

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENNA FOLKERS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE BROOK K. JACOBSEN, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. **Whether the State Presented Sufficient Evidence to Support the Defendant's Conviction for Child Endangerment.**

Authorities

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State v. Anspach, 627 N.W.2d 227 (Iowa 2001)
State v. Bentley, 757 N.W.2d 257 (Iowa 2008)
State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)
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State v. Williams, 695 N.W.2d 23 (Iowa 2005)
Iowa Code § 726.6(1)(a)
Iowa R. App. P. 6.904(3)(p)

ROUTING STATEMENT

Because this case can be decided based on existing legal principles transfer to the Court of Appeals would be appropriate.

Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Brenna Folkers, appeals from judgment and sentence entered by the district court following a bench trial finding her guilty of child endangerment, an aggravated misdemeanor. *See* Iowa Code §§ 726.6(1)(a), 726.6(7). On appeal the defendant challenges the sufficiency of the evidence that she knowingly acted in a manner creating a substantial risk to her two year-old son's physical, mental, or emotional health or safety.

Course of Proceedings

The State accepts the defendant's summary of the proceedings below and adds the following notes. Iowa R. App. P. 6.903(3). Defendant unsuccessfully moved to suppress statements made during hospital interviews arguing she was in custody and did not have the benefit of *Miranda* warnings. *See generally* Motion to Suppress (4/06/17); Ruling on Motion to Suppress (11/29/17) [hereinafter "Suppr. Ruling"]; App.----, 6-10.

Facts

Around 6 a.m. on January 16, 2017, Waterloo officers were dispatched to 3307 Kipling Road on the report of a house fire. Trial Tr.p.8, lines 1-18. Officer Christopher Roberts first encountered Richard Wilson, defendant Folkers' husband, outside their mobile home with their two year-old son V.W. Tr.p.8, lines 19-23, p.9, lines 3-25, p.12, lines 10-18, p.39, lines 14-20, p.50, lines 5-25. Upon learning a female was still inside, Officer Roberts yelled inside the smoky interior for her to come out. Tr.p.8, lines 19-23, p.9, lines 3-12,18-22, p.10, lines 1-14. Folkers told officers she woke up to smoke in the trailer and they had used a fire extinguisher on the floor inside the front door. Tr.p.12, lines 4-6, p.14, lines 17-23. Both Folkers and the child were covered in black soot and transported to a hospital for treatment of smoke inhalation. Tr.p.12, lines 17-23, p.39, line 14-p.40, line 3, p.51, lines 1-12,17-19. Officer Roberts transported Wilson as well. Tr.p.13, lines 6-13.

Officers spoke to Folkers and Wilson separately at the hospital. Tr.p.14, lines 17-25, p.18, lines 4-7. Folkers was described as distraught and belligerent. Trial Tr.p.41, line 24-p.42, line 7. Folkers reluctantly admitted she and Wilson used marijuana and hash oil but

did not admit to using or smoking that evening or morning. Tr.p.14, lines 17-25, p.32, lines 8-10; Exh.A (Disc 2/7:29:16-7:33:41 & 7:38:25-7:47:12)¹; Suppr. Ruling p.2; App. 7. Wilson consented to a search of the trailer and returned there with officers. Tr.p.18, lines 4-7,15-17, p.42, lines 11-20; Exh.A (Disc3/8:30:27-8:43:52).

Fire department personnel indicated that the fire had started in the front entryway though the heat source had been removed leaving burned linoleum and a hole in the trailer floor. Tr.p.39, lines 14-25, p.40, line 12-p.41, line 7, p.46, lines 14-19. No wiring, heat tape, or other source that might have ignited was found. Tr.p.40, line 12-p.41, line 12.

During the search a large butane torch was found on the kitchen counter and was the suspected cause of the fire. Tr.p.18, line 18-p.19, line 3, p.27, lines 1-7, p.44, lines 5-13, p.52, lines 1-4; Exh.A (Disc 3/8:30:26-8:43:52); Exh.J; App.----. Wilson admitted to using the torch to smoke cigarettes and hash oil. Tr.p.59, lines 18-24. In the bathroom off the master bedroom, officers found a wood cabinet

¹ Exhibit A consists of three discs with two introduced video clips on disc 2. The first and second discs include short interviews with defendant Folkers at the hospital, and the third one reflects Wilson showing officers around their trailer home.

containing several glass bongos or pipes for smoking marijuana and hash oil, several bags of marijuana and marijuana residue, marijuana blunts, and a container of hash oil. Tr.p.18, line 18-p.26, line 24, p.45, lines 10-25, p.52, lines 1-9; Exhs. A (Disc 3/8:30:27-8:43:52), B-I, K, L-M; App.-----, 11-12. Hash oil is described as “preparation of marijuana” and is extracted from marijuana leaves using butane fuel, which poses a danger of fire or explosion. Tr.p.34, line 15-p.35, line 17, p.36, lines 2-5; Exh.L; App. 11.

