IN THE COURT OF APPEALS OF IOWA

No. 5-159 / 94-834

STATE OF IOWA,

Appellee,

vs.

MARY CATHERINE WEAVER,

Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Mary Catherine Weaver appeals the judgment and sentence entered upon her convictions of first-degree murder and child endangerment in violation of Iowa Code sections 707.2(2) and 726.6(1)(b) (1993). **AFFIRMED.**

Paul H. Rosenberg of the Rosenberg Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and Diann Wilder-Tomlinson, County Attorney, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ., but decided en banc.

CADY, J.

Mary Catherine Weaver appeals the judgment and sentence entered upon her convictions of first-degree murder and child endangerment in violation of Iowa Code sections 707.2(2) and 726.6(1)(b) (1993). Upon our review, we affirm the trial court.

Melissa Mathes died on Saturday, January 23, 1993 at the University of Iowa Hospitals and Clinics, one month prior to what would have been her first birthday. The previous Friday morning she suffered a respiratory arrest while in the care of Mary. Mary had been providing day care for Melissa since August 1992.

At the time of Melissa's tragic death, Mary was forty-one years old, married, and living in Marshalltown with her husband and two young children. Mary had resided in the Marshalltown area for the last seventeen years. She had a reputation in the community as a peaceful, nonviolent person, with no history of violence or abuse against Melissa or any other individual. The events of January 22, 1993, however, brought an abrupt and perplexing end to Mary's unblemished community standing.

On that fateful day, between 10:20 and 10:30 a.m., Mary picked up eleven-month-old Melissa Mathes at the Mathes home. Tessia Mathes, Melissa's mother, testified Melissa was playing normally that morning and had a healthy appetite. Mary also testified Melissa appeared to have improved from a week of flu-like symptoms, and was jabbering when she picked her up.

After running a few short errands, Mary arrived at her home with Melissa around 11:00 a.m. She put Melissa in her infant seat, put away groceries she had bought earlier that morning, and fed Melissa some baby food. It was then time for Mary to pick up her own children from preschool. She placed Melissa on the living room floor to dress her in her snowsuit. As she was dressing her, Mary noticed Melissa's eyes had rolled back in her head and that she was not breathing. Mary called 911 at approximately 11:14 a.m.

Police officer, Michael DeVini, was the first to respond to the call. He found Melissa on her back in the kitchen of the Weaver home with vomit on her face and clothing. DeVini began to administer CPR for infants. The ambulance crew arrived, intubated Melissa, and took her to the Marshalltown Hospital. By noon doctors at the Marshalltown Hospital decided to air-flight Melissa to the University of Iowa Hospitals and Clinics. Melissa died the following morning at 4:17 a.m.

An autopsy of Melissa revealed she suffered numerous injuries to the brain. There was evidence of both acute and previous trauma. The injuries of recent origin included: extensive bilateral retinal and interior chamber hemorrhages in the eyes, traumatic angle recession of the left eye, a frontal cortex contusion, hypoxic injury, and subarachnoid hemorrhages. An occipital fracture, subdural hemorrhage, sagittal sinus thrombus, parieto-occipital necrosis, subdural hemorrhages in the optic nerves, and cystoid macular edema in the right eye were estimated to be from seven to ten

days old. A 1.5 by 1.0 centimeter contusion on the scalp of the left occiput was not dated.

Mary was charged with first-degree murder and child endangerment in June 1993. In Mary's first trial, the jury was unable to reach a verdict and a mistrial was declared. Mary then waived her right to a jury trial, and the case proceeded to a second trial to the court.

Because Melissa had both recent and prior injuries, the testimony of the medical experts became critical. The State's expert witnesses were in agreement that Melissa's fatal injuries were sustained within twenty-four hours of her death, and were consistent with shaken or shaken/slammed baby syndrome. There was evidence these injuries occurred just prior to the time Melissa stopped breathing or between 10:30 and 11:30 a.m. on January 22, 1993, and that Melissa would have been immediately symptomatic after sustaining the injuries.

Mary presented three expert medical witnesses. Two of them testified that Melissa died from the injuries received seven to ten days before her death. The third defense expert testified that she found no evidence Melissa had been slammed.

At trial, the defense attempted to introduce the testimony of Kimberly Smuck, who had a conversation with Tessia a few weeks prior to Melissa's death concerning the cost of grave sites. The State objected on hearsay grounds and the court sustained the objection.

