IN THE SUPREME COURT OF IOWA
Supreme Court No. 22–1581

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAULA COLE,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Was the evidence sufficient to support conviction?

Authorities

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Iowa Dep't of Health & Hum. Servs., *Denial of Critical Care*, https://hhs.iowa.gov/child-abuse/what-is-child-abuse/denial-of-critical-care

ROUTING STATEMENT

The State concurs with Cole's routing statement. *See* Def's Br. at ___. The challenge raised in this appeal can be addressed by applying established legal principles. Therefore, transfer to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Paula Cole's direct appeal from her conviction for child endangerment, a serious misdemeanor, in violation of Iowa Code section 726.6(7) (2021). Cole left five children at home, unsupervised. One of those children left the family's apartment, barefoot. Another child responded to that by finding a neighbor and using their phone to call the police. When police confronted Cole about what she did, Cole initially lied to them—she told police that the children's father had arrived before she left. But the children had already told police that they hadn't seen their father in days. Cole later admitted that she knew that she shouldn't have left them alone. A jury found that Cole knowingly acted in a manner that had created a substantial risk to the children's physical, mental, or emotional health. She was sentenced to serve 7 days in jail (already served), and she was placed on probation with another 180-day jail term and an $855 fine suspended.

In this appeal, Cole challenges the sufficiency of the evidence to support her conviction for child endangerment.

Course of Proceedings

The State accepts Cole's statement of the course of proceedings as generally accurate. *See* Def's Br. at 8–10; Iowa R. App. 6.903(3).

Statement of Facts

On July 2, 2021, Black Hawk Police Department officers responded to an apartment complex because "a child had called in reporting that their sibling had run away." *See* TrialTr. 28:10–17.

That caller was Q. He was ten years old. Neither Q nor any of his siblings had a phone that they could use to call anyone for help, so Q had knocked on a neighbor's door and asked to use their phone. *See* TrialTr. 30:22–31:5; TrialTr. 37:6–17; State's Ex. C.

When police arrived, they found four unsupervised children outside of the apartment building. *See* TrialTr. 36:19–37:5; TrialTr. 38:20–39:14. The child who prompted Q's call to police was barefoot. She was nine years old. *See* TrialTr. 60:15–61:23. The children told the police that Cole was their mother, and that she went to Wal-Mart with their infant sibling. They also described what happened that led to Q borrowing the neighbor's phone to call the police:

> [T]hey told me that the female child had gotten into a disagreement with one of the other children in the apartment, and she said she was going to run away, and so she left. And the child that actually called, I believe he was a ten-year-old, *was worried for his sister's safety*, so he asked the neighbor if they could use their phone because Mom wasn't home . . .

TrialTr. 28:10–29:18 (emphasis added); *accord* TrialTr. 59:1–61:23.

There was a twelve-year-old child in the apartment. He was asleep when police arrived. *See* TrialTr. 29:22–30:8. An officer noted that the twelve-year-old child "never got up off the couch" while they were there, and he "seemed pretty tired." *See* TrialTr. 30:9–11. Of the other children, Q was the oldest. He told police that he was in charge while his mother was gone. *See* TrialTr. 30:12–21.

Police found a phone number for Cole. They called her and told her that she needed to return home. She said that she would. Before Cole arrived back at home, the children told police that they had not seen their father at all on that particular day. *See* TrialTr. 31:16–32:10.

Cole arrived back at the apartment about 20 minutes after she spoke to police on the phone (which was approximately "drive time" from that Wal-Mart back to her apartment). *See* TrialTr. 32:11–23. Cole told police that the children were all sleeping when she left. *See* State's Ex. A; TrialTr. 34:9–14. Cole initially told the officers that the

children's father was supposed to be supervising their children, and that she had left as he was arriving at the apartment. But when police told Cole that the children said they had not seen their father in days, she admitted that was a lie. *See* State's Ex. A; TrialTr. 34:15–35:3.

Police asked Cole what the children were supposed to do "if there was an emergency, if a child got hurt or burned or something," and Cole did not have "an answer for that." *See* TrialTr. 35:4–9. The neighbor said "nobody had asked [him] to watch [Cole's children]." *See* TrialTr. 37:6–17; *accord* TrialTr. 59:1–11; TrialTr. 61:24–62:8.

