IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. PAULA COLE, Defendant-Appellant	Supreme Court No. 22-1581

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE PATRICK WEGMAN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 24th day of May, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Paula Cole, 808 Walnut Street, Waterloo, IA 50703.

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State v. Buman, 955 N.W.2d 215, 219 (Iowa 2021)

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Iowa Code § 726.6(1)(d) (2021)

State v. Leckington, 713 N.W.2d 218, 221 (Iowa 2006)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case:

The Defendant-Appellant, Paula Cole, appeals her conviction for one count of child endangerment in violation of Iowa Code § 726.6(1)(a) and (8) (2021).[1] Ms. Cole appeals the conviction, judgment, and sentence imposed by the Iowa District Court in Black Hawk County following a jury trial.

Course of Proceedings:

On July 13, 2021, a trial information was filed charging Ms. Cole with one count of child endangerment in violation of Iowa Code § 726.6(1)(a) and (8) (2021). (Trial Information)

[1] Ms. Cole was charged under Iowa Code § 726.6(1)(a) and (7). However, under the current statute subsection (7) addresses child endangerment resulting in bodily injury that does not result in a serious injury. Iowa Code § 726.6(7) (2017) and Iowa Code § 726.6(8) (2021) are identical.

(App. pp. 4-5). Trial began on July 12, 2022, and after the State rested their case, Ms. Cole moved for directed verdict. (Jury Trial, 88:17-23). The State resisted the motion. (Jury Trial, 90:6-7). The District Court overruled Ms. Cole's motion. (Jury Trial, 92:6-7). The District Court acknowledged that the evidence was "somewhat conflicting." (Jury Trial, 91:15-16). After the Defense rested, they renewed their motion for directed verdict. (Jury Trial, 107:2-12). The State resisted and the District Court denied Ms. Cole's motion. (Jury Trial, 107:14-25). The District Court again acknowledged that there was conflicting testimony. (Jury Trial, 108:2-4).

The jury found Ms. Cole guilty of child endangerment. (Jury Trial, 131:20-24). Ms. Cole filed a motion for new trial and in arrest of judgment. (Motion for New Trial and Arrest of Judgment). The District Court overruled Ms. Cole's motion. (Sentencing Hearing, 4:1-18). The District Court also acknowledged that the evidence at trial was conflicting. (Sentencing Hearing; 4:10-14).

The parties came to a sentencing agreement. They agreed that Ms. Cole would receive a 187-day jail sentence with 180 days suspended. (Sentencing Hearing, 4:22-24). Ms. Cole served 7 days in jail at the outset of the proceedings. (Sentencing Hearing, 4:24-25). The State recommended Ms. Cole be placed on self-probation for two years and that Ms. Cole get a suspended fine of $855. (Sentencing Hearing, 5:1-8). The District Court ordered the sentencing agreement as stated by the parties. (Sentencing Hearing, 6:19-25). The District Court ordered Ms. Cole to pay court costs and set up a payment plan. (Sentencing Hearing, 7:8-19). (Order of Judgment and Sentence) (App. pp. 7-11). Ms. Cole filed a timely notice of appeal on September 28, 2022. (Notice of Appeal) (App. p. 12).

Facts:

On July 2, 2021, Ms. Cole lived in an apartment at 1009 South Hackett Road in Waterloo, Iowa, with her six children. She had four boys D, Q, O, and I, and two girls, C and S. That

morning, Ms. Cole woke up her two oldest children, D (age 12) and Q (age 10), and told them she was going to the store and put D in charge of watching his siblings. (Jury Trial, 100:21-22; 101:15-17). Ms. Cole took her youngest child, S (infant), with her to Walmart to get groceries at 11 A.M. (Jury Trial, 53:15-23; 40:8-12).

