IN THE COURT OF APPEALS OF IOWA

No. 9-1014 / 09-0631
Filed February 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH HODEL SCHROCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Michael R. Mullins, Judge.

This is an appeal by Joseph H. Schrock from a conviction and sentence of child endangerment causing serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger and Karen Doland, Assistant Attorneys General, and Barbara E. Edmondson, County Attorney, for appellee.

Heard by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

This is an appeal by Joseph H. Schrock from his conviction and sentence of child endangerment causing serious injury. Schrock asserts the district court erred in (1) finding sufficient evidence was presented to convict him of the charges, (2) allowing opinion testimony of his intoxication, and (3) allowing evidence of his alleged intoxication; he also raises a double jeopardy challenge and other issues pro se. We affirm.

I. Background Facts and Proceedings

On the afternoon of September 23, 2007, Schrock was caring for his four-year-old son, Joseph, while Schrock and his friend Malcolm Gauthreaux were watching a football game and consuming some beers. They then drove to the house of Schrock's co-worker, Nick Brenneman, to pick some cherry tomatoes from his garden. Brenneman was not home when they arrived, but testified he had previously given Schrock permission to do so. While there, Schrock decided to take Joseph on Brenneman's four-wheeler, or "ATV," which was designed for one person. Schrock described the terrain of the dirt road as having ruts that he was attempting to straddle. He encountered a "big washout" on the road, and hit a rut as he drove the vehicle from the right side to the left side of the road. This maneuver resulted in Schrock rolling the ATV approximately forty feet.

Deputy Sheriff Kirk Bailey responded to the accident and testified that Schrock had a laceration above his left eye and abrasions on the top of his head, blood all over his shirt, and had to be handcuffed because he was yelling and very upset. Schrock confirmed his injuries by testifying that he received a concussion, three fractures to his eye socket, a broken clavicle, sprained wrist,

and a fractured rib. Joseph sustained an "open depressed skull fracture" and an "intraparenchymal hemorrhage," or bleeding within the brain. Schrock stated to Deputy Bailey that there had been no accident, and in spite of a nearby damaged ATV, denied he had been driving the vehicle. Deputy Bailey testified that he administered field sobriety tests because Schrock's speech was mumbled, he smelled of alcohol, his eyes were bloodshot and watery, and he admitted to having four beers.[1] Following Schrock's poor performance on the field sobriety tests, Deputy Bailey determined Schrock was intoxicated and took him into custody. Schrock refused any further test of his blood alcohol level.

Schrock was charged with child endangerment causing serious injury and operating while intoxicated. On September 19, 2008, following a jury trial, Schrock was found guilty of child endangerment but not guilty of operating while intoxicated. He was granted a new trial on the charge of child endangerment because some documents were allowed in the jury room that referenced his prior operating while intoxicated convictions, prior abusive behavior, and a prior report by the Department of Human Services concerning Joseph. Following a new trial, on February 13, 2009, Schrock was convicted and sentence entered on the jury's findings that he was guilty of child endangerment causing serious injury in violation of Iowa Code sections 726.6(1)(a), 726.6(5). He appeals.

II. Sufficiency of the Evidence

Schrock contends the district court erred in denying his motion for new trial, claiming the evidence was insufficient to convict him of child endangerment.

[1] During the accident, Schrock's dentures fell out, and Deputy Bailey admits he was not aware of this with regard to its possible cause of Schrock's slurred speech.

Our review of challenges to the sufficiency of the evidence is for correction of errors at law. *State v. Yeo*, 659 N.W.2d 544, 547 (Iowa 2003). To determine whether the evidence was substantial such that a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, we consider the entirety of the evidence presented in a light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record. *Id.*

Child endangerment requires the defendant knowingly act in a manner that creates a substantial risk of harm. Iowa Code § 726.6(1)(a) (2007). The act causing the injury must itself be intentional, but the resulting injury need not be intended. *State v. Heacock*, 521 N.W.2d 707, 711 (Iowa 1994). No intent to injure is required. *Id.* Thus, it is the appreciation of the risk to the child or minor posed by one's conduct that creates criminal culpability. *State v. Millsap*, 704 N.W.2d 426, 430 (Iowa 2005).

Schrock contends because he did not intend to injure his son, there was insufficient evidence to support his conviction of child endangerment. Schrock testified that he had three beers before arriving at Brenneman's, although Deputy Bailey testified Schrock admitted to him at the scene that he had consumed four beers. Schrock testified that he then decided to give Joseph a ride on the ATV. He put Joseph in front of him and drove down a dirt road where he "straddled a rut," came to a washed out area, and crossed over to the other side of the road, when the ATV flipped. Joseph, tossed from the ATV, suffered an open depressed skull fracture and hemorrhaging in his brain as a result of the accident.

Deputy Bailey opined the accident occurred while Schrock was driving at least twenty miles per hour. Schrock's speech was mumbled, he emitted a strong order of alcohol, his eyes were bloodshot and watery, and Deputy Bailey testified that after Schrock failed the field sobriety tests, in his opinion, Schrock was intoxicated. While Schrock claims this was just an accident, there was substantial evidence in the record that Schrock knowingly acted in a manner that created a substantial risk of harm to Joseph. Therefore, the district court was correct in overruling Schrock's motion for new trial on this claim.

III. Opinion Testimony on Intoxication

Schrock next asserts the court erred in allowing the testimony of Deputy Bailey that Schrock was intoxicated. The court has broad discretion in ruling upon an evidentiary issue, including the admissibility of evidence. *State v. Kone*, 562 N.W.2d 637, 638 (Iowa Ct. App. 1997). Our standard of review is for an abuse of discretion. *Id.* In order to show an abuse of discretion, one generally must show that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Jones*, 511 N.W.2d 400, 405-06 (Iowa Ct. App. 1993). It is for the trial court to determine whether evidence is relevant and whether its relevance outweighs the potential for prejudice. *Id.* at 406.

