

**IN THE COURT OF APPEALS OF IOWA**

No. 3-362 / 12-1146  
Filed June 12, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BILLIE JO OSBORN,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Ringgold County, Randy V. Hefner,  
Judge.

Billie Jo Osborn appeals from her conviction of child endangerment.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney  
General, and Clinton L. Spurrier, County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

**DANILSON, J.**

Billie Jo Osborn appeals from her conviction of child endangerment, in violation of Iowa Code section 726.6(1)(a), (1)(h), and (7) (2011), arguing the evidence did not establish she knowingly subjected her children to a substantial risk of harm or that she knowingly allowed unsupervised access by a person on the sex offender registry. She also asserts her trial counsel was ineffective. We conclude there was substantial evidence to uphold the conviction and counsel was not ineffective. We affirm.

**I. Background Facts and Proceedings.**

A review of the record shows that a reasonable jury could find that Billie Jo Osborn resided with Harvey Roach Jr., who was convicted in 1997 of sexually abusing his thirteen-year-old stepdaughter. Roach went to prison upon his conviction and did not participate in sexual abuse education programming offered. Upon his release, he was required to register as a sex offender. He was later convicted for failing to register as a sex offender.

From August 2008 through August 2010, the department of human services (DHS) was involved with Osborn and her three children (one of Osborn's daughters was then fifteen years old) in child-in-need-of-assistance (CINA) proceedings because Osborn was living with Roach. During those proceedings, Osborn was told that Roach had sexually abused his teenage stepdaughter and that Roach was a threat to Osborn's children's safety.<sup>1</sup> A

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<sup>1</sup> Social worker Stacy Westphal opined it was not safe for the children to be around Roach because he was on the sex offender registry, he had had no treatment for his conviction, there was no sex offender risk assessment indicating he was not a risk, and

protective order was issued prohibiting contact between Roach and Osborn's children. When Osborn failed to abide by the no-contact order, a protective order was entered prohibiting contact between Osborn or her husband and Roach. The protective order terminated when the CINA case was closed in August 2010.

Roach was still required to register as a sex offender as of February 2011. On February 8, 2011, a child protective investigation was conducted upon receipt of information that Osborn's children and husband (from whom she was separated) had moved in with her and Roach. Osborn and her husband would not concede to DHS that the children had moved in, only that "the children had been staying overnight at the home of Billie and Harvey Roach, Jr." Osborn did not tell the DHS investigator that she ensured that the children were supervised at all times when around Roach.

Osborn was charged with child endangerment.

At trial, Osborn's eleven-year-old son, T.O., testified that while staying in the house where his mother and Roach resided, T.O. would sometimes sleep on the couch in the living room and his then five-year-old sister, A.O., would sometimes sleep on a bed in an area off the kitchen. He also testified that he shoveled snow with Roach and was not accompanied by either of his parents when doing so. T.O. testified his mother had told him it was not okay to be around Roach by himself. But, "[a]s long as I'm around, you could be around him."

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the age of his victim was close to the age of Osborn's oldest daughter, R.O., at the time of the CINA proceedings.

Deputy Shannon Arends accompanied the DHS child abuse investigator to Osborn's house on February 8, 2011. At trial, Arends testified "[Osborn's] response [to DHS questions as to whether the children were left unattended] was there were times that the children had been left unattended, but she did try to minimize those times."

The jury was instructed that the State was required to prove all the following elements of the crime of child endangerment:

1. On or about the week of the 2nd day through the 8th day of February, 2011, the Defendant was the parent of [A.O.] and/or [T.O.]
2. [A.O.] and [T.O.] were each under the age of fourteen years.
3. The Defendant either:
  - a. acted with knowledge that she was creating a substantial risk to [A.O.'s] or [T.O.'s] physical, mental or emotional health or safety,
  - or
  - b. allowed Harvey Ray Roach, Jr. to have custody or control of, or unsupervised access to, [A.O.] or [T.O.], knowing Harvey Ray Roach, Jr. was a registered sex offender.

The jury was also instructed, "For a person to have custody of a child means that the person has the right or ability to make decisions about the child's protection or care, or can exercise restraint over the child." And further that "[f]or a person to have unsupervised access over a child means that the person has the ability to have contact with the child without oversight of the child's parent or caretaker."

