IN THE COURT OF APPEALS OF IOWA

No. 8-052 / 06-0946
Filed May 14, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JENNY L. PARKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Defendant appeals her convictions for child endangerment causing bodily injury and neglect of a dependent person. **AFFIRMED.**

Christopher Kragnes of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Baker, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

This case arises from Jenny Parker's failure to intervene on behalf of her daughter while the child was subjected to a series of abusive acts by her father. The district court found Jenny guilty of child endangerment resulting in serious injury, and neglect of a dependent person. She appeals and we affirm.

I. Background Facts & Proceedings

Jenny and Robert Parker are the parents of J.P. and L.P. On February 9, 2005, Robert got "really mad" at thirteen-year-old J.P. because she ate a carton of yogurt without permission. Robert dragged J.P. into the computer room, where Jenny was sitting at the computer, and started hitting and kicking her. J.P. tried to get away, but Robert picked her up and threw her down on the floor. He then dragged J.P. again, and her head hit a door. Robert threw J.P. on the stairs and kicked her on the leg, causing a large bruise. J.P. was diagnosed with post-traumatic stress disorder after this incident.

L.P., who was then eight years old, hid behind a chair and witnessed the incident. He stated Robert and J.P. argued for a few minutes before Robert grabbed her. L.P. testified Jenny was in the room and working on the computer, "[b]ut then she turned around and watched it, too, because she was also scared." He stated that during the incident J.P. was "bloody mercy screaming really loud." Jenny did not do anything to stop the incident. L.P. stated, "[Jenny] tried to cover her ears because she didn't want to hear [J.P.] getting hurt." After the incident Robert and Jenny talked together. L.P. went upstairs to check on his sister's welfare, but neither parent checked on J.P. that evening.

The next day, J.P. discussed the incident with the school nurse. The Iowa Department of Human Services was contacted and a removal order for the children was obtained. Robert called the school, and a social worker told him both children were going to be removed. When L.P. got home from school Jenny told him "to hurry up and go out to the car and get in it." Robert then took L.P. to an aunt's house. When police officers arrived at the house to remove L.P., Jenny and Robert refused to disclose his whereabouts. However, police officers soon located L.P. and took him to the shelter where J.P. had already been taken.

On March 17, 2005, Robert was charged with child endangerment causing bodily injury and neglect of a dependent person. On June 16, 2005, the same charges were filed against Jenny. Both parents waived their right to a jury trial. On January 31, 2006, the State filed a motion to consolidate the cases. Jenny objected, stating her defense theory was based on the fact the cases would not be tried together. The district court granted the motion to consolidate. The court noted that since the case was being tried to the bench, it would have the ability to separate out the acts allegedly committed by Robert from those allegedly committed by Jenny.

After the trial the district court entered written findings of fact and conclusions of law. The court found Jenny guilty of child endangerment causing bodily injury. The court found Jenny "knew that her husband's attack on J.P. created a substantial risk to the children's physical, mental or emotional health or safety based upon the raw brutality of the violence," but she did nothing to protect her children. *See* Iowa Code § 726.6(1)(a) (2005). The court also found

Jenny "willfully deprived both children of necessary supervision appropriate to their age" because she failed to protect the children. *See* Iowa Code § 726.6(1)(d).

In addition, the court found Jenny guilty of neglect of a dependent person, in violation of section 726.3. The court found Jenny "knowingly exposed J.P. to a hazard or danger." The court noted, "defendant's ongoing complicity with her husband's violence is also illustrated by her actions the next day, when she assisted in hiding L.P. from the authorities."

Jenny filed a motion for new trial, which was denied by the district court. She was sentenced to a term of imprisonment not to exceed five years on the child endangerment charge and ten years on the neglect of a dependent person charge. Both sentences were suspended and Jenny was placed on probation for two years. She now appeals her convictions.

II. Consolidation of Trials

Jenny contends the district court abused its discretion by consolidating her trial with that of Robert. She asserts she was prejudiced because evidence of Robert's prior bad acts was admissible against him, and she believes this evidence was also considered against her.[1] She claims the State's motion to consolidate was not timely. She also asserts that she should have been permitted to introduce evidence of domestic violence by Robert against her to show the reason she failed to act was because of fear of bodily harm to herself.