Mary was found guilty as charged. She filed a motion for new trial and a supplemental motion alleging newly discovered evidence. Her motions were supported by two affidavits. The affiants stated Tessia reported to them that Melissa had hit her head on the coffee table shortly before Mary arrived on January 22. The court denied Mary's motion.

Mary appeals. She argues the State failed to prove beyond a reasonable doubt that she inflicted homicidal force on Melissa causing her death. She also contends the significant brain injuries Melissa suffered prior to being placed in her care made her vulnerable to "deadly venous pressure either spontaneously or with minor trauma." Second, Mary asserts the district court abused its discretion in denying her motion for new trial. Finally, Mary claims the district court abused its discretion in excluding evidence that Tessia was investigating the cost of grave sites a few weeks before Melissa's death.

I. Sufficiency of the Evidence

Mary argues there is insufficient evidence to prove beyond a reasonable doubt that the fatal events of January 22, 1993, were caused by homicidal force inflicted by her. She asserts Melissa was vulnerable to death by head trauma, and a plausible explanation existed for Melissa's acute injuries. She argues Melissa's survival and nascent recovery from her previous injuries, does not eliminate trivial or accidental trauma as a source for the respiratory arrest that caused her death.

In support of her theory, Mary presented the expert testimony of Dr. Vincent DiMaio, a forensic pathologist and chief medical examiner and director of the criminal investigation laboratory in Bexar County, San Antonio, Texas, Dr. Earl Rose, a forensic pathologist and former Director of the University of Iowa College of Medicine's pathology department, and Dr. Ruth Ramsey, a neuroradiologist and Director of Neuroradiology at the University of Chicago Medical School. Dr. DiMaio testified that Melissa's old injuries caused progressive cell death which reached a lethal point on Friday, January 22. He found no evidence of a second trauma and attributed Melissa's acute injuries to increased brain pressure and a re-bleed of the old injuries. He concluded the frontal contusion was not actually a contusion but rather a perivascular hemorrhage. Dr. Rose also testified Melissa's death was attributable to the seven to ten day old injuries. He opined that her prior injuries re-bled, either spontaneously or due to minor trauma, the re-bleed led to excessive intracranial pressure, and precipitated respiratory arrest. Finally, Dr. Ramsey testified there was no evidence Melissa's head had impacted with a hard surface prior to her loss of consciousness on January 22.

Our standard for reviewing motions for a new trial based upon sufficiency of the evidence is well settled. A verdict will be upheld where there is substantial evidence to support the charge. *State v. Rhode*, 503 N.W.2d 27, 38 (Iowa App. 1993); *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Conversely, a verdict will be overturned where there is no substantial evidence in the record to support it or such

a finding is clearly against the weight of the evidence. *State v. Lewis*, 514 N.W.2d 63, 66-67 (Iowa 1994); *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is viewed in the light most favorable to the state. *Id.* All legitimate inferences which may fairly and reasonably be deduced from the evidence will be accepted. *State v. Jones*, 271 N.W.2d 761, 763 (Iowa 1978). In determining the sufficiency of the evidence it is necessary to consider all of the evidence. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979)).

After carefully sifting through all of the evidence in this case, we conclude there was substantial evidence in the record to support the trial court's judgment. The expert testimony in conjunction with Melissa's clinical history prior to death confirm the trial court's conclusion that Mary committed the act which caused Melissa's death.

According to Tessia, Brad Mathes (Melissa's father), and Mary, Melissa was feeling better on Friday morning January 22 following a week of vomiting and fussiness. Tessia and Brad testified Melissa was playing and not fussy. Tessia testified she fed Melissa two bowls of cereal that morning and Melissa was jabbering when Mary picked her up. Mary confirmed that Melissa was looking better and jabbering when she picked her up. She also testified to feeding Melissa a half jar of baby food prior to her collapse. Each of the State's experts testified that, based upon

this clinical history and Melissa's sudden collapse, a severe traumatic event occurred sometime after Melissa was placed in Mary's custody.

Dr. D.L. Thomas was the treating physician at the emergency room in Marshalltown. He testified that something neurologically catastrophic had happened to Melissa on Friday morning January 22.