Osborn was convicted of child endangerment and now appeals. She contends the evidence did not establish she knowingly subjected her children to a substantial risk of harm, or that she knowingly allowed unsupervised access by

a person on the sex offender registry. She also claims trial counsel was ineffective in failing to challenge section 726.6(1)(h) as violating the Due Process and Equal Protection Clauses of the Iowa and United States Constitutions.

## **II. Scope and Standard of Review.**

We review challenges to the sufficiency of evidence for errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We consider all the record evidence, viewing it “in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.” *Id.* (internal quotation marks and citation omitted). We uphold a verdict if supported by substantial evidence. *Id.* “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.” *Id.*

Claims of ineffective assistance of counsel are based upon a defendant’s right to counsel guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We review constitutional issues de novo. *State v. Mitchell*, 757 N.W.2d 431, 434 (Iowa 2008).

## **III. Discussion.**

Osborn was charged with violating Iowa Code section 726.6, which provides in pertinent part:

1. A person who is the parent, guardian, or person having custody or control over a child or a minor under the age of eighteen with a mental or physical disability, or a person who is a member of the household in which a child or such a minor resides, commits child endangerment when the person does any of the following:
  - (a) Knowingly acts in a manner that creates a substantial risk to a child or minor’s physical, mental or emotional health or safety.

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(h) Knowingly allows a person custody or control of, or unsupervised access to a child or a minor after knowing the person is required to register or is on the sex offender registry as a sex offender under chapter 692A. However, this paragraph does not apply . . . to a person who is married to and living with a person required to register as a sex offender.

With respect to subparagraph (a), “[w]e interpret the word ‘knowingly’ in this statute to mean ‘the defendant acted with knowledge that [he or] she was creating substantial risk to the child’s safety.’” *State v. Leckington*, 713 N.W.2d 208, 214 (Iowa 2006) (quoting *State v. James*, 693 N.W.2d 353, 357 (Iowa 2005)).

On appeal, Osborn contends the evidence does not establish that she knowingly subjected her children to a substantial risk of harm (subparagraph (a)) or that she knowingly allowed unsupervised access by a person on the sex offender registry (subparagraph (h)). She argues that because the evidence was insufficient on both theories, we must reverse and remand for dismissal. In the alternative, she contends that if we find there is sufficient evidence of one theory, but not the other, we must remand for a new trial.

The State responds, arguing the evidence is sufficient to sustain either or both alternatives of child endangerment. And even if there is an insufficient factual basis for one theory, the conviction should stand.

*A. Sufficiency of the evidence.*

We will affirm the denial of a motion for judgment of acquittal if substantial evidence in the record supports each element of the offense challenged by the defendant. “Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” In making this assessment, we consider all the evidence, and we view it in the light most favorable to the State.

*State v. Sayles*, 662 N.W.2d 1, 3 (Iowa 2003) (citations omitted).

Viewed in the light most favorable to the State and indulging all reasonable inferences, we conclude there is minimally sufficient evidence to sustain the conviction under either theory alleged. Under subparagraph (a) of section 726.6(1), one commits child endangerment when the person “[k]nowingly acts in a manner that creates a substantial risk to a child or minor’s physical, mental or emotional health or safety.” The jury could find Osborn knowingly created a substantial risk of harm to her children by their living with a convicted child sex offender. “[I]t is the appreciation of the risk to the child or minor posed by one’s conduct that creates criminal culpability under this statute.” *State v. Millsap*, 704 N.W.2d 426, 430 (Iowa 2005). Osborn was informed by DHS workers involved in the prior CINA proceeding that Roach posed a threat to her children. Osborn told DHS workers she did not believe Roach posed a risk of harm to her children and did not take precautions to keep Roach away from the children. In fact, T.O. testified he called Roach “Dad Junior.” R.O. called Roach’s parents grandma and grandpa.

However, Osborn’s contention that Roach did not pose a threat to her children is juxtaposed to T.O.’s testimony that Osborn told him he could be around Roach “[a]s long as I’m around.” T.O. testified that his father told him he wasn’t to tell anyone that he was living with Roach. From this evidence a reasonable jury could infer that Osborn understood Roach posed a risk to the safety of her children and nonetheless allowed her children to live with him. See *Millsap*, 704 N.W.2d at 430 (noting a defendant’s knowledge may be proved not

only by direct evidence, but also by reasonable inferences drawn from the surrounding circumstances). The statute does not require actual harm come to the child; knowingly creating a risk of harm is sufficient. See *State v. Anspach*, 627 N.W.2d 227, 232-33 (Iowa 2001).