Iowa Rule of Criminal Procedure 2.71 provides:

[1] Evidence was presented that Robert was convicted of assault causing bodily injury after he struck J.P. several times with a stick in 1999.

> Two or more defendants who are alleged to have participated in the same transaction or occurrence or series of transactions or occurrences from which the offense or offenses charged arose may be tried jointly whether the defendants are charged in one or more complaints. Jointly tried complaints or defendants shall be adjudged separately. Complaints or defendants shall not be jointly tried as to a party if the court finds, in its discretion, that prejudice would result to the party.

Rule 2.71 vests discretion with the district court to determine whether defendants should be tried jointly or separately. *State v. Belieu*, 288 N.W.2d 895, 900 (Iowa 1980). We review a district court's decision to consolidate or sever trials for an abuse of discretion. *Id.* "To establish an abuse of discretion, a defendant must show sufficient prejudice to constitute denial of a fair trial." *State v. Leutfaimany*, 585 N.W.2d 200, 203 (Iowa 1998).

It is not sufficient to show hostility between co-defendants. *Belieu*, 288 N.W.2d at 900. Also, the effort by one co-defendant to implicate another co-defendant does not in itself demonstrate prejudice. *Id.* "To result in prejudice preventing a fair trial, the defenses must be more than merely antagonistic, they must conflict to the point of being irreconcilable and mutually exclusive." *Leutfaimany*, 585 N.W.2d at 203.

The trials of co-defendants should be severed in two circumstances: (1) the trial is so complex and the evidence so voluminous the jury will be confused and cannot compartmentalize the evidence; and (2) the evidence admitted by or against one defendant is so prejudicial to a co-defendant, the fact-finder is likely to improperly use it against the co-defendant. *State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998). Jenny raises the second ground here, claiming evidence of Robert's prior bad acts was improperly used against her.

During the trial Jenny objected to the admission of evidence of prior bad acts by Robert, pointing out that the evidence was not relevant to the criminal case against her. The district court stated several times that it would not consider the evidence in connection with Jenny. ("So I'm not going to allow testimony that impacts or applies to Mr. Parker to have an adverse impact on Mrs. Parker."). We note "the likelihood of an improper use of the evidence is reduced by the fact that the present case was tried to the court." *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004). Jenny has not shown the evidence of Robert's prior bad acts was improperly used against her.

We conclude Jenny has failed to show sufficient prejudice to constitute denial of a fair trial. A review of the record shows Jenny has failed to preserve error on her claims the motion to consolidate was untimely and that she was prohibited from introducing evidence helpful to her defense. Because Jenny failed to raise these issues before the district court we determine they have not been preserved for our review. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997). We find the district court did not abuse its discretion by denying Jenny's objection to the State's motion to consolidate.

III. Sufficiency of the Evidence

Jenny contends there is insufficient evidence in the record to support her convictions for child endangerment causing bodily injury or neglect of a dependent person. We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Schmidt*, 480 N.W.2d 886, 887 (Iowa 1992). A guilty verdict is binding on appeal, unless there is not substantial

evidence in the record to support it, or the verdict it clearly against the weight of the evidence. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* The trial court's decision will be viewed on appeal in the light most favorable to the result reached. *State v. Talbert*, 622 N.W.2d 297, 301 (Iowa 2001).

A. Jenny contends the State did not present sufficient evidence to support her conviction for child endangerment under section 726.6(1)(a), which requires a finding that the defendant "[k]nowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety." She asserts there was insufficient evidence to show that the incident took place over sufficiently long period of time that she would have had time to intervene. She claims this was a very sudden and short burst of anger and aggression by Robert, and she did not have sufficient time to react.

The evidence, however, does not show Robert struck J.P. one time, but that the incident took place over several minutes. J.P. and L.P. testified the incident contained several different elements. First, J.P. and Robert argued for a few minutes, then Robert grabbed J.P. and dragged her into the computer room. He hit and kicked her. J.P. tried to get away, but Robert picked her up and threw her down on the floor. Then he started dragging her again, this time pulling her by the hair and some of her hair was pulled out. J.P.'s head hit against a door. Robert then threw J.P. on the stairs and kicked her with his work boot. We find

there is sufficient evidence in the record to permit the fact-finder to determine Jenny would have had time to react if she had chosen to do so.

