

28972-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER L. KIRWIN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred in entering judgment on jury verdicts for which the evidence was insufficient to support conviction.
2. The trial court violated the defendant's right to counsel.
3. The court violated the defendant's rights to a defense by repeatedly sustained evidentiary objections that were not supported by the rules of evidence.

II.

ISSUES PRESENTED

- A. Was there sufficient evidence to support the jury's verdicts?
- B. Did the defendant make a knowing and voluntary waiver of her right to counsel?
- C. Did the trial court properly exclude hearsay and irrelevant questions by the defendant?

III.

STATEMENT OF THE CASE

The defendant was charged by information filed in Spokane County Superior Court with three counts of custodial interference after the

defendant disappeared from Spokane and was located some days later by authorities in California. CP 1-2.

The children's father flew to California and returned with the children to Spokane. RP 13. The defendant was returned to Spokane and proceeded to trial on a *pro se* basis. RP 2.

Mr. Todd Kirwin testified that he and the defendant were married in 1996. RP 6. The couple had three children. RP 7. The couple was divorced in 2005. RP 7. Mr. Kirwin testified that he went through the court system to obtain the ability to be with the children who resided with their mother, the defendant. RP 7. Mr. Kirwin stated that in April of 2009, he began to have difficulties in visiting the children. RP 8. Mr. Kirwin tried multiple avenues to reach the defendant but finally a contempt order for the defendant was issued by a Spokane court. RP 8. On June 12 of 2009, a modification order adjusting the parenting plan was signed by the court. RP 11. Mr. Kirwin was given full custody of the children. RP 11. Mr. Kirwin contacted the police to seek their assistance in locating his children and the defendant. RP 12. The defendant and the children were located by U.S. marshalls in California. RP 13. Mr. Kirwin flew to California and immediately returned with the children to Spokane. RP 13.

On cross-examination, the defendant asked, “Were you following the orders from the parenting plan in 2008 where you were to pick up the children at the school or from a neutral place?” RP 24.

Jacob Kirwin testified that the defendant took the family to Idaho, Montana, Utah, Arizona and ending in California. RP 35-36. Jacob thought he had 20-30 days of school remaining when his mother (the defendant) removed him from school to take the extended trip. RP 33.

Mackenzie Kirwin testified that the family departed with the defendant on May 23. RP 69. Mackenzie stated that on the day prior to the family’s departure, she told the defendant that she had 20 days to respond to a legal document that arrived. RP 69. The defendant responded by saying, “No I don’t”, and then ripping the document in half. RP 69. MacKenzie testified that “...we really had no clue where we were going.” RP 70. At one point Mackenzie attempted to navigate the family back to Spokane, but the defendant discovered that they were about to enter Washington State and had Jacob Kirwin take over the navigation. RP 71.

Ms. Mary Klaus testified that she is the defendant’s mother. RP 100. Ms. Klaus stated that she did not know that the defendant had departed with the children. RP 102. Ms. Klaus found a note taped to

Jacob's drum set asking that the drums be returned to Logan Elementary School. RP 103.

At the outset of the trial, the defendant stated she wanted to proceed *pro se*. RP 3. The trial court attempted to have a colloquy with the defendant, but the defendant displayed an unusual series of responses to the trial court's questions and argued with the trial court constantly. RP 3-23.

The defendant was found guilty as charged. RP 181. This appeal followed. CP 70-71.

The State objects to the last paragraph in the defendant's Statement of the Case on page three of the defendant's appellate brief. The defendant states that "Ms. Kirwin's theory of the case..." Brf. of App. page 3. The defendant cites to page 12 of the transcript. Nowhere in the transcript and certainly not at page 12, does the defendant say what the defendant's Statement of the Case claims. The defendant's statement that she had taken the children out of the state for protection because Mr. Kirwin was abusive and had an extensive history of harassment is completely without support in the transcript. The State respectfully requests that the entire paragraph be stricken as unsupported by the record. The defendant groundlessly impugns Mr. Kirwin.

IV.

ARGUMENT

A. THERE WAS AMPLE EVIDENCE SHOWING THAT MR. KIRWIN HAD LEGAL RIGHTS TO HAVE CUSTODY OF THE CHILDREN.

The defendant argues that the State did not submit sufficient evidence that Mr. Kirwin had legal rights to the custody of the children.

The focus of the defendant's arguments is that the State presented no evidence that Mr. Kirwin had any legal right to physical custody of his children prior to the entry of the parenting plan modification and orders entered on June 12, 2009.