Turning to subparagraph (h) of section 726.6(1), we observe that the subparagraph appears to embody the legislative determination that allowing unsupervised access to a registered sex offender creates a risk of harm to a child. See *State v. Mitchell*, 757 N.W.2d 431, 438 (Iowa 2008) (“It follows that sex offenders who cohabit with a person with control or custody of his or her minor children also share living quarters with the children and have joint use of the children's home. This living arrangement allows the sex offender access to the children in their home, a place traditionally and constitutionally protected from public intrusion. It also potentially allows unlimited and unmonitored access to children during those early morning and nighttime hours typically devoted to private activities such as bathing, changing clothes, and bedtime. It is this access the State seeks to control.” (citation omitted)). As such, a violation of subparagraph (h) may also constitute a violation of subparagraph (a).

In any event, under subparagraph (h) of section 726.6(1), one commits child endangerment when the person “[k]nowingly allows a person custody or control of, or unsupervised access to a child or a minor after knowing the person is required to register or is on the sex offender registry as a sex offender.” Osborn does not challenge that she knew Roach was on the sex offender

registry. She argues that there is not sufficient evidence Harvey had unsupervised access to her children.

The State's theory is that there was no way Harvey could *not* have had unsupervised access at some point under the circumstances. We need not decide whether that claim would suffice because T.O. testified he did spend time with Harvey shoveling sidewalks when neither of his parents was present. Roach testified that while he and T.O. were shoveling, even if T.O.'s parents were watching out the window, "they wasn't looking out for the hour and a half, two hours straight." Moreover, the evidence establishes that each child, on occasion, slept in an area of the home, or was otherwise in a place where Roach could have had unsupervised access to the child. R.O. testified that A.O. always slept in her bed, but T.O. testified A.O. would sometimes sleep on a bed in an area off the kitchen. T.O. also testified he would sometimes sleep on the couch in the living room. There was no evidence that the rooms in which the children slept were locked or otherwise inaccessible to Roach. R.O. testified there was no plan discussed to ensure A.O. and T.O. were supervised.

We believe the evidence presented—"along with a good dose of common sense," *see Leckington*, 713 N.W.2d at 214—would enable a rational trier of fact to conclude that Osborn knowingly created a substantial risk to her children's physical or emotional safety and knowingly allowed unsupervised access to the children by Roach, a convicted child sex offender. We therefore affirm the conviction.

*B. Ineffective assistance of counsel.* Osborn also asserts her trial counsel breached an essential duty by not challenging Iowa Code section 726.6(1)(h) as violating due process and equal protection under the state and federal constitutions.

Substantive due process prevents the government “from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” With a substantive due process claim, we follow a two-stage analysis. First, we determine the nature of the individual right involved, then the appropriate level of scrutiny. If the right at issue is fundamental, strict scrutiny applies; otherwise, the state only has to satisfy the rational basis test. When the rational basis test applies, there need only be a “reasonable fit” between the legislature’s purpose and the means chosen to advance that purpose. We have said that “[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in th[e] field [of substantive due process].”

*King v. State*, 818 N.W.2d 1, 31 (Iowa 2012) (internal citations omitted).

As for a claim of violation of equal protection, “[t]he Fourteenth Amendment to the United States Constitution and article I, section 6 of the Iowa Constitution provide individuals equal protection under the law. This principle requires that ‘similarly situated persons be treated alike under the law.’” *Mitchell*, 757 N.W.2d at 435-36. To allege a viable equal protection claim, there must be an allegation that similarly situated persons are treated differently. *See King*, 818 N.W.2d at 24. Iowa Code section 726.6(1)(h) makes a distinction between unmarried parents or guardians who allow a registered sex offender access their children with those married to a registered sex offender. “But for the marriage distinction, the parents are similarly situated. The statute is, therefore, subject to equal protection review.” *See Mitchell*, 757 N.W.2d at 436.