C (age 9) testified that she was awake when her mother told her that she was leaving the house and D was in charge while she was gone. (Jury Trial, 94:18-25). I (age 5) was sleeping when Ms. Cole left and there is no testimony regarding when O (age 7) woke up. (Jury Trial, 98:15). After Ms. Cole left, C and O started arguing because O was eating C's leftovers. (Jury Trial, 94:5-8). D informed the jury that C threatened to leave and D stopped C from leaving the apartment and fell back asleep. (Jury Trial, 102:7-20).

After D fell back asleep, C went outside to see if Ms. Cole returned so she could address the fight C had with O. (Jury Trial, 94:5-8; 97:13-14). Q was asking C to come back inside

and she refused to do so. (Jury Trial, 58:24-59:23). Q then went to his neighbor's apartment. (Jury Trial, 59:12-23). Jonathan Wheeler, Ms. Cole's neighbor, testified that he and his wife had an open-door policy with Ms. Cole and that "[a]ny time her kids needed us, they would just come over." (Jury Trial, 59:4-8).

Wheeler tried to help Q (age 10) get C (age 9) back inside the building. (Jury Trial, 60:23-25). According to Wheeler, C was stomping around and pacing outside the building. (Jury Trial, 61:3-6). Wheeler indicated that C did not walk out into the parking lot very far and was close to the stoop near the front door of the building. (Jury Trial, 61:17-23). He indicated that C both stayed close to the building and went to the edge of the parking lot or edge of the property. (Jury Trial, 64:1-8; 67:23-68:1). It is unclear if Wheeler meant the edge of the parking lot that was closest to the building or the far edge of the property. The State did not admit a map or diagram into

evidence to clarify Wheeler's testimony. However, Wheeler could see C while she was outside. (Jury Trial, 64:8-13).

C testified that she went outside because she was angry and wanted to see if her mom was home. (Jury Trial, 94:5-8). When she was ready to go back inside her brother Q had called the police. (Jury Trial, 95:10-14). C said she never went out into the parking lot and stayed outside by the front door. (Jury Trial, 95:15-22).

Wheeler let Q use his phone because Q was "freaking out" and Wheeler believed that Q would calm down if he called 911. (Jury Trial, 64:21-24). It is unclear what Wheeler meant by "freaking out." Q was not yelling or crying while speaking to the 911 dispatcher. (State's Ex. C.) Wheeler did not believe the children were in danger and he did not believe that the situation warranted a 911 call. (Jury Trial, 65:1-6). Wheeler told the dispatcher during the 911 call that he was able to help the kids out when they needed it. (Jury Trial, 65:18-24). (State's Ex. C, 4:13-4:17). Before ending the call, the

dispatcher confirmed with Wheeler twice that C was outside the building. (State's Ex. C., 6:06-6:08; 6:09-6:28).

Ms. Cole did not specifically ask Wheeler to come over and watch the children that morning. (Jury Trial, 59:9-11). However, Wheeler indicated that Ms. Cole did not need to tell him she was leaving most of the time because they had an open-door policy and the children knew that if something was wrong they could come ask him or his wife for help. (Jury Trial, 66:11-19).

Officer Shawn Bram was dispatched at 11:30 to the residence and he was the first officer to arrive. (Jury Trial, 28:12-19). When he got to the apartment complex, he saw several children outside by the front door. (Jury Trial, 28:22-25). Officer Bram thought there were three children outside of the building. (Jury Trial, 38:7-9). Officer Bram indicated that C (age 9) was outside the building. (Jury Trial:38:17-22).[2] It appeared that they were waiting outside for an officer to arrive.

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[2] As best that can be deduced, O and Q were outside of the building with C.

(Jury Trial, 39:3-8). The apartment complex requires a key or a card to enter the building. (Jury Trial, 38:25-39:2). The children explained that C got into an argument with her younger brother, she said she was going to run away, and she went outside. (Jury Trial, 29:9-13). No children were running around the parking lot and none of the children had run away. (Jury Trial, 39:15-19). None of the children were bleeding or hurt. (Jury Trial, 39:24-40:2; 63:20-25).