Cole spoke with someone over the phone, while police were present. In that conversation, she admitted that she knew that she should not have left those five children alone, unsupervised. *See* State's Ex. B. In a subsequent conversation, Cole elaborated on that:

> During our initial interview, we addressed the allegation. During that interview, Ms. Cole acknowledged leaving her children home alone with the exception of her youngest child. She acknowledged that [Q] had autism, and I was not aware of that prior to our interview. She also expressed that her daughter was experiencing puberty and because of that she was having some trouble with disciplining her emotional response to situations.
>
> [. . .]
>
> . . .[W]e talked about the things that I just referenced, her son's — her son's special needs which she identified, the issues with [her daughter]. She acknowledged that [her daughter] had some relational issues between the children,

> which happens . . . when kids are without an adult, sometimes they take advantage of that. So we talked about how she can ascertain as a parent when it's appropriate to leave her children alone, and my report documents that she was in agreement . . . that it was not appropriate to leave her children at home without an adult due to the reasons I just stated.

See TrialTr. 79:6–81:19; *accord* 84:23–86:20; TrialTr. 87:10–20. The court noted that, on the recorded 911 call, "[Q] did struggle to provide information when even asked direct questions." *See* TrialTr. 92:1–7; *accord* State's Ex. C.

The neighbor said that they had an open-door policy with Cole and her family, and they could call on him anytime they needed help without asking first. *See* TrialTr. 65:22–66:22. But that neighbor was not always home—he had a job (as did his wife). Cole could not know that one of them would be available to help her unsupervised children unless she had asked first—which she did not. *See* TrialTr. 67:4–12.

After Q came to his door, the neighbor saw Cole's eight-year-old daughter in the parking lot. She had "made it a little ways out of the parking lot, but she was heading off of the property at that time." *See* TrialTr. 67:20–68:1. This contradicted the daughter's testimony that she was just checking to see if Cole returned. *See* TrialTr. 93:25–97:15.

Additional facts will be discussed when relevant.

ARGUMENT

I. The evidence was sufficient to support conviction. A reasonable juror could determine that Cole knowingly left five children unsupervised and did not ensure that they had a way to contact her (or anyone else) for help, and that her action created a substantial risk to the children's physical, mental, or emotional health.

Preservation of Error

There is no longer an error-preservation requirement for challenges to sufficiency of the evidence on direct appeal. *See State v. Crawford*, 972 N.W.2d 189, 194–202 (Iowa 2022).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. That means evidence which, if believed, would be enough to "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). A reviewing court will "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

Merits

Cole argues that the evidence was insufficient to prove that she *knowingly* created a risk, and also insufficient to prove that her act of leaving five children unsupervised "actually created a substantial risk to [their] physical, mental, or emotional health or safety." *See* Def's Br. at 22. Both of these challenges fail, on the evidence in this record. The evidence establishes that Cole's acts *did* create a substantial risk to her unsupervised children's health and safety, and that Cole acted with full knowledge and awareness of that risk.

A. Leaving these five children unsupervised and without access to a phone or a key to the building created a very real risk to their health and safety.

"[T]he definition of 'substantial risk' in the context of child endangerment is: The very real possibility of danger to a child's physical, [mental, or emotional] health or safety." *State v. Anspach*, 627 N.W.2d 227, 233 (Iowa 2001). However, "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." *Id.* at 232–33.

Leaving children unsupervised is an act that sometimes creates substantial risk of harm, depending on the children and the situation. "Each situation is unique." *See* IOWA DEP'T OF HEALTH & HUM. SERVS.,

Denial of Critical Care, https://hhs.iowa.gov/child-abuse/what-is-child-abuse/denial-of-critical-care (accessed April 28, 2023). It was clear from the evidence at trial (and it would have been clear to Cole) that leaving these particular children unsupervised and without any way to call for help would create a real risk to their health and safety.