Dr. Katherine Mathews, an experienced child neurologist and Melissa's treating physician in Iowa City, testified that child abuse was the most probable explanation for acute onset of retinal hemorrhages and diffuse brain injury Melissa suffered. She further testified that no explanation for Melissa's old injuries could account for all of the symptoms Melissa displayed when she arrived in Iowa City. Dr. Mathews also stated Melissa's lethal injury could not have predated her arrival at Mary's home.

Dr. Robert Robinson, a professor and pathologist at the University of Iowa, performed the autopsy on Melissa. He concluded the cause of death was respiratory arrest accompanied by acute trauma. He found the type of injuries Melissa received were consistent with shaken baby syndrome. He also concluded Melissa would likely have been immediately unresponsive from the type of acute trauma the autopsy indicated she received.

Dr. Wilbur Smith, a pediatric radiologist and professor at the University of Iowa College of Medicine, examined Melissa's x-rays and CT scans prior to her death. At trial he testified to the type of injuries associated with shaken baby

syndrome including subdural hematomas, brain injury, subarachnoid bleeding, and brain swelling. He identified subarachnoid bleeding, and brain swelling in the Marshalltown and Iowa City CT scans of Melissa's brain. He opined that Melissa's death was the result of shaken baby syndrome and the fatal injury occurred close to the time she stopped breathing on January 22, 1993.

Dr. Randall Alexander is a pediatrician and a professor at the University of Iowa College of Medicine. He holds a subspecialty in child abuse and developmental disability. Dr. Alexander testified that Melissa suffered from two episodes of severe trauma, and the second episode was lethal. He concluded the trauma was an example of shaken baby syndrome and Melissa would have immediately displayed symptoms after being injured. He stated if Melissa's injuries had occurred prior to the time she came into Mary's care on January 22, she would have looked terminally ill and would not have been capable of playing or eating. He also testified Melissa's retinal hemorrhages could not be received from a fall, and the type of force necessary to cause her brain injury would be equivalent to a fall from a second story window.

Dr. Robert Schelper, the director of autopsy services at the University of Iowa Hospitals and an expert on neuropathology, also concluded Melissa suffered two traumas and neither was accidental. He testified the second trauma occurred within twenty-four hours of death and was caused by baby slamming. He testified a fall could not have caused the type of injuries Melissa suffered. He also concluded Melissa's clinical history and the autopsy findings did not support the defense theories

of rapid re-bleeding and brain swelling resulting in respiratory arrest or of a progressive deterioration of brain cells. He determined a serious non-accidental trauma would be required to cause Melissa's new injuries.

Dr. Robert Folberg, an ophthalmologist and director of the Eye Pathology Lab at the University of Iowa, consulted on Melissa's autopsy. His testimony supported the conclusion that Melissa suffered from two traumas, one several days old and one acute. He also stated that the type and location of the retinal hemorrhages were consistent with those caused by shaking and could not be explained by a re-bleed of the old injuries or CPR. He believed a new trauma was the cause.

Dr. Thomas Bennett, a forensic pathologist and State Medical Examiner, provided the final testimony for the State. After reviewing the autopsy reports, the medical records, and Melissa's past medical history, he concluded Melissa died from an episode of shaken/slammed baby syndrome which occurred within minutes of her collapse at Mary's house. He testified that a tremendous force would be necessary to cause the type of injuries Melissa experienced. His testimony also supported the conclusion Melissa would have been immediately effected by the injuries. Additionally, he concluded the theory of increased pressure on the brain and re-bleeding could not explain the frontal cortex contusion, all of the new injuries to the eyes, or the subarachnoid hemorrhage.

In sum, there was substantial evidence Melissa was recovering from her seven to ten day old injuries when she was placed in Mary's care. Although Melissa had a

somewhat increased risk of head injury due to brain swelling from her previous injuries, a significant trauma was still necessary to cause the injuries she received. Also, although re-bleeding of her old injuries was possible, it could not explain the frontal cortex contusion, subarachnoid hemorrhage, or all of the acute retinal hemorrhages.

Moreover, after Melissa arrived at Mary's house she ate some baby food and appeared normal. The experts indicated this would not have been possible if she had received her second injuries prior to arriving at Mary's house.

All of the State's experts concluded Melissa's injuries were consistent with shaken baby or slammed baby syndrome and the injuries could not have occurred accidentally or with minor trauma. The State's experts also testified the defense theories were not compatible with Melissa's clinical history or all of the autopsy findings. Thus, the evidence produced at trial, taken in the light most favorable to the state is sufficient to convince a rational trier of fact Mary was guilty of first-degree murder and child endangerment beyond a reasonable doubt.