Officer Bram indicated that D (age 12) was sleeping when he arrived and Q (age 10) claimed to be in charge and informed him that there were no adults at home with them. (Jury Trial, 30:12-18; 46:10-16). D woke up after the police arrived and before his mom got home. (Jury Trial, 105:10-13). D pretended to be asleep while the police were at the apartment. (Jury Trial, 103:6-9). C confirmed that D went back to sleep after their mom left and was “fake sleeping” while the police were there. (Jury Trial, 98:16-20).

C had a cell phone with her and Officer Bram talked to her about her phone. (Jury Trial, 40:13-22). C testified that she gave Officer Bram her mother's phone number so he could call her. (Jury Trial, 41:3-7). Officer Bram could not remember if C gave him Ms. Cole's phone number. (Jury Trial, 41:1-13). Officer Bram believed that dispatch called Ms. Cole and she came home roughly 20 minutes later. (Jury Trial, 32:17-19). Officer Bram testified that the children were not able to show him how to get in touch with their mom and thought that their phone did not have service. (Jury Trial, 31:1-5). Officer Bram indicated that he did speak to C about her phone, but could not remember if he talked to her about the app she used to call her mother. (Jury Trial, 40:13-41:2). Officer Bram said he believed that C gave him Ms. Cole's number, but he could not remember. (Jury Trial: 41:3-7).

C testified that she had a cell phone, she knew how to use it, she knew her mother's phone number and could call her using an app on the cell phone. (Jury Trial, 96:2-10). C

had called her mom that morning and she called her again after the police got there. (Jury Trial, 96:11-20). D was aware that C had a phone and knew that it had their mother's phone number programmed into it. (Jury Trial, 103:18-104:1). D knew where the phone was and knew he could have used it to call his mom. (Jury Trial, 104:2-6).

Officer Bram was wearing his body camera and was recording when Ms. Cole came home from the store. (Jury Trial, 33:2-13). (State's Ex. A).[3] Ms. Cole entered through the door at 12:01:54 holding a baby in a baby carrier, a twelve pack of toilet paper, and several other grocery bags. (State's Ex. A, 12:01:54). Officer Bram can be heard asking Ms. Cole who was watching her children, and a young boy answers Officer Bram by saying "D[*****]." (State's Ex. A., 12:02:14-12:02:24). Ms. Cole tells Officer Bram that the children were asleep and their father was coming to the building as she was leaving. (State's Ex. A.) (12:02:14-12:02:24). Ms. Cole explains

[3] Officer Bram's body camera footage is limited to when he was inside Ms. Cole's apartment.

that the children's father needed some money to go to Casey's, and Ms. Cole gave him ten dollars. (State's Ex. A.) (12:02:30-12:02:42).

Officer Bram testified that Ms. Cole did not leave a note and it did not appear she left anyone to watch the children. (Jury Trial, 34:22-23). Officer Bram testified that he did not see the children's father around while he was at the apartment complex. (Jury Trial, 33:24-34:1).

A second police officer, Jamie Sullivan, was also dispatched to Ms. Cole's apartment. Officer Sullivan spoke with Ms. Cole and her body camera recorded the conversation. (State's Ex. B.) Ms. Cole admitted to leaving her children at home while going to the store: "But my 12-year-old [D] was here with them." (State's Ex. B., 12:06:40-12:07:20). Officer Sullivan did not speak to the children and only briefly spoke to Ms. Cole. (Jury Trial, 56:1-4). Officer Bram and Officer Sullivan stated that there is no law that establishes an age at

which a child can be left home alone. (Jury Trial, 45:3-6; 56:15-17).

Vera Wallican is a child protection worker with the Department of Human Services (DHS). (Jury Trial, 69:11-13). Wallican had two conversations with Ms. Cole, once at the jail and the other during a home visit after she was released from jail. (Jury Trial, 79:17-19). During the initial interview in the jail, Ms. Cole acknowledged that she left five of her children at home while she went to the store. (Jury Trial, 79:20-22). Ms. Cole left at around 11 A.M. and got a phone call from the police at around 11:30 A.M. and was asked to come home. (Jury Trial, 80:11-14). Ms. Cole informed Wallican that she woke up her two oldest sons to let them know she was going to the store. (Jury Trial, 80:17-20). During the jail conversation, after she had been arrested and DHS had gotten involved, Ms. Cole agreed that her children should not have been left home alone. (Jury Trial, 82:9-10; 83:8-11).