The rules for discussion of "insufficient evidence" issues are well known. "There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

There was never any debate on the issue of Mr. Kirwin's rights to visitation with the children. The most unarguable fact is that the defendant disappeared with the children. The inference to be derived from that fact is that the father had legal rights to visit with the children and the defendant wanted to prevent any visitation. The details of the order existing prior to June 12, 2009 are irrelevant. The simple fact is that the defendant knew the father had the right to have custody of the children, at least occasionally, and for whatever reasons, she left with the children to various places in Utah, and California. The inferences from the defendant's actions were that she knew the father had rights to the children. Otherwise, why depart with the children without telling the grandmother of the children? This is a classic example of *res ipsa loquitur*.

The defendant, in her *pro se* questioning asks her ex-husband, "Were you following the orders from the parenting plan in 2008 where you were to pick up the children at the school or from a neutral place?" RP 24. Although surely not intended by the defendant, she clearly

demonstrated to the jury that she knew there was a parenting plan in place, despite the position she now takes on appeal.

The defendant by her own phrasing of the issue answers her contentions. Courts do not modify non-existent orders. Therefore, it is a reasonable conclusion that if the court modified a parenting plan, there had to be a parenting plan in place prior to the modification. The modification order itself states in section 2.1: “This court has exclusive continuing jurisdiction. The court has previously made a parenting plan, residential schedule or visitation determination in this matter....” Ex. 1.

The totality of the evidence shows that the defendant acted to deprive the children’s father of his legal rights to see the children.

B. THE TRIAL COURT EXERTED MAXIMUM EFFORTS TO ASSURE THAT THE DEFENDANT’S REQUEST TO PROCEED *PRO SE* WAS KNOWING AND VOLUNTARY.

The defendant claims that the trial court did not properly obtain a voluntary waiver of the right to counsel because she was not told of the statutory five year maximum for each count.

A waiver of counsel must be knowing, voluntary, and intelligent. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). This court in *State v. Chavis*, 31 Wn. App. 784, 644 P.2d 1202 (1982) held that a colloquy between the trial court and the defendant is

required. The *Chavis* court rejected a routine inquiry of the defendant. *Chavis, supra* at 789-90.

The Washington State Supreme Court has taken a somewhat “softer” approach to attorney waiver and held that a colloquy is not absolutely required. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 691 P.2d 957 (1984). The Court in *Acrey* stated that while a colloquy is the preferred technique to establish a defendant’s knowledge of risks, “...this court will look at any evidence on the record that shows defendant’s actual awareness of the risks of self-representation.” *Acrey, supra* at 211.

The defendant’s trial difficulties arose from an inability to grasp and maintain focus on the nature of the charges. The defendant, as is perhaps to be expected with a *pro se* litigant, wished to bring into evidence all manner of irrelevant data.

The court tried to talk the defendant out of representing herself. It was apparent from the outset that the defendant was going to represent herself no matter what anyone said or did not say. The trial court warned the defendant several times that proceeding *pro se* was a bad idea.

The defendant is correct that she was not advised of the maximum statutory sentence for a class C felony. She was, however, advised of the standard ranges and the possibility of prison. RP 4. The defendant was

advised of her responsibilities to follow correct legal procedures and that the word of judge was final. RP 5. The trial court explained how objections worked. RP 6. The defendant often refused to accept the trial court's admonitions. When the court advised the defendant of the consequences of irrelevant or improper theories of the case, the defendant responded, "Isn't it free speech?" RP 6. The court told the defendant:

The bottom line is that you're walking into a real hornet's nest, and you need to do this with your eyes open understanding the serious danger you're putting yourself into by trying to represent yourself in a matter in which you have no formal education or training. Do you understand that?

RP 9.

To which the defendant responded: "Yes. I am educated in what is custodial interference and what my case is." RP 9. At another point, the defendant lectured the trial judge on what was against the law and that she did not have to go to law school for "...six months or a year just to defend myself." RP 11.

A fair reading of the record shows that the trial court was dealing with an impossible situation. The defendant continually argued with the court, gave *non sequitur* responses, behaved in a recalcitrant manner and generally made it impossible to have a "normal" colloquy. A waiver of the right to counsel is supposed to be knowing and voluntary. Given the

defendant's continuous obfuscation, the trial court did what it could. It is difficult to tell from the record, despite many attempts by the trial court to enlighten the defendant, exactly what the defendant truly understood.