At trial, Wilson testified for the prosecution following guilty pleas to reckless use of fire and child endangerment. Tr.p.63, lines 9-14. He admitted to drinking from 8 p.m. to 2 a.m. and to smoking hash oil around 7 p.m. and again at midnight in their bathroom. Tr.p.57, lines 4-21, p.58, lines 18-24, p.60, lines 3-20, p.62, lines 10-18, p.63, lines 3-5. Wilson conceded Folkers had knowledge of the marijuana, hash oil, and drug paraphernalia in the bathroom cabinet, and had smoked with him on occasion. Tr.p.59, lines 3-17, p.62, lines 7-9. But Wilson would not say his wife had smoked with him that evening or morning. Tr.p.57, line 22-p.58, line 2, p.62, lines 4-9,25, p.63, lines 1-2. Wilson said he had smoked a cigarette around 2 a.m. using the torch as a lighter and left it by the front door when he went

to bed. Tr.p.59, line 18-p.60, lines 1-2,16-25, p.61, lines 1-4, p.62, lines 1-3, p.63, line 25-p.64, line 5.

Wilson further testified that the wooden cabinet in their master bathroom was usually locked, and that their young son was not permitted in either that bedroom or bathroom. Tr.p.63, lines 15-24, p.64, line 9-p.65, line 8. He said they used a baby gate to block off the kitchen, bedroom, and bathroom. Tr.p.64, line 23-p.65, line 8.

Additional relevant facts will be discussed as part of the State's argument.

ARGUMENT

I. Substantial Evidence Supports the District Court's Conclusion the Defendant was Guilty of Child Endangerment Based on the Presence of Controlled Substances and Drug Paraphernalia in the Home and Ongoing Drug Use by Defendant and Her Husband.

Preservation of Error

Defense counsel unsuccessfully moved for a judgment of acquittal at the conclusion of the State's case-in-chief though such a motion is not necessary to preserve a sufficiency of the evidence challenge in a bench trial. Trial Tr.p.65, line 19-p.69, line 24; *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997).

Standards for Review

The Court reviews sufficiency of the evidence claims for correction of errors at law. *State v. Thomas*, 847 N.W.2d 438, 442 (Iowa 2014) (citations omitted); *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

In reviewing sufficiency of the evidence challenges,

courts consider all of the record evidence viewed in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence. [The Court] will uphold a verdict if substantial record evidence supports it. [The Court] will consider all the evidence presented, not just the inculpatory evidence. Evidence is considered substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt.

Thomas, 847 N.W.2d at 442 (citations and internal quotations omitted); accord *State v. Reed*, 875 N.W.2d 693, 704-05 (Iowa 2016); *State v. Showens*, 845 N.W.2d 436, 439-40 (Iowa 2014); *State v. Millsap*, 704 N.W.2d 426, 430 (Iowa 2005).

When evaluating sufficiency challenges the court does not resolve conflicts in the evidence, assess the credibility of witnesses, or weigh evidence. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). The factfinder is free to believe or disbelieve witness testimony as it

chooses and to accord such weight as in its judgment the evidence should receive. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006); *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005). Evidence is not insubstantial merely because it would also support contrary inferences. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012); *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990); *State v. Helm*, 504 N.W.2d 142, 146 (Iowa Ct. App. 1993).

Although “[d]irect and circumstantial evidence are equally probative,” the evidence “must raise a fair inference of guilt” as to each element of the crime; “it must do more than create speculation, suspicion, or conjecture.” *State v. Schrier*, 300 N.W.2d 305, 308 (Iowa 1981); *see also State v. Huser*, 894 N.W.2d 472, 491 (Iowa 2017); *Reed*, 875 N.W.2d at 705; *Thomas*, 847 N.W.2d at 447; *Brubaker*, 805 N.W.2d at 171-72; *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011); *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008); Iowa R. App. P. 6.904(3)(p).

Merits

Viewing the evidence in the light most favorable to the verdict, the district court reasonably found sufficient direct and circumstantial evidence that “the defendant knowingly acted in a

manner creating a substantial risk to V.W.’s physical, mental, or emotional health or safety as required by Iowa Code section 726.6(1)(a).” Findings of Fact, Conclusions of Law, Decision and Order (7/10/18) pp.3-4 [hereinafter “Trial Ruling”]; App. 16-17. This Court should agree substantial evidence supports the defendant’s conviction for child endangerment.