During their first conversation, Wallican learned that C was going through puberty. (Jury Trial, 79:23-25). Ms. Cole expressed that she was having difficulty disciplining C due to her emotional outbursts. (Jury Trial, 80:1-2).

ARGUMENT

I. The State did not present sufficient evidence to prove that Ms. Cole knowingly acted in a manner that created a substantial risk to the children's physical, mental, or emotional health.

Preservation of Error:

The court's power to review a challenge to the sufficiency of evidence on direct appeal arises out of the Iowa Constitution and statutory authority. State v. Crawford, 972 N.W.2d 189, 195 (Iowa 2022) (citing Iowa Const. art V, § 4 and Iowa Code § 602.4102(1)). A court on appeal can "review a criminal defendant's challenge to the sufficiency of the evidence on direct appeal notwithstanding any failure to preserve error in the district court." Crawford, 972 N.W.2d at 198.

Ms. Cole moved for directed verdict after the State rested their case and again after Ms. Cole rested her case. (Jury Trial,

88:17-23; 107:2-12). The District Court overruled Ms. Cole's motions. (Jury Trial, 92:6-7; 107:14-25). Ms. Cole filed a motion for new trial and in arrest of judgment (Motion for New Trial and Arrest of Judgment). The District Court overruled Ms. Cole's motion. (Sentencing Hearing, 4:1-18).

Standard of Review:

"We review the sufficiency of the evidence for correction of errors at law." State v. Buman, 955 N.W.2d 215, 219 (Iowa 2021) (quoting State v. Kelso-Christy, 911 N.W.2d 663, 666 (Iowa 2018)). "Substantial evidence exists when the evidence 'would convince a rational fact finder the defendant is guilty beyond a reasonable doubt." Kelso-Christy, 911 N.W.2d at 666 (quoting State v. Meyers, 799 N.W.2d 132, 138 (Iowa 2011)).

"In deciding whether the evidence is substantial, we view the evidence in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence." State v. Hickman, 623 N.W.2d 847, 849 (Iowa 2001). "[W]here the record contains substantial evidence, we

are bound by the jury's finding of guilt." Id. Evidence raising only "suspicion, speculation, or conjecture is not substantial." State v. Leckington, 713 N.W.2d 218, 221 (Iowa 2006). When a defendant's conviction is not supported by sufficient evidence, the defendant is entitled to have the conviction vacated. Crawford, 972 N.W.2d at 199.

Argument:

There was not substantial evidence viewed in the light most favorable to the State to find that Ms. Cole committed child endangerment in violation of Iowa Code § 726.6(1)(a) and (8). Ms. Cole did not *knowingly* act in a manner that *created a substantial risk* to a child's physical, mental, or emotional health or safety. Specifically, the evidence was lacking that (1) Ms. Cole knowingly created a risk, and that (2) Ms. Cole's actions actually created a substantial risk to her child's physical, mental or emotional health or safety.

The elements of child endangerment are as follows: 1) a person who is the parent, guardian, or person having custody

or control over a 2) child commits child endangerment when the person 3) knowingly acts in a manner that creates a substantial risk to a child's physical, mental, or emotional health or safety. Iowa Code § 726.6(1)(a) (2021). The Uniform Jury Instructions and the District Court vary the instructions slightly by specifying that a child is someone under the age of fourteen. (Jury Instruction 12) (App. p. 6). Neither party disputes that the five children that were left at home were under the age of fourteen and that Ms. Cole was their mother. (Jury Trial: 119:18-21).

A. Ms. Cole did not have the requisite intent to be found guilty of child endangerment.

Ms. Cole took appropriate steps to ensure that her children would be safe and could contact her in case of an emergency before going to the store. She did not knowingly act in a way that created a substantial risk of harm.