The twelve-year-old was the oldest, but he did not provide any level of supervision that would mitigate risks to the other children. He was either asleep and *unable* to supervise anyone, or "fake sleeping" and *unwilling* to supervise the other four children. *See* TrialTr. 29:22–30:11; TrialTr. 98:16–20. That meant ten-year-old Q was in charge—which is what Q told police. *See* TrialTr. 30:12–21; TrialTr. 46:4–16.

Q is an autistic child. *See* TrialTr. 84:23–87:20. It was apparent that Q had difficulty communicating. *See* TrialTr. 92:1–7; State's Ex. C. The next oldest child was Cole's eight-year-old daughter—and she was "experiencing puberty and . . . having some troubles disciplining her emotional response to situations." *See* TrialTr. 79:15–80:8. There was real (and foreseeable) risk that "relational issues between the children" would spiral into conflict that would endanger their physical safety or their mental or emotional well-being, in the absence of supervision. *See* TrialTr. 80:21–81:19. Indeed, that is what happened—there was a

conflict between two of the children. *See* TrialTr. 28:10–29:18. That almost became a physical fight. *See* State's Ex. C, at 1:16–1:42. Then, it caused Cole's nine-year-old daughter to leave the apartment and the building. By the time Q found and notified their neighbor, his sister was already "heading off of the property." *See* TrialTr. 67:20–68:1.

Cole had not talked to that neighbor, before she left. *See* TrialTr. 67:4–12. There is no evidence that Cole had any reason to believe that those neighbors were available to help her children, if they needed it.

Jurors could conclude that the unsupervised children did not have access to a phone that they could use to contact anyone for help. Cole offered testimony from her daughter. She said she had a phone that she could use, but that it was charging in her bedroom when she left the apartment building and when the police arrived. *See* TrialTr. 95:23–96:20. But that did not make sense. If she could just call Cole, then she would not need to leave the building to see if Cole returned. *See* TrialTr. 93:25–95:8. And Q would not have needed to borrow the neighbor's phone to call the police, nor would the children have told the officers that "they couldn't get ahold of their mom." *See* TrialTr. 28:10–29:18; *accord* TrialTr. 59:1–20 (neighbor stating that Q said that he "just wanted to use the phone"); *accord* TrialTr. 105:17–23.

There was a very real possibility that the neighbor and his wife would both be at work, or running errands, or otherwise unavailable. *See* TrialTr. 67:4–12. What then? Jurors could reasonably conclude that Cole's children would have no way to contact anyone for help, in the event of an emergency. And jurors could also infer that there was a real risk that Cole's nine-year-old daughter would have stormed out into streets and intersections, barefoot, without a phone in her pocket and without any other way to contact anybody to get help. *See* TrialTr. 67:20–68:1; *accord* TrialTr. 28:10–29:18 (noting that Q "was worried for his sister's safety"). And what would happen if other children left the building to look for her? In her brief, Cole argues that her children were safe in that building because nobody could enter without a key. *See* Def's Br. at 26 (citing TrialTr. 38:22–39:8). But that meant that if her children left, then they would be unable to re-enter the building—they would be locked out, without an adult to help them. That would give rise to further risks—like the ones recognized in *State v. Swift*:

> [W]e find ample evidence that Swift's actions created a substantial risk to the child's physical, mental, or emotional health or safety. Swift left her child, who was only six years old, unattended in a busy parking lot next to a busy intersection at dusk. No one besides Swift knew the child was waiting alone. The child could have been struck by a vehicle in the parking lot or in the intersection if he wandered away. The jury could also reasonably infer that

> the child could have become the victim of an ill-intentioned stranger who found him left alone with no one to protect him. *See Wood v. Commonwealth*, 701 S.E.2d 810, 816 (Va. Ct. App. 2010) (noting danger of driving children to "public parking lot surrounded by moving vehicles and strangers").

State v. Swift, No. 22–0231, 2023 WL 2674091, at *2 (Iowa Ct. App. Mar. 29, 2023); *accord State v. Wilson*, 287 N.W.2d 587, 588 (Iowa 1980) ("We thoroughly disapprove of defendant's leaving her child unattended . . . . No imagination is required to anticipate the harm which might have befallen the child."); *In re N.E.*, No. 21–0246, 2021 WL 4891008, at *3 (Iowa Ct. App. Oct. 20, 2021) (noting that mother "le[ft] young children alone" leading to "child-endangerment charges").