As Folkers notes, the fighting issue was the third element of child endangerment—whether she knowingly acted in a manner that created a substantial risk to her son’s physical, mental, or emotional health or safety. Appellant’s Brief pp.10-12; Iowa Code § 726.6(1)(a); *State v. Leckington*, 713 N.W.2d 208, 214 (Iowa 2006). “A substantial risk is met where there is ‘a showing that the risk is real or articulable.’” *State v. Overstreet*, No.15-1704, 2016 WL 7403733, at *3 (Iowa Ct. App. Dec. 21, 2016) (citing *State v. Anspach*, 627 N.W.2d 227, 232-33 (Iowa 2001)). Stated another way, a substantial risk means “[t]he very real possibility of danger to a child’s physical health or safety.” *State v. Janes*, No.16-1590, 2018 WL 347534, at *2 (Iowa Ct. App. Jan. 10, 2018) (quoting *Anspach*, 627 N.W.2d at 233). Proof of negligence or recklessness or actual injury is not required. *Anspach*, 627 N.W.2d at 232-33; *State v. Lee*, No.17-0413, 2018 WL

1099273, at *3 (Iowa Ct. App. Feb. 21, 2018); *State v. Osborn*, No.12-1146, 2013 WL 2637291, at *4 (Iowa Ct. App. June 12, 2013).

Folkers' sufficiency challenge focuses on the lack of proof as to when she might have smoked hash or marijuana in the residence and whether V.W. was ever present or nearby or had access to those substances. Appellant's Brief pp.11-12. She also urges the State failed to prove she had knowledge or control as to whether, when, or where Wilson smoked drugs in their home. *Id.*

The district court noted “[c]ourts have long recognized the dangers and hazards of leaving one’s children in the presence of accessible controlled substances or in the custody of drug abusers.” Trial Ruling pp.3-4 (collecting cases); App. 16-17. In *State v. Petithory*, 702 N.W.2d 854, 858-60 (Iowa 2005), the Court upheld a conviction for criminal neglect based on the finding the defendant regularly left children in the presence of meth addicts exposing them to potential dangers and hazards from not only the substances but also the resulting effects on the users. In similar cases, the Court has upheld child endangerment convictions notwithstanding claims the children at issue were not present when drugs were actually used or off in another room of the residence. *Janes*, 2018 WL 347534, at *2;

State v. Maaske, No.06-0145, 2007 WL 750632, at *1-*2 (Iowa Ct. App. March 14, 2007).

The district court reasonably found Folkers guilty based on the presence of drugs and paraphernalia in their home along with her knowing possession and admitted personal use of marijuana and hash oil in the home on occasion with her husband. Trial Ruling p.4; *see also* Suppr. Ruling p.2; App. 7. Folkers was clearly aware of and at times complicit in her husband's drug use. Exh.A (Disc 2/7:38:25-7:47:12). The State was not required to prove Folkers knowingly failed to prevent Wilson from smoking in their home.

Wilson's claim the drugs and paraphernalia were kept locked in the wooden cabinet in their bathroom and that V.W. was blocked off from entering their bedroom or bathroom is not supported by the record. Trial Tr.p.63, lines 15-24, p.64, line 9-p.65, line 8; Trial Ruling p.2; App. 15. The cabinet was not locked when the small trailer was searched, Wilson did not produce or point out a key used to secure it, and the police video does not appear to show a baby gate in use in the home. Exh.A (Disc 3/8:30:27-8:43:52). Therefore, the court reasonably found the drugs potentially accessible to V.W. Trial Ruling p.2; App. 15. Whether V.W. was in same or adjoining room

when Folkers or Wilson smoked marijuana or hash oil is not an exculpatory factor. *Cf. Janes*, 2018 WL 347534, at *2; *Maaske*, 2007 WL 750632, at *1-*2.

There is also testimony that extracting hash oil from marijuana is a highly flammable process using butane fuel and the oil itself is “still somewhat flammable.” Tr.p.34, line 15-p.35, line 17, p.36, lines 2-5. It is undisputed a large butane torch was stored in the home and that Wilson had used it to light a cigarette that morning—likely resulting in the fire. Tr.p.59, lines 18-24, p.60, line 16-p.61, line 4, p.62, lines 1-3, p.63, line 25-p.64, line 2. Thus, it is reasonable to reject Folkers’ denial they manufactured hash oil and to believe the torch was used to both manufacture and smoke hash oil while in the home creating a substantial risk of harm to the child. *See* Exh.A (Disc 2/7:38:25-7:47:12).

Accordingly, this Court should agree the record reflects substantial evidence supporting the defendant’s conviction for child endangerment.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the conviction and sentence of defendant-appellant Brenna Folkers.

REQUEST FOR NONORAL SUBMISSION

Appellant has requested nonoral submission. The State agrees that oral argument would not be of material assistance to the Court in connection with the sufficiency of the evidence challenge. Iowa R. App. P. 6.903(2)(i), 6.908(2). In the event argument is scheduled, the State requests to also be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,268** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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