Iowa Supreme Court held that the term "knowingly" as it relates to child endangerment refers to the creation of a substantial risk of harm, not simply the act creating the risk.

State v. James, 693 N.W.2d 353, 356 (Iowa 2005); State v. Millsap, 704 N.W.2d 426, 430 (Iowa 2005) (holding the statute requires the defendant act with knowledge that they were creating a substantial risk to the child's safety).

Iowa Courts have held that child endangerment is a general intent crime. State v. Benson, 919 N.W.2d 237, 244-45 (Iowa 2018). "The State need not prove the defendant acted with desire to achieve the prohibited result. Instead, the State need only show that the prohibited result may reasonably be expected to follow from the circumstances presented." State v. Folkers, 941 N.W.2d 337, 340 (Iowa 2020) (quoting Benson, 919 N.W.2d at 244-45). "[K]nowledge may be proved not only by direct evidence, but also by reasonable inferences drawn from the circumstances surrounding the accident." Millsap, 704 N.W.2d at 430.

Iowa Courts have found that the knowledge requirement has been satisfied under a myriad of circumstances. See State v. Schlitter, 881 N.W.2d 830 (Iowa 2016) (holding that even if

Schlitter was not abusing the child, that he knew that the child was at risk of physical injury while in the care of his friend due to the obvious signs of physical abuse leading to the death of the child) (abrogated on other grounds by State v. Crawford, 972 N.W.2d 189 (Iowa 2022)); see also Millsap, 704 N.W.2d at 430-431 (holding that giving his nephews specific instructions on how to sit in the bed of the truck demonstrated Millsap appreciated the risks of riding there).

Before going to the store, Ms. Cole woke up her oldest two sons, aged twelve and ten, to let them know she needed to go to the store and that the twelve-year-old needed to watch his younger siblings. (Jury Trial, 100:21-22; 101:15-17; 80:5-8). C (age 9) testified she was awake and knew her mom was leaving to go to the store. (Jury Trial, 94:18-25). Q indicated that he woke C up after her mother left. (State's Ex. C., 1:02-1:43). D had watched his siblings before and knew if there was an emergency that he could go over to the neighbor's house to ask for help. (Jury Trial, 101:9-17).

Ms. Cole provided her children with a cellphone. (Jury Trial, 96:2-10). Officer Bram confirmed that the children had at least one cellphone and could not remember if they had two. (Jury Trial, 31:3-4). Ms. Cole's children knew that there was a cellphone at home and they knew how to contact their mother. (Jury Trial, 96:2-10; 103:18-104:1). C testified that she provided Officer Bram with her mother's phone number and that is how Officer Bram was able to notify Ms. Cole that he was at her home. (Jury Trial, 41:3-7).

Ms. Cole lived in a locked apartment building, meaning that no one could enter the building without a key. (Jury Trial, 28:22-25). This additional security measure is likely why the children were outside the building waiting for Officer Bram to arrive. (Jury Trial, 39:3-8).

Furthermore, Ms. Cole had an open door policy with her neighbors, the Wheelers. (Jury Trial, 66:11-19). They had an agreement where Ms. Cole's children could go over to their apartment if they needed anything while Ms. Cole was gone.

(Jury Trial, 66:11-16). The children were aware of this policy and knew they could go to Wheeler's apartment if there was an emergency. (Jury Trial, 101:13-20). Wheeler also testified that Ms. Cole did not need to inform either himself or his wife when she was leaving. (Jury Trial, 66:11-16).

Here, the State acknowledged that a twelve year old child is capable of babysitting in their closing arguments. (Jury Trial, 90:12-14).[4] When asked if "the five children there [were] responsible enough to have been left alone[?]", Officer Bram responded by saying, "[i]f the 12-year-old [D] was awake and taking care of his siblings, I would say probably yes, but the child was sleeping when I got there." (Jury Trial 46:7- 9). Given that D was twelve years old at the time and he previously babysat his siblings, this must be considered when determining if Ms. Cole knowingly created a risk to C or her children. (Jury Trial, 100:14-15; 101:15-17).