Note that it took Cole about 20 minutes to return, after she got the phone call from the police. *See* TrialTr. 32:11–23. So even if Cole's children *did* have a phone that could place calls, she would not have been able to help in the event of an injury or some other emergency. When police asked Cole what those children were supposed to do "if there was an emergency, if a child got hurt or burned or something," Cole simply did not have "an answer for that." *See* TrialTr. 35:4–9. It is important to note that Cole did not say that the children could have called 911 (or anyone else) in the event of an emergency. Jurors could infer that Cole had no answer because she knew they had no phone.

Leaving a 12-year-old unsupervised does not always create a substantial risk of harm. Likewise, leaving young children in the care and under the watchful supervision of an older child does not always create a substantial risk of harm. But the facts in this case established that these children had a particularized need for supervision, beyond what any 12-year-old could provide while sleeping (or "fake sleeping"). There were known patterns of "relational issues between the children." *See* TrialTr. 80:21–81:19. Cole's daughter was having "troubles with disciplining her emotional response" and Q was autistic (which meant impaired social and emotional processing). *See* TrialTr. 79:15–80:2. So there was a real risk that inter-sibling conflict could erupt, if these children were left unsupervised. Moreover, leaving these five children unsupervised *and without a phone* meant they had no way to contact Cole (or anyone else) for help, in case of a conflict or an emergency—or if they left the apartment building and locked themselves out. The jurors could apply their common sense and lived experience, and they could reasonably conclude that Cole's act of leaving these five children unsupervised and without a phone they could use to call for help was an act that created a substantial risk of harm to those children, under these circumstances. So this half of Cole's sufficiency challenge fails.

B. Jurors could infer that Cole lied to police because she knew that leaving her children unsupervised had created a real risk of harm, and that Cole was telling the truth when she described specific facts that would have enabled her to foresee that risk.

Iowa courts "interpret the word 'knowingly' in [section 726.6] to mean the defendant acted with knowledge that [she] was creating substantial risk to the [child's] safety." *See State v. Leckington*, 713 N.W.2d 208, 214 (Iowa 2006) (quoting *State v. James*, 693 N.W.2d 353, 357 (Iowa 2005)). Of course, "the defendant's knowledge may be proved not only by direct evidence, but also by reasonable inferences drawn from the circumstances." *See State v. Millsap*, 704 N.W.2d 426, 430 (Iowa 2005) (citing *State v. Miller*, 308 N.W.2d 4, 7 (Iowa 1981)).

Cole argues that, if leaving those five children unsupervised did create a substantial risk to their health or safety, then there was still insufficient proof that she knowingly created that risk. *See* Def's Br. at 23–31. But Cole is wrong. Start by considering Cole's own statements. She initially told a false story that was intended to establish that she *did not know* that those five children would be left unsupervised: that their father was just arriving to supervise them, as she was leaving. *See* State's Ex. A; TrialTr. 34:15–35:3. But the children had not seen him, and there was no other evidence that was consistent with that claim.

Jurors could infer that those were false statements, and that Cole had told that lie because she knew that she should not admit to leaving those children unsupervised for that length of time, because she knew that would mean admitting to exposing them to a real risk of harm. *See State v. Bloom*, 983 N.W.2d 44, 50 (Iowa 2022) (quoting *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993)) (explaining that fabrication can be a significant admission when it "indicates a consciousness of guilt").

