

FILED

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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

STATE OF IOWA,

)

Appellee,

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Filed November 22, 1978

vs.

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LEE CHARLES PONTIOUS,

)

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61280

Appellant.

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Appeal from Polk District Court - Richard A. Strickler, Judge.

Defendant appeals his conviction for manslaughter in violation of § 690.10, The Code. Affirmed.

Patrick H. Payton, of Payton & Hearn, P.C., of Des Moines, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General, and Dan Johnston, Polk County Attorney, counsel for appellee.

Submitted to Oxberger, C. J., Donielson, Snell and Carter, JJ.

DONIELSON, J.

Defendant Lee Pontious appeals from his conviction and sentence for manslaughter in violation of § 690.10, The Code 1977, in the death of his six-week old daughter Melissa. He asserts the evidence is insufficient to support his conviction and the trial court erred in giving instructions that singled out expert medical testimony. We affirm.

On the morning of July 4, 1977, defendant called police to his mobile home to investigate the circumstances surrounding the death of one of his infant twin daughters. Defendant told police he had found Melissa dead in her crib that morning. Dr. Kenneth Schultheis of the Medical Examiner's office made a preliminary determination of sudden infant death, or crib death, occurring approximately 6 to 8 hours earlier, or about 2 a.m.

Dr. Emanuel Lacsina performed an autopsy later that day with Dr. Schultheis present, and it was determined that the infant had died from cranial cerebral trauma, a severe injury to the head. Her skull was found fractured on both the right and left sides, and analysis of the considerable amount of blood between the skull and the scalp indicated a very recent injury and bleeding. The autopsy revealed that the infant had eaten no more than a couple hours before her death, and had died within three hours of sustaining the skull fractures. There were no visible bruises or marks on the infant's body. X-rays of the skull were not taken until after the fractures were revealed, and were therefore unreadable.

Defendant was taken into custody and denied any wrongdoing in connection with Melissa's death. The twin infants had spent from 1:30 to 11:30 p.m. on July 3rd with a babysitter while defendant and his 18-month-old daughter Shannon had picnicked with defendant's date. Both the babysitter and the date testified that the children had been fine when last observed by them at 11:30 p.m. and 1:40 a.m., respectively, although Melissa was fussy with a cold. The record indicates that at various times, while being interviewed, defendant told police that if there was anything wrong with the infant, it was the responsibility of the babysitter; that the infant had fallen off defendant's bed when left unattended the night before; and that he had left the mobile home for 15-20 minutes about 3:00 a.m. to get a can of pop and upon his return had found Melissa on the floor outside of her crib with Shannon near her "patting her head." Medical testimony by Dr. Lacsina indicated that an extreme force would be required to produce the

resulting fractures of the infant's skull, a force comparable to a fall of 100 feet. The lack of abrasions or contusions on the body suggested that the injury was caused by a "blunt type of trauma," an example given being "a hit from a fist."

Defendant contends that the trial court should have sustained his motion for directed verdict and dismissal made at the close of State's evidence and again at the close of all evidence. In making a determination as to the propriety of the court's ruling on a motion for directed verdict in a criminal case we view the evidence and all reasonable inference therefrom in the light most favorable to the jury's verdict; it is necessary to consider only the evidence supporting the verdict, whether contradicted or not. *State v. Overstreet*, 243 N.W.2d 880, 884 (Iowa 1976). However, the State must prove all of the essential elements of the crime and any evidence, circumstantial or direct, must be sufficient to raise a fair inference of guilt. It must do more than raise a suspicion, speculation or conjecture. *State v. Overstreet*, supra at 883-884; *State v. Stamper*, 195 N.W.2d 110, 111 (Iowa 1972); *State v. Williams*, 179 N.W.2d 756, 758 (Iowa 1970).

Either direct or circumstantial evidence, or both, on each and every essential element to conviction is sufficient to warrant a finding of guilt if it satisfies the jury beyond a reasonable doubt. Circumstantial evidence may be equal in value to and sometimes more reliable than direct evidence. However, where circumstantial evidence alone is relied on as to any one or more of the essential elements, the circumstance or circumstances must be entirely consistent with defendant's guilt and wholly inconsistent with any rational hypothesis of defendant's innocence and so convincing as to exclude a reasonable doubt that defendant was guilty of the offense charged. *State v. Stamper*, supra at 111, *State v. Link*, 171 N.W.2d 259, 261 (Iowa 1969).

We have examined this record with care and believe there was sufficient evidence to sustain a jury finding of guilty. Medical testimony at trial indicated the requisite force to inflict the fatal injury was comparable to a fall of 100 feet, and was inflicted by a blunt instrument, which could have been a fist. Defendant offered police three different explanations for his daughter's injury, all of which contradicted the medical evidence. Melissa's crib was only 48 1/2 inches from the floor; a fall from a bed or crib could not supply sufficient force to produce the injury that caused her death. Further,

- 3 -

defendant was unable to explain how an 18-month-old child was able to lift Melissa from the crib. When last seen at 11:30 p.m. by the babysitter and around 1:30 a.m. by defendant's date, Melissa appeared normal and healthy. Time of death was fixed at 2:00 a.m., when Melissa was exclusively in her father's care. *State v. Tornquist*, 254 Iowa 1135, 1146, 120 N.W.2d 483, 490 (1963). We conclude the evidence and the reasonable inferences that could be drawn therefrom support the submission of this case to the jury and its verdict.

Defendant also contends on appeal that the trial court erred in instructing the jury in Instruction No. 12 concerning the expert testimony of the two physicians as follows: "This testimony should be considered in connection with the knowledge, skill, and experience possessed by the witness; but it is solely the province of the jury to say what weight it should receive." The defendant asserts that by denying his request to insert the words "if any at all" after the word "receive", the trial court implied that the jury must accord some weight to the evidence offered, and emphasized the testimony of the physicians over the testimony of other witnesses.

There is no dispute that jurors are the sole judges of credibility of witnesses and of weight to be given their testimony. *State v. Hatters*, 184 Iowa 878, 169 N.W. 113 (1918). The jury is under no obligation to accept as true or give any weight to the testimony of any witness, including an expert. See *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 345, 5 N.W.2d 646, 656 (1942). We find the trial court adequately apprised the jury that they might exercise their discretion in determining the credibility and weight, if any, to be given the testimony of the physicians. The language of Instruction No. 12 was consistent with recommended Uniform Jury Instruction No. 501.5. The general credibility instruction given later in Instruction No. 17 again allowed the jury to conclude that they might exercise their discretion by giving no weight to testimony by any witness they felt warranted no consideration. Instructions must be considered as a whole and not in isolation. *State v. Tensley*, 249 N.W.2d 659, 662 (Iowa 1977). There is no error.

AFFIRMED.