II. Motion for New Trial

Mary asserts the trial court erred by denying her motion for new trial. She filed her motion, together with an affidavit from Robin McElroy, following the trial. A supplemental motion was later filed, supported by the affidavit of Mistry Lovig. Both motions alleged the discovery of new evidence which Mary could not have discovered with reasonable diligence prior to trial. The affidavits contained similar

accounts of separate conversations with Tessia, shortly after Melissa's death. In each conversation, Tessia related that Melissa forcibly struck her head on the coffee table shortly before Mary arrived to pick her up on January 22, 1993. The affidavits also established that McElroy and Lovig knew Tessia but were not acquainted with Mary or one another.

At the hearing on the motion for new trial, Mary called Dr. Rose and Dr. DiMaio to explain why the new evidence of the head injury was material to a medical expert in understanding and explaining the cause of Melissa's death. The State objected to the doctor's testimony, but the trial court allowed the experts to express an opinion whether the new evidence was material. The court did not allow the doctors to elaborate on why the new evidence was forensically significant or how it would effect the experts conclusions as to how, where, and when Melissa, received her fatal injuries. No offer of proof was made.

The court found the new evidence was inadmissible, and denied the motion for new trial. It held the evidence was hearsay, was not material for impeachment purposes, and would not have effected the outcome of the trial.

Unusually broad discretion is vested in a trial court in ruling on a motion for new trial on the basis of newly-discovered evidence. *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992). We will only overturn its ruling if an abuse of discretion is demonstrated. *Wheeler v. Dental East P.C.*, 494 N.W.2d 248, 250 (Iowa App. 1992). This broad discretion is particularly appropriate. From its closer vantage

point the trial court has a clearer view, and we generally yield to its determination. *Id.*

In order for a defendant to prevail on a motion for new trial based on a claim of newly-discovered evidence, the defendant must show: (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial. Iowa R. Crim. P. 23(2)(b)(8); *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991).

The first issue we must consider is the hearsay nature of the new evidence. Mary asserts Tessia's statements to McElroy and Lovig were admissible under the residual exception to the hearsay rule, Iowa Rule of Evidence 803(24). It provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact: (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement. . . .

In authoring the federal counterpart to 803(24) Congress recognized it could not foresee every evidentiary contingency. *United States v. Renville*, 779 F.2d 430, 439 (8th Cir. 1985). Some flexibility in the rules was required to permit courts to admit evidence in exceptional circumstances where the evidence was necessary.

highly probative, and carried a guarantee of trustworthiness equivalent to or superior to that which underlies the other recognized exceptions. *Id.* Congress, however, intended that the residual hearsay exception "be used very rarely and only in exceptional circumstances." *State v. Brown*, 341 N.W.2d 10, 14 (Iowa 1983) (quoting 28 U.S.C.A. Rule 803, Historical Note at 583).

Before hearsay evidence can be admitted pursuant to the residual exception, the trial court must make specific findings of trustworthiness, materiality, necessity, notice, and service of the interests of justice. *State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994); *Manno v. McIntosh*, 519 N.W.2d 815, 819 (Iowa App. 1994). These findings should be made explicitly on the record. *Brown*, 341 N.W.2d at 14.

Mary argues the trial court erred in finding the evidence lacked circumstantial guarantees of trustworthiness. She points to the following facts: identical statements were made by two different people during the same time frame; neither affiant knew Mary or had a motive to lie; both of the affiants were personal acquaintances of Tessia's and were sympathetic listeners at the time the statements were made to them, the statements were made without solicitation, and the statements were against Tessia's penal interests.

Despite these facts, we find the trial court acted within its discretion in determining the condition of trustworthiness had not been met. The statements were not necessarily against Tessia's penal interest. She merely relayed that Melissa was accidentally injured. She did not implicate herself in the injury. Thus, while her

alleged statements may have an exculpatory affect on Mary, they do not necessarily inculpate Tessia.