Then, in the phone conversation, Cole admitted that she *knew* that she should not have left those five children unsupervised. But she still did it because she "didn't have nobody else to keep track" of them while she went to Wal-Mart. *See* State's Ex. B. And Cole said something similar during her subsequent interview with DHS: she agreed "that it was not appropriate to leave her children at home without an adult" due to facts about those specific children that Cole already knew and understood, before she left them alone. *See* TrialTr. 79:6–81:19. Cole argues that "[e]xpressing regret" in that conversation is not enough to establish the requisite mental intent. *See* Def's Br. at 30. But the jury could arrive at a different view of that evidence. They could believe that Cole was "very honest, credible, [and] transparent" in her agreement that she should not have left those children unsupervised, based on

the facts that she knew before she left (which she had described to the DHS caseworker, during their discussions). *See* TrialTr. 79:10–81:19. That testimony about those conversations was not just direct evidence that Cole knew it was "not appropriate to leave her children at home without an adult due to [those] reasons." *See* TrialTr. 81:14–19. It was also evidence that she knew that Q was autistic, that her daughter was experiencing difficulty regulating emotional responses and reactions, and that there were "some relational issues between the children." *See* TrialTr. 79:10–81:19. Even standing alone, that would be sufficient to support a reasonable inference that Cole knew that her actions created a substantial risk of harm to her unsupervised children, because she "knew the facts and circumstances that created the risk." *See James*, 693 N.W.2d at 356–57; *accord Millsap*, 704 N.W.2d at 430–31; *see also State v. Fiems*, No. 18—2186, 2019 WL 5428860, at *1 (Iowa Ct. App. Oct. 23, 2019) (citing *Millsap*, 704 N.W.2d at 430).

On this half of Cole's challenge, *Swift* is directly on point:

> Swift contends on appeal that she "did not think she was placing the child in a dangerous situation." Yet she acknowledged at trial that she "screwed up" by leaving the child unattended in the parking lot and that she "could have made a better decision." [FN: Her acknowledgment shows that this is not a case where a parent was exposed to criminal liability for consciously choosing to give their child a "long leash." [citation omitted]]

Swift, 2023 WL 2674091, at *3 & n.1. Here, when Cole argues that she "made an educated decision as a parent that her children could be left home alone while she went to the store for about an hour," that claim is foreclosed by evidence that established that she lied to the police. She initially told them that she believed that their father was coming to watch them, and that she did not intend to leave them home alone. *Compare* Def's Br. at 38, *with* State's Ex. A, *and* TrialTr. 34:15–35:3. Jurors could infer that if Cole had believed that there was no real risk, then she would have explained that to the officers (and to DHS). But when Cole chose to lie to the police instead, that was strong proof that she knew that she could not plausibly claim that she had believed that it was appropriate to leave those five children unsupervised. *See Bloom*, 983 N.W.2d at 50 (quoting *Cox*, 500 N.W.2d at 25). And her argument is also undermined by her statements on the recorded phone call and in her conversations with DHS, in which she admitted that she knew that she should not have left those children unsupervised (instead of defending that decision as an act of free-range parenting). *See* State's Ex. B; TrialTr. 79:10–81:19; *Swift*, 2023 WL 2674091, at *3 & n.1.

Beyond Cole's statements, there is also common sense. There are risks of injury from everyday household items, especially when

used by a five-year-old in unsupervised play. Any parent would know that it would be extremely risky to leave those children unsupervised and without a phone that they could use to call for help, in the event of a break, a cut, a burn, or a concussion (to name a few possibilities). Any juror would understand that Cole had assumed a substantial risk that her unsupervised children might injure themselves and that their neighbors might not be available to offer them a phone to dial 911. It was "easily foreseeable" that leaving those children unsupervised and without a real phone would create substantial risks to their safety. *See Millsap*, 704 N.W.2d at 431. Cole knew it, too—she knew that she had no answer to simple questions about what her children would be able to do "if there was an emergency, if a child got hurt or burned." *See* TrialTr. 35:4–9. Add that to the substantial risk of harm from conflict between these children, which arose from facts that Cole described in conversations with DHS. *See* TrialTr. 79:10–81:19. Cole already knew all of those facts that created that risk, and "[t]hat is all the State was required to prove: defendant's knowledge that the children were in a position of substantial risk." *See Millsap*, 704 N.W.2d at 431.

The evidence at trial was sufficient to support that inference and support this conviction. Thus, Cole's challenge fails.

CONCLUSION

The State respectfully requests that this Court reject Cole's challenge and affirm her conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to 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 **4,095** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: May 24, 2023

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