, more than tended to rebut the State's entire theory of the case. And this evidence was further relevant because the brunt of the State's evidence was based on expert hypothetical (conclusory) testimony as to when L.H. likely suffered the relevant head trauma that resulted in his death. That conclusory evidence, as we have seen, deviates from the actual facts presented concerning Dorsey's daycare and her character.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

The appellant, through counsel, requests to be heard in oral argument upon the submission of this cause.

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 7,989 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 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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