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SUPREME COURT
STATE OF WASHINGTON

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No. 81897-5

BY RONALD R. CARPENTER
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA CHRISAUNDRRA BOSS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable James D. Cayce

SUPPLEMENTAL BRIEF OF PETITIONER CYNTHIA BOSS

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TABLE OF CONTENTS

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT 6

 1. THE LAWFULNESS OF THE CUSTODY ORDER AND WHETHER CPS HAD A RIGHT TO PHYSICAL CUSTODY OF THE CHILD WERE ELEMENTS OF THE OFFENSE WHICH WERE REQUIRED TO BE IN THE "TO-CONVICT" INSTRUCTION..... 6

 a. All of the elements of the offense are required to be in the "to-convict" instruction. 6

 b. The lawfulness of the custody order and CPS's right to physical custody of the child were elements of the offense of custodial interference in the first degree which were required to be included in the "to-convict" instruction..... 8

i. CPS's right to physical custody of O.J. B-P..... 9

ii. Lawfulness of the court order granting CPS physical custody of O.J.B-P. 10

 c. Ms. Boss is entitled to reversal of her conviction as the trial court failed to instruct the jury on all of the elements of the offense..... 12

 2. THE COURT'S COMMENT ON THE EVIDENCE BY DIRECTING A VERDICT ON THE ELEMENT OF THE CHARGED OFFENSE WAS NOT A HARMLESS ERROR 14

a. The court may not comment on the evidence to the jury..... 14

b. The comment was not harmless in light of the fact the jury was never required to find the disputed element..... 16

E. CONCLUSION..... 18

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 6

WASHINGTON CONSTITUTIONAL PROVISIONS

Article IV, section 16..... 14, 15, 16

FEDERAL CASES

Hendrix v. City of Seattle, 76 Wn.2d 142, 456 P.2d 696 (1969), *cert. denied*, 397 U.S. 948 (1970), *overruled on other grounds by McInturf v. Horton*, 85 Wn.2d 704, 538 P.2d 499 (1975)..... 8

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 6

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 6

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 5 L. Ed. 37 (1820) 8

WASHINGTON CASES

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997) 15, 17

State v. Boss, 144 Wn.App. 878, 184 P.3d 1264 (2008), *review granted*, 165 P.3d 1019 (2009)..... passim

State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) 6, 7, 12, 13

State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996) 6

State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953) 6, 8

State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979) 14

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 7

State v. LaCaze, 95 Wn.2d 760, 630 P.2d 436 (1981) 10

<i>State v. Lampshire</i> , 74 Wn.2d 888, 447 P.2d 727 (1968).....	15
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	14, 15, 16
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	15, 16
<i>State v. Lund</i> , 63 Wn.App. 553, 821 P.2d 508 (1991).....	10
<i>State v. Miller</i> , 156 Wn.2d 23, 123 P.3d 827 (2005).....	8
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005)	6, 7, 11, 12
<i>State v. Ohrt</i> , 71 Wn.App. 721, 862 P.2d 140, <i>review denied</i> , 123 Wn.2d 1029, 877 P.2d 695 (1994).....	9, 10
<i>State v. Oster</i> , 147 Wn.2d 141, 52 P.3d 26 (2002).....	6, 7
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	7
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	6
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990), <i>cert. denied</i> , 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991)	14
<i>State v. Zimmerman</i> , 130 Wn.App. 170, 121 P.3d 1216 (2005)....	15
STATUTES	
RCW 9A.40.060	9, 10, 11
RCW 9A.46.020	13
OTHER AUTHORITIES	
<i>Black's Law Dictionary</i> 559 (8 th ed. 2004)	8
RULES	
RAP 2.5.....	7

A. ISSUES PRESENTED

1. This Court has repeatedly held that all of the essential elements of the charged offense must be included in the “to-convict” jury instruction. This Court has also repeatedly held that the failure of the trial court to include an element in the to-convict jury instruction may be raised for the first time on appeal. In Ms. Boss’s matter, the Court of Appeals determined that a lawful right to physical custody of the child was an essential element of first degree custodial interference that the jury was required find beyond a reasonable doubt. Since the to-convict jury instruction omitted that essential element, Ms. Boss is entitled to a reversal of her conviction and remand for retrial.

2. The Court of Appeals held that whether the custody order was lawful was a legal determination to be made by the court and not a factual determination to be made by the jury. The Legislature in the first degree custodial interference statute expressly included the lawfulness of the court order as an element of the offense. Thus, whether the custody order was lawful was an essential element of the charged offense of first degree custodial interference which was not included in the to-convict jury instruction. Ms. Boss is entitled to reversal of her conviction and remand for a new trial.

3. A trial court impermissibly comments on the evidence when in a jury instruction the court takes an element of the charged offense away from the jury by finding the element had been proven as a matter of law, essentially directing a verdict on the element. The Court of Appeals determined the trial court commented on the evidence in Ms. Boss's matter when it instructed the jury that CPS had a lawful right to custody to O.J.B-P. as a matter of law directing a verdict on that element, but found the error harmless in light of the State's proof. This Court has held that where the court's jury instructions direct a verdict on an element, the error is not harmless regardless of the State's proof. In light of the Court of Appeals' conclusion that the trial court's to-convict instruction effectively directed a verdict on the issue of CPS's right to lawful physical custody of the child, Ms. Boss is entitled to reversal of her conviction and remand for a new trial.

B. STATEMENT OF THE CASE

Cynthia Boss is the mother of O.J.B-P. 2/7/07RP 106. In May 2006 O.J.B-P. was four months of age. 2/7/07RP 107. Because of an alleged fear of imminent harm to the child by Ms. Boss and the child's father, on May 11, 2006, Child Protective Services (CPS) obtained from the superior court an order taking the

child from the parent's custody and placing the child in shelter care, and an order prohibiting contact between Ms. Boss, the child's father, and the child. 2/7/07RP 104-05. The next day at the shelter care hearing, the court issued an order approving CPS custody. 108-09. Attempts by CPS were made to obtain custody of O.J.B-P. without success. The child was finally located in Houston, Texas in Ms. Boss's custody. 2/7/07RP 129; 2/8/07RP