B. Jenny claims the State did not present sufficient evidence to show that but for her failure to intervene J.P. would not have suffered bodily injury. The State was not required to show Jenny's inaction was the sole proximate cause of J.P.'s injuries. *See State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992). A defendant may be convicted if her conduct was a "substantial factor" in bringing about the harm. *Id*.

There was sufficient evidence in the record to permit the fact-finder to determine that if Jenny had intervened Robert might have thought better of his actions, or J.P. might have had time to escape.

C. Jenny was also convicted under section 726.6(1)(d) by willfully depriving the child of supervision appropriate to her age. In discussing this provision, the district court stated:

> Dr. Dewdney testified that the effects of child abuse are worsened when another care provider is present during the abuse, and does not protect the child. The other care provider's failure to protect causes the child's self-esteem to suffer even more. The defendant's failure to protect her children was a deprivation of necessary supervision based upon their age.

Jenny claims there is insufficient evidence to show she was in the same room during the abuse.

L.P. clearly testified Jenny was in the room when Robert was injuring J.P. He testified, "she turned around and watched it, too, because she was also scared." He stated the incident took place in the computer room, and Jenny was sitting in the computer chair the whole time. J.P. testified Jenny was in the

kitchen when it happened. A social worker, however, testified J.P. told her that her mother was sitting by the computer when the abuse happened, "and that her mother saw what her father was doing to her." Moreover, a police detective testified J.P. told him Jenny was aware of the assault and saw it occur. We conclude there is substantial evidence in the record to show Jenny was in the same room while Robert was injuring J.P.

D. Jenny contends sections 726.6(1)(a) and (d) should not apply when a parent fails to protect their children on one occasion. She asserts that by enacting section 726.6(1)(e), which applies when a defendant "[k]nowingly permits the continuing physical or sexual abuse of a child or minor," the legislature intended that when a charge is based on a parent's inaction, a parent could be convicted of child endangerment only if the parent failed to protect a child over a continuing period of time.[2]

We note that section 702.2 defines the term "act" to include "a failure to do any act which the law requires one to perform." We determine section 726.6(1)(a) may apply when a parent's failure to act "creates a substantial risk to a child or minor's physical, mental or emotional health or safety," even if that substantial risk involves only a limited period of time or does not involve an ongoing series of discrete events. Furthermore, section 726.6(1)(d) involves a willful deprivation of supervision, which would apply to a failure to act or provide supervision. *See State v. Leckington*, 713 N.W.2d 208, 215 (Iowa 2006) (noting, in upholding a conviction based on a single event, that this section "does not

[2] The State originally charged Jenny under section 726.1(e) also, but amended the information by eliminating this charge before trial. The element of "continuing" abuse appearing in subsection (e) is not found in sections 726.1(a) or (d).

have a temporal requirement for the length of time a person must willfully deprive a child of health care")

E. Jenny asserts there is insufficient evidence to support her conviction for neglect of a dependent person under section 726.3. This section applies if a defendant knowingly or recklessly exposes a dependent person to a hazard or danger which the person cannot reasonably be expected to protect against. Iowa Code § 726.3. Jenny claims she did not knowingly expose J.P. to a hazard because she did not know ahead of time that Robert would become violent.

The State is required to prove a defendant's knowledge that a child was in a position of substantial risk. *State v. Millsap*, 704 N.W.2d 426, 431 (Iowa 2005). A parent may be considered the source of danger for purposes of section 726.3. *State v. Petithory*, 702 N.W.2d 854, 860 (Iowa 2005). There is substantial evidence in the record to show that during the time of the assault Jenny knew J.P. was being exposed to danger from her father, that she was being placed at substantial risk by Jenny's failure to act, and Jenny had time to intervene. We conclude there is sufficient evidence in the record to support Jenny's conviction for neglect of a dependent person.

IV. Merger of Convictions

Jenny raises a claim that the charge of child endangerment and the charge of neglect of a dependent person should have merged because they involve the same act and require that the parent's act puts the child in risk of substantial harm. Jenny has not cited any authority in support of this argument.

"Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 6.14(1)(*c*); *see also State v. Sayles*, 662 N.W.2d 1, 3 n.1 (Iowa 2003) (noting we do not address a contention without any argument or citation of authority). We conclude Jenny has waived this issue on appeal.

We affirm Jenny's convictions.

AFFIRMED.