*Level of scrutiny.* Defendant's ineffectiveness claim is premised upon her contention that the statute treats married and unmarried persons differently and should be subject to strict scrutiny. This premise is contrary to existing legal precedent, which has not been undermined. In *Mitchell*, the court stated, "because this court has not recognized unmarried persons as a protected class, the statute is subject to rational basis review."<sup>2</sup> *Id.* Consequently, both Osborn's due process and equal protection challenges are subject to the rational basis test.

*Due process.* Because the rational basis test applies, there need only be a "reasonable fit" between the legislature's purpose and the means chosen to advance that purpose. *King*, 818 N.W.2d at 31. The legislature's purpose in enacting Iowa Code section 726.6(1)(h) was to "protect children from sex crimes by minimizing sex offenders' access to children where and when they are most vulnerable." *Mitchell*, 757 N.W.2d at 438. Prohibiting children from living with sex offenders is rationally related to that purpose.

*Equal protection.* The *Mitchell* court found the former section 726.6(1)(h) did not violate equal protection. 757 N.W.2d at 439. The court wrote:

The legislature could have reasonably determined its chosen classification scheme [for Iowa Code section 726.6(1)(h)], which differentiates between cohabitants who are married and those who are unmarried, would rationally advance the government objective of protecting children from sex offenders. "The court's power to declare a statute or ordinance unconstitutional is tempered by the

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<sup>2</sup> The defendant argues strict scrutiny is required because the statute "interferes with the fundamental right of marriage," but does not explain how "subjecting unmarried persons to criminal punishment for conduct that is not criminal when performed by a married person" does so. She later argues that the statute interferes with a person's fundamental right *not* to marry, but offers no authority for the proposition.

court's respect for the legislative process. Under the rational basis test, we must generally defer to . . . legislative judgment." Under the rational basis test we conclude the statute does not violate the Equal Protection Clauses of the United States and Iowa Constitutions.

*Mitchell*, 757 N.W.2d at 438-39.

We acknowledge that violation of the former section 726.6(1)(h) at issue in *Mitchell* occurred when an unmarried person's "[c]ohabits with a person after knowing the person is required to register or is on the sex offender registry," whereas the current statute prohibits "[k]nowingly allow[ing] a person custody or control of, or unsupervised access to a child." But the *Mitchell* court noted that one aspect of cohabitation was the joint use and ownership of property and resulting shared living quarters, which

allows the sex offender access to the children in their home, a place traditionally and constitutionally protected from public intrusion. It also potentially allows unlimited and unmonitored access to children during those early morning and nighttime hours typically devoted to private activities such as bathing, changing clothes, and bedtime. It is this access the State seeks to control.

*Id.* at 438. The reasoning then employed to uphold the statute equally applies to the current version (which, in fact, seems to more closely address the concerns of shared access and control noted in *Mitchell*).

From [*State v. Kellogg*, 542 N.W.2d 514 (Iowa 1996),] we can also discern that cohabiting is more than simply living together, even though it is not tantamount to marriage. Along with sharing living quarters and expenses and joint use of property, we have identified "sexual relations," "[t]he continuity of the relationship," and "[t]he length of the relationship" as appropriate considerations for determining whether a couple is cohabiting. *Id.* at 518. These considerations indicate that, in a cohabiting relationship, the sex offender may have some financial obligation and stake in the children's well-being, but we do not believe that these considerations compel us to find that a cohabiting sex offender

would have a financial obligation and stake in the children's well-being as great as that of a stepparent. The legislature could reasonably conclude that unmarried cohabitation of a parent with a sex offender poses greater danger to children than cohabitation between married persons.

*Mitchell*, 757 N.W.2d at 438.

Applying a rational basis test, the *Mitchell* court determined former Iowa Code section 726.6(1)(h) did not violate Equal Protection Clause in treating married and unmarried persons differently. *See id.*

Defendant has failed to prove counsel's performance was deficient in *not* raising a claim contrary to recent legal precedent.<sup>3</sup> *Cf. State v. Clay*, 824 N.W.2d 488, 496 (Iowa 2012) ("Competent representation requires counsel to be familiar with the current state of the law.").

Because substantial evidence supports Osborn's conviction, and we reject her constitutional challenges to Iowa Code section 726.6(1)(h), we affirm the child endangerment conviction.

**AFFIRMED.**

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<sup>3</sup> Moreover, if *Mitchell* is to be revisited, that task is not for this court. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."); *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent.").