We also question the reliability of the statements because they conflict with Mary's own testimony. According to the two affiants, Melissa's injury occurred when Tessia was putting on Melissa's snowsuit shortly before Mary picked her up. Mary, however, testified that Tessia was putting Melissa in her snowsuit, when she arrived at the Mathes' home and Melissa was "jabbering" and seemed fine. Furthermore, the affiants' testimony was not completely independent of one another. Lovig stated she read about McElroy's statements in the newspaper prior to coming forward.

The timing of the affidavits also detracts from their reliability. Over one year passed between the time Tessia allegedly made the statements and the time the affiants came forward. The passage of time may have affected their ability to accurately recall a detailed conversation. Both affiants also waited until two trials were completed before volunteering their evidence. This places some suspicion on the evidence given the publicity accompanying the trials. We conclude there were insufficient circumstantial guarantees of trustworthiness. The trial court did not abuse its discretion in determining the affidavits were inadmissible under the residual exception.

Mary alternatively argues the affidavits are admissible to impeach Tessia's version of the events on the morning of January 22. She asserts Tessia's statement that Melissa bumped herself on a padded recliner was intended to be exculpatory and

the factfinder could infer she was attempting to cover up involvement and mislead the police.

Assuming the statements were appropriate impeachment evidence, they still do not support a motion for new trial. If the affidavits were offered to demonstrate Tessia made inconsistent statements, they would not constitute substantive evidence. In order to support a motion for a new trial, the evidence at issue must not be "merely cumulative or impeaching." *See State v. Allen*, 348 N.W.2d 243, 246 (Iowa 1984).

The trial court also determined the new evidence would not have changed the result of the trial. We found substantial evidence to support this finding. *See Jones v. Scurr*, 316 N.W.2d 905 (Iowa 1982). The thrust of Mary's post-trial claim is that the new evidence about Melissa hitting her head on the coffee table supports her position that the injury which caused Melissa's death occurred before Melissa was placed in her care. Mary passionately argues that justice demands the medical experts re-evaluate their opinions in light of this new evidence. She asserts that the coffee table injury, superimposed on the old injury, could have been the cause of Melissa's death without immediate symptoms.

First, we observe that Mary did not offer evidence at the post-trial hearing or make an offer of proof to support her claim that the coffee table injury could have caused delayed symptoms. Moreover, the experts for the State testified at trial that the grave symptoms displayed by Melissa on January 22 could only have resulted

from an injury inflicted just prior to the onset of the symptoms. In rendering their opinion, the experts were all aware of Melissa's seven to ten day old injuries. Thus, the new evidence would not impact the State's evidence because, even if Melissa had bumped her head just prior to the time Mary picked her up, she displayed no immediate symptoms.

Moreover, the new evidence merely supplements the evidence presented by the defense at trial. The defense experts testified death resulted from the earlier injury when it began to re-bleed on January 22 due to spontaneous evolution of the earlier injury, or when assisted by some second minor injury to Melissa. Thus, the new evidence, when transposed upon the evidence produced at trial, would not impact the results of the trial. The trial court did not err in denying Mary's motion for new trial based on newly discovered evidence.

III. Exclusion of Grave Price Conversation

During trial Tessia was asked whether she had inquired about the price of a grave three or four weeks before the death of her daughter. Tessia denied doing so.

Mary later called Kimberly Smuck to testify regarding a conversation she allegedly had with Tessia several weeks before Melissa's death. The State objected and the court sustained the objection as hearsay and improper impeachment evidence.

Mary made an offer of proof indicating Smuck would have testified that: in December 1992 she went to the Hardees Restaurant where Tessia was working.

Smuck was wearing a smock from her workplace, Riverside Cemetery, and Tessia asked her about the price and location of graves. When Smuck returned to work, she told her supervisor about her exchange with Tessia. Approximately three weeks later the Mathes family purchased a grave for Melissa at Riverside Cemetery. On this occasion, Tessia allegedly asked Smuck whether she remembered the previous conversation and said, "I didn't think I would be here so soon."

On appeal, Mary asserts the trial court erred in excluding the testimony on hearsay grounds. She claims the statements fall outside the definition of hearsay and were offered as circumstantial evidence of Tessia's involvement in Melissa's death. She also claims there was more than a "mere suspicion" Tessia was involved in Melissa's death, and the evidence should have been admitted for impeachment purposes.

In determining the ultimate admissibility of evidence a trial court exercises its sound discretion. We will reverse the trial court's determination on the issue of admissibility only when we find a clear abuse of discretion. *State v. Roth*, 403 N.W.2d 762, 765 (Iowa 1987).