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[4] The Red Cross offers classes to children as young as 11 to start their own babysitting business. Babysitting & Child Care Education and Training, https://www.redcross.org/take-a-class/babysitting/babysitting-child-care-training.

The evidence is clear that D was sleeping while C got upset and went outside the building. (Jury Trial, 94:5-8; 97:13-14). However, Ms. Cole woke him up before she left and D fell back asleep at some point after she left. (Jury Trial, 94:18-25; 100:21-22; 101:15-17; 102:7-20). Both D and C said that D pretended to be asleep when Officer Bram arrived because he did not want to talk to police officers. (Jury Trial, 103:6-9; 98:16-20). The DHS worker testified that during an "honest, credible, and transparent conversation" with Ms. Cole, Ms. Cole told her she woke her two oldest sons before leaving the house. (Jury Trial, 80:5-8; 80:17-20).

The State argued that "[t]here was a substantial risk when the child who is undergoing emotional difficulties decided to run away." (Jury Trial, 91:3-5). The State did not present evidence that "the prohibited result may reasonably be expected to follow from the circumstances presented." Folkers, 941 N.W.2d at 340. There was some evidence presented that C was having relational issues with her brothers and that she

was having trouble with her emotional responses to situations. (Jury Trial, 79:25-80:2; 81:5-6). The State did not present any additional information about C. That alone is not enough for the State to meet its burden to show that Ms. Cole knew she had created a risk of substantial harm.

More information was needed to determine if the subsequent events were reasonably expected. There was no evidence that described how C acted during an emotional outburst or if there was a plan to help C calm down. There was no evidence of how frequently these emotional outbursts occurred. There was no evidence that there was conflict that morning before Ms. Cole left. There was no evidence to show if the kids previously got into fights while D babysat. There was no evidence presented that D had fallen asleep when he babysat his siblings before. There was no evidence presented that C had a history of threatening to run away or of actually running away. There was no evidence presented that the siblings regularly argued about food. There was no evidence

that the children had previous “emergencies” in the past where they needed to reach out to their neighbors. The State did not present evidence that demonstrated that Ms. Cole should have reasonably expected this disagreement to happen.

Ms. Cole expressed that she regretted her actions to DHS after she was arrested and charged with child endangerment. (Jury Trial, 82:9-83:4). Expressing regret to a DHS worker after the incident occurred does not establish the request mental intent for Ms. Cole to be found guilty of child endangerment. Expressing regret to a DHS worker, a person with the power to take her children away from her, after being arrested and charged with a crime does not create substantial evidence that Ms. Cole knew that things would go awry and chose to go to the store regardless.

Ms. Cole had a plan in place when she left to go to the grocery store to ensure that her children would be safe while she was gone. Because “knowingly” means she must know she was creating a risk, not merely knew she was committing the

act that created the risk, the State did not prove that Ms. Cole knowingly put her children at risk by leaving her five children, aged 12, 10, 9, 7, and 5, home together while she made a short trip to the grocery store for necessities. The children were in an apartment in a secured building, they had a cell phone to call her if they needed to, the oldest son had babysat his siblings before with no problems, she woke two of her oldest children up to let them know she was going, and she had an agreement with her neighbors and the children knew they could go to them for help if they needed it. Therefore, Ms. Cole did not knowingly create a substantial risk of harm.

B. Ms. Cole did not act in a manner that created a substantial risk to a child's physical, mental, or emotional health or safety.

The State did not demonstrate that there was a real or articulable risk to the children's physical health or safety. The Iowa Supreme Court defined substantial risk in State v. Anspach. It is "unnecessary to prove that the physical risk to a child's health or safety is likely. Rather a showing that the risk

is real or articulable will suffice." State v. Anspach, 627 N.W.2d 227, 232-233 (Iowa 2001). The Court further defined "substantial risk" in the context of child endangerment as "**the very real** possibility of danger to a child's physical health or safety." Id. at 233. (emphasis added).