Schrock admits that evidence of his poor performance on the field sobriety tests, as well as his admission concerning the amount of alcohol he consumed were relevant and admissible, but asserts Deputy Bailey's testimony referencing

Schrock's intoxication was irrelevant and prejudicial.[2] Because he was already acquitted of the charge of operating while intoxicated, Schrock asserts his "state of intoxication" was not relevant at trial. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Iowa R. Evid. 5.401.

In ruling on Schrock's January 2009 motion in limine, the court found "evidence concerning whether the defendant consumed alcohol and whether he was intoxicated or impaired is evidence that is relevant to the jury's determination as to whether the defendant's conduct satisfies the elements of child endangerment as alleged." Our case law provides that a lay witness may express an opinion regarding another person's sobriety, provided the witness has had an opportunity to observe the other person. *State v. Murphy*, 451 N.W.2d 154, 155 (Iowa 1990). Deputy Bailey was on the scene observing and questioning Schrock. He noted and later testified that Schrock's speech was mumbled and slurred, he was unstable, confused, smelled strongly of alcohol, and had bloodshot eyes. As a "technical [accident] investigator," Deputy Bailey

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[2] Schrock also asserts he was prejudiced by Deputy Bailey's mention of Schrock's refusal "to give a breath test," which is unclear from his brief but may refer to his refusal to take a breathalyzer test after he was arrested. Schrock failed to raise this claim below and failed to support this claim on appeal; thus it is deemed waived. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (error preservation); *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived."); *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) ("[R]andom mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration."). Even if this had been raised below and adequately argued on appeal, we would find no prejudice because of the admissions Schrock made as to his alcohol consumption and the observations made by Deputy Bailey as to Schrock's appearance and demeanor.

was specially trained to recognize the characteristics of intoxicated persons. We find no abuse of the district court's discretion in allowing Deputy Bailey to opine that Schrock was intoxicated. *Id.* ("We see no logic in limiting the admissibility of such testimony when the witness is specially trained to recognize the characteristics of intoxicated persons.") *Id.* at 156.

IV. Mistrial

Schrock asserts he suffered prejudice when the jury heard evidence of his being charged with operating while intoxicated during an investigative interview, and the court erred in denying his motion for a second mistrial. We review the trial court's decision denying a motion for mistrial for an abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006).

The jury listened to a one hour and fifteen minute audio recording that contained within it a brief reference to Schrock being charged with operating while intoxicated. The State had previously agreed to redact any reference to the charge, and admitted this one remaining reference was an oversight. Schrock asserts this reference caused him prejudice and the court erred in denying his motion for a mistrial. During the hearing on the motion for new trial, the district court stated,

> The evidence of Defendant's intoxication is entirely relevant. It is extremely relevant. It has always been in this case, and it always will be. Defendant is charged with acting—knowingly acting in a manner that created a substantial risk to the child's physical, mental or emotional health or safety. Whether he was ever charged with evidence of his intoxication, if the jury finds he was intoxicated, is relevant to determine—for them to determine whether he was acting in a manner that created a substantial risk, knowingly acted in such a manner . . . it is unfortunate that that reference was left in the tape recording. If that reference had been to him driving while not having a license or reference had been to operating an ATV

> that wasn't registered, I don't believe any of those would have been terribly prejudicial either.

Following the trial, the court ruled on Schrock's post trial motions, and reaffirmed,

> I doubt seriously whether the jury gave it much of a thought. In fact, I had allowed evidence of—of intoxication in. So the jury knew that. There was evidence that Mr. Schrock had been operating a four-wheeler, which is a motor vehicle.

In its written ruling, the court found, "Although the audiotape included a reference to the defendant being arrested for operating while intoxicated, in the context of the entire audiotape, this Court finds that such reference did not deny the defendant a fair trial." The referenced phrase in the audiotape was minimal, and the recording itself was long. After our review of the tape, we agree with the district court that the brief statement did not work to deny Schrock a fair trial because the jury had already heard considerable evidence of Schrock's alcohol consumption, as well as his having driven the ATV, all relevant and admissible evidence for the charge of child endangerment.

V. Pro Se Issues

Schrock also raises a number of pro se issues. He asserts the court did not allow certain testimony of Gauthreaux, but he fails to cite any authority or reference in his brief how this issue was preserved for our review. The issue is therefore deemed waived. *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived."). Schrock next asserts he did not knowingly endanger Joseph, and that Deputy Bailey's

opinion testimony should not have been allowed; these arguments are subsumed in his appellate counsel's brief, and addressed above.

Finally, Schrock asserts double jeopardy barred his retrial. The Double Jeopardy Clause of the United States as well as the Iowa Constitution protects against: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Kramer*, 760 N.W.2d 190, 194, (Iowa 2009) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969). Generally, double jeopardy does not bar retrial when the motion is made by the defendant, and the mistrial was not caused by the prosecution's misconduct, "goading" the defendant. *See Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 2089, 72 L. Ed. 2d 265, 425 (1982); *Arizona v. Washington*, 434 U.S. 497, 515-16, 98 S. Ct. 824, 835, 54 L. Ed. 2d 717, 734-35 (1978). With Schrock's motion for mistrial, and no such evidence of prosecutorial misconduct alleged, Schrock's assertion of a double jeopardy violation must fail. We therefore reject Schrock's arguments on appeal and confirm his conviction.

AFFIRMED.