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). Thus, for an out of court statement to be hearsay it must contain an assertion of fact and be offered to prove the truth of that assertion. *State v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987); *Jones*, 271 N.W.2d at 767.

Mary argues that the question "What is the price of a cemetery plot?" is not an assertion of the truth of a fact and therefore, falls outside the definition of hearsay.

Questions generally are not intentional expressions of facts or opinions, and therefore, do not qualify as assertions for purposes of the hearsay rule. *Rawlings*, 402 N.W.2d at 409. However, where a question contains a relevant inherent assertion of fact, the utterance may be an assertion for hearsay purposes. *Id.*

Mary admits the statements were offered to prove Tessia was anticipating a death in the family. Because Melissa was in Tessia's care immediately before Mary picked her up, the statements were relevant to Mary's defense. In this context, the utterance contained an implicit assertion of fact that Tessia was anticipating or planning the death of her daughter. We believe the utterance was an assertion of the truth of a fact for hearsay purposes, and the trial court properly ruled it was inadmissible.

Mary also suggests the evidence was probative of Tessia's credibility because she previously denied having the conversation. The trial court found a proper foundation was not laid for the evidence and it was collateral to any issues in the case.

Ordinarily a party may contradict and discredit an adverse witness by presenting evidence showing the facts were other than as indicated by the testimony of the witness. *Roth*, 403, N.W.2d at 767 (citing *State v. Odem*, 322 N.W.2d 43, 45 (Iowa 1982)). The offer of impeachment evidence is not, however, without limits.

To be admissible, a proper foundation must be laid for its admission and the evidence must have been admissible for some proper purpose independent of the contradiction. *Roth*, 403 N.W.2d at 767; *see* Iowa R. Evid. 613(b).

Foundation is necessary to alert the witness as to the occasion of the prior statement and to afford the witness an opportunity to explain or deny making the statement. *State v. Oshinbanjo*, 361 N.W.2d 318, 322 (Iowa App. 1984); *State v. Gilmore*, 259 N.W.2d 846, 853 (Iowa 1977). In this case, we conclude sufficient foundation was laid. Although Tessia was not alerted to the place where the statements were made, she was alerted to the nature of the prior statements and the time they were allegedly made. She was also given an opportunity to explain or deny making the statements. *See United States v. Peltier*, 800 F.2d 772, 777 n.8 (8th Cir. 1986). Contrary to the trial court's findings, the statements also go to a legitimate issue in the case independent of the contradiction. *See Gilmore*, 259 N.W.2d at 853. Tessia's questions about the cost of cemetery plots went to the heart of Mary's defense. *See State v. Harrington*, 349 N.W.2d 758, 761 (Iowa 1984) (stating evidence incriminating others is admissible).

Nonetheless, we find no abuse of discretion on the part of the trial court in excluding this evidence. We conclude the court could have properly excluded the evidence under the balancing test articulated in Iowa Rule of Evidence 403. *See State v. Baker*, 293 N.W.2d 568, 574 (Iowa 1980) (regardless of the trial court's reason, its ruling will be upheld if it can be sustained on any grounds). The evidence had

questionable probative value and was relatively remote in time from Melissa's death. Tessia could have inquired about the cost of cemetery plots for a variety of reasons. She could have been anticipating the death of an aging family member or simply making conversation. The reason Mary ascribed to the statements was purely speculative. Moreover, the statements were inflammatory and their potential for misuse was high. The trial court properly excluded the evidence.

In conclusion, we affirm the decision of the trial court. In doing so, we have carefully and fully considered each claim raised by Mary, as well as her overall cries of injustice. We intimately recognize our goal to see that justice is done in each case, but are equally cognizant that justice can only be accomplished according to the law. The principles of law governing judicial review of trial verdicts do not permit the decision in this case to be disturbed.

AFFIRMED.

All judges concur except Sackett, J., who concurs in part and dissents in part.

SACKETT, J. (concurring in part; dissenting in part)

I concur in part and dissent in part.