Iowa Courts have held that the risk must be real or identifiable as opposed to speculative or conjectural. See State v. Folkers, 941 N.W.2d 337, 339 (Iowa 2020). However, the risk does not need to be "likely, probable, or statistically significant." Id. In this case, the State did not present evidence of a real, identifiable, or articulable risk of harm.

i. The State did not articulate a real or identifiable risk and instead relied upon conjecture and speculation.

The State struggled to articulate what exactly the risk of harm was under these circumstances. The State argued that there was no one at home that "could have prevented the emergency" and the children had "no choice but to call 911." (Jury Trial, 24:7-8; 24:24-25). After Ms. Cole moved for a directed verdict and motion for acquittal, the State argued that

the risk was no one was "in a position to prevent [nine-year old C] from leaving." (Jury Trial, 90:16-19; 91:9-10). The State further argued in closing arguments that D (age 12) was "not able to prevent bad things from happening." (Jury Trial, 117:15-19).

Iowa case law does not hold a parent, guardian, or caretaker criminally liable if they are unable to "prevent bad things from happening." Most importantly, "bad thing" is not an articulable risk. "Bad things" are not reasonably definite and does not sufficiently notify a criminal defendant what the allegedly prohibited conduct entails.

Furthermore, it is impossible as a parent to completely "prevent bad things from happening." It is impossible to remove all risk from any given situation. Accidents happen when parents, guardians, or babysitters are present and these accidents can happen even when someone in a position of care does everything right. In this case, there's no indication that anything would have happened differently even if Ms. Cole had

been home. Children get into silly arguments whether their parents are home or not. And there was no emergency—the worst thing that happened was that C walked around outside on a summer day.

The State never explicitly stated that the risk of harm applied only to C, but it did not argue that the risk of harm applied to any of the other children. The State references broadly that all the children were left alone, but only uses C as an example. Of the children that were home alone that day, C was the only girl and the State continually uses "she" pronouns during arguments.

Although the State argued "the children had no choice but to call 911," (Jury Trial, 24:24-25), this assertion was not supported by the record. Wheeler was never asked whether he or his wife had Ms. Cole's phone number. Further, Officer Bram and C both testified that C had a cell phone. (Jury Trial, 40:13-18; 96:2-3). C testified she knew how to reach her mother with the phone and gave her mother's phone number

to the officer, who called Ms. Cole. (96:4-17). Wheeler testified that he called 911 just to calm Q down, not because he thought the situation warranted an emergency call. (Jury Trial, 64:21-65:6).

Throughout trial, the State engaged in speculation and failed to meet its burden of production and persuasion. At the end of closing arguments, the State relied on conjecture and fear-based tactics to persuade the jury that nine-year-old C was at risk because she was walking around her own yard. "We don't need to wait until there's an Amber Alert. We don't need to wait until that child is snatched up by a stranger, until that child is just gone and there's hundreds of people combing the streets looking for her." (Jury Trial, 126:23-127:2). Anyone can engage in catastrophic thinking, but that does not mean that those tragic possibilities are real, identifiable, reasonably expected to follow, or even marginally likely to occur.

The State did not define who the risk applied to and what the risk was under these circumstances. The State clearly engaged in speculation and conjecture, and it does not meet the standard to convict Ms. Cole of child endangerment beyond a reasonable doubt.

ii. There was not a nexus between Ms. Cole's conduct and risk to the children.

The Iowa Supreme Court has generally found that there must be a nexus between the parental conduct and the creation of the substantial risk of harm to the child. This has been most clearly expressed with parental drug use cases. See State v. Folkers, 941 N.W.2d 337, 339 (Iowa 2020). In Folkers, the Iowa Supreme Court found that there was a nexus from the parental drug use to the substantial risk of harm to a child. Id. In that case, the parents used an "oversized butane torch to smoke illegal drugs and cigarettes in the home," which ultimately caused a fire. Id.