The defendant clearly wanted to proceed *pro se* and no amount of input from the trial court was going to change her mind. To be certain, the *ideal* situation is a colloquy between a rational, receptive defendant and the trial court. However, when the defendant makes such a colloquy impossible, she should not be permitted to escape justice by creating her own dust storm.

C. THE TRIAL COURT PROPERLY EXCLUDED THE DEFENDANT'S NUMEROUS ATTEMPTS TO ELICIT HEARSAY TESTIMONY AND IRRELEVANT TESTIMONY.

The defendant asserts that the trial court erred by excluding evidence that the defendant thinks was admissible. The State agrees with the defendant that she had a right to present the testimony of witnesses, but not to simply ride roughshod over the rules of evidence. *Pro se* defendants are required to follow the same rules as an attorney.

In her first assertion, the defendant states, "After the *court elicited* Mr. Kirwin's hearsay statement...." Brf. of App. 10. There is no hearsay statement elicited by the trial court. The trial court asked Mr. Kirwin if he had ever made a statement to the effect that the defendant had a mental

disorder. RP 21. The witness testifying to what he might have told someone is not hearsay by any definition. The defendant takes this piece of non-hearsay testimony as an invitation to attempt to enter testimony from “any psychologist, counselor or guardian *ad litem* telling the witness that the defendant had a mental disorder.” RP 21.

ER 801(c) defines hearsay as a statement, “...other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801. Hearsay is inadmissible absent an exception. ER 802. The defendant presents no exceptions to the general hearsay rule that would permit the admission of the statements the defendant tried to elicit. No interpretation of the general hearsay rule would permit Mr. Kirwin to testify regarding what someone else told him. The defendant repeats her incorrect assertion that the trial court elicited what a mental health expert said to Mr. Kirwin. RP 21. The defendant does not explain how alleged hearsay testimony from Mr. Kirwin would permit the defendant to violate the rules. The trial court did not err in its question of Mr. Kirwin. The trial court properly sustained a hearsay objection to the defendant’s attempt to admit statements made to Mr. Kirwin by others because “It is in the court file.” This is another instance of a non-trained, *pro se* defendant trying to act as an attorney.

The Washington State Supreme Court has held that *pro se* litigants must adhere to all applicable procedural rules. In other words, the defendant is not excused in her multiple attempts to admit irrelevant and hearsay material. *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985).

In her second assertion, the defendant believes it is not hearsay to ask a child witness regarding what Mr. Kirwin had said regarding a scary basement. The defendant claims that the statement sought was not for the truth of the matter asserted but rather to show that Mr. Kirwin made untrue and "...perhaps frightening..." statements to one of the children. Brf. of App. 11. Apparently, the defendant did not read her own appellate brief as the first stated purpose for admitting the statement was to show that Mr. Kirwin made "untrue statements." The proposed statement was clearly offered to prove the truth (or lack thereof) of the matter asserted. The whole purpose of the area of inquiry was to bolster an allegation that Mr. Kirwin made false statements to scare the children.

For the third assertion, the defendant wanted to elicit testimony as to what a police officer told Ms. Klaus regarding an alleged incident with Mr. Kirwin attempting to run Ms. Klaus and her husband off the road. RP 105. The defendant claims the trial court denied the defendant the chance to make an offer of proof. Nowhere in the record does the

defendant mention that she would like to make an offer of proof. The defendant continues to fault the trial court for “precluding” the defendant from making an offer of proof. As stated above, there is nothing in the record asking for an offer of proof. The trial judge cannot be faulted for not granting something that was never requested.

The defendant also claims that the trial court prevented her from asking questions relevant to her defense. “The admission of relevant evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of that discretion.” *State v. Mak*, 105 Wn.2d 692, 702, 718 P.2d 407 (1986). “[T]he trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Such determinations are left to the sound discretion of the trial court.” *Id.* at 703. The questions and the statements the defendant sought to elicit were clearly irrelevant as most either did not contain time limitations or asked about periods of time prior to the time of the crime. The trial court did not abuse its discretion.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 1st day of March, 2011.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 28972-9-III
 v.)
) CERTIFICATE OF MAILING
 JENNIFER L. KIRWIN,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on March 1, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

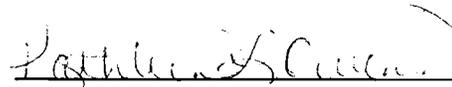
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3/1/2011
(Date)

Spokane, WA
(Place)


(Signature)