Other than the fact Melissa had recently been committed to defendant's care and defendant and Melissa were alone when the child had her seizures, the evidence allegedly establishing defendant's culpability is expert testimony based on a review of medical data of the child before and after her death and testimony of the caretakers as to the child's condition when delivered to defendant. The majority has carefully outlined the stark contrast in the medical testimony presented by the State and defendant. The theory accepted by the trial court follows only the testimony of the State's experts and is contrary to the testimony of defendant's experts. Defendant's experts dispute the State's theory. The expert testimony introduced by defendant supports a finding defendant could not have been responsible for the child's death in the manner claimed by the State.

For the State to prove its case, the testimony of the State's medical experts must be based solidly in fact and the experts' theories must be generally accepted within the medical community with a proven track record for accuracy. The State bears the burden of not only introducing expert testimony, but has the further burden of showing it is reliable. *See, generally, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469, ___ (1993); *Watkins v. Schriver*, 52 F.3d 769, 771 (8th Cir. 1995).

There are three questions I find relevant to my consideration.

1. Are the theories of the State's experts based on proven and accepted medical theories?

2. Do the facts support the theories advanced by the State's experts?

3. Does the expert testimony of defense witnesses discount defendant's responsibility and advance so many challenges to the State's evidence that a rational trier of fact could not reject defendant's evidence in addressing the issue of reasonable doubt?

The fact the medical theories relied on by the State are contradicted by highly credentialed defense experts impacts on the issue of the acceptance of the State's theory in the medical community. Basically, the State's experts' opinions were Melissa was shaken and/or shaken and slammed shortly before she died and the State attributes her death to the shaken baby syndrome and/or shaken/slammed baby syndrome.

Dr. Wilber Smith, one of the State's witnesses, acknowledged the medical community is divided on whether only shaking can cause the injuries which classically have been associated with the shaken baby syndrome. Defendant presented evidence of testing which disproves the shaken baby syndrome. I find the record reflects the shaken baby theory is not a generally accepted theory.

The theory a child could receive the injuries from being slammed is a proven theory. But, there is no evidence Melissa suffered external injuries or bleeding

injuries and it is only reasonable to assume she would have such injuries if she had been slammed.

Additionally and importantly, Melissa was not a well baby when injured. The experts for both the State and the defense are in agreement Melissa suffered a massive skull fracture seven to ten days prior to her death.[1] At Melissa's autopsy, there were noted and visible results of the skull fracture, brain hemorrhaging in the subdural space, a one-inch-long blood clot in her brain, and a significant stroke or zonal cell death. The State's experts dismissed the skull fracture as having healed. Defendant's experts concluded the events could be the result of trivial trauma due to the child's vulnerable condition caused by her previous injuries. Yet, there seems to be agreement that a subdural hemorrhage such as Melissa's could spontaneously re-bleed or re-hemorrhage as a result of minor trauma.

I look also to the fact the investigation focused only on defendant and little attention was given to other care givers to investigate or nullify questions of others' involvement.

All of these issues strongly impact on the question of reasonable doubt.

I recognize this court is not a fact finder; that is the job of the trial court. The fact I would have found reasonable doubt is not reason for me to vote to reverse. I am only charged to review all evidence in the light most favorable to the State and

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[1] There is no claim defendant was responsible for this injury and the conclusion I gain from the record is she was in her parents' or relatives' care when it happened.

afford the State all reasonable inferences to determine whether a rational trier of fact would be convinced the defendant is guilty beyond a reasonable doubt. *See State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981).

I would reverse and sustain defendant's motion for acquittal because the theory advanced by the State leaves too many questions and creates so much doubt as to guilt that I do not find substantial evidence in this record to prove defendant guilty beyond a reasonable doubt.

I agree with the majority the trial court did not abuse its discretion in refusing to allow evidence the child's mother had inquired about the choice of a grave three or four weeks before the child's death.

However, I disagree with the majority's conclusion as to the affidavits filed after trial. Two separate witnesses stated the child's mother told them shortly after Melissa's death Melissa forcibly struck her head on a coffee table just before she was delivered to defendant's care. The majority says this does not constitute substantial evidence. The two affidavits are not only contrary to the mother's testimony at trial, but most importantly, the affidavits impeached her version of the events on the morning in question. This is critical evidence because the State's experts base their opinions in large part on the mother's testimony as to absence of a serious injury on that morning.

There is evidence in the record symptoms from a head injury can be unpredictable and transient. Melissa could have suffered injuries in her mother's care which did not manifest themselves until Melissa was in defendant's care, creating more doubt the State's theory is correct. At the very least, defendant should have a new trial.