This idea is clearly represented throughout prior caselaw. In State v. Anspach, the Iowa Supreme Court found that the

defendant's conduct created a substantial risk because the children were not restrained with seatbelts and the defendant was recklessly driving. State v. Anspach, 627 N.W.2d 227, 234 (Iowa 2001). In State v. Fiems, the Iowa Court of Appeals found that a father committed child endangerment by locking his seven-year-old child in a bare basement for ten to twelve hours per night because the child did not have access to a bathroom, communication, or egress. State v. Fiems, No. 18-2186, 2019 WL 5428860, at *1 (Iowa Ct. App. October 23, 2019). In State v. Tewes, the Iowa Court of Appeals found that there was a substantial risk of harm to their children when they witnessed their father shove their mother. State v. Tewes, No. 20-0990, 2021 WL 4304240, at *3 (Iowa Ct. App. September 22, 2021). The Court explained that there are well documented consequences to an individual's mental health after witnessing domestic violence between parents. Id.

At the start of closing arguments, the State said that D was "not capable of watching [his] younger siblings." (Jury

Trial, 117:15-19). Leaving a 12-year-old child home alone to supervise siblings is not per se illegal conduct. The majority of Iowa case law on child endangerment addresses conduct which is illegal, such as physical abuse, sexual abuse, or drug use. Even in these instances where the underlying conduct is illegal, Iowa Courts have still required that a nexus exist between the conduct and the substantial risk to a child. Folkers, 941 N.W.2d at 339. Under these facts, there is not a nexus between Ms. Cole's conduct of leaving the children home alone with a twelve year old child in charge and the creation of a substantial risk.

Ms. Cole made an educated decision as a parent that her children could be left home alone while she went to the store for an hour. D was twelve years old at the time, he had watched his siblings before, they were in a locked apartment complex, and they had a cell phone they could use to contact Ms. Cole. She knew that if there was an emergency, the

neighbors would be able to help the children while she went to the store and came back.

While charging decisions are ultimately the decision of the State, it is worth noting that the Iowa legislature has defined what is necessary for an individual to be found guilty of child endangerment due to lack of supervision in Iowa Code § 726.6(1)(d) (2021). This statute provides that a parent commits child endangerment when they willfully deprive a child of necessary supervision which substantially harms the child or minor's physical, mental, or emotional health. Id. Critically, this statute requires substantial harm to result to sustain a conviction.

By the State's own admission "nothing bad happened." (Jury Trial, 128:5-9). There was repeated testimony from the State's witnesses that none of the children were injured, bleeding, or crying. (Jury Trial, 39:24-40:02; 63:20-64:4). Wheeler did not believe that he needed to call 911 because C never left his sight as she paced outside the apartment

building. (Jury Trial, 65:1-6). He only called 911 because he thought it would help Q feel better. (Jury Trial, 64:21-65:3). None of the children suffered substantial harm by being left home alone for an hour while their mother got toilet paper at Walmart, supporting the reasonableness of Ms. Cole's decision.

The State's argument relied upon an amorphous risk that was grounded in fear and conjecture. Iowa law requires that the risk be "a very real possibility of danger." Anspach, 627 N.W.2d at 233. It is unclear what exactly the risk was under these circumstances and what the real danger would be. It can be easy to speculate and engage in catastrophic thinking, but evidence raising only "suspicion, speculation, or conjecture is not substantial." Leckington, 713 N.W.2d at 221.

Conclusion:

There was insufficient evidence to find that Ms. Cole committed child endangerment even when viewing the evidence in the light most favorable to the State. The State did

not present sufficient evidence to show that Ms. Cole actually created a substantial risk to any of her children or that she did so knowingly. Therefore, Ms. Cole requests that her conviction be vacated and remanded for an entry of dismissal. Crawford, 972 N.W.2d at 199.

REQUEST FOR ORAL SUBMISSION

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.96, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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/s/ Ella M. Newell Dated: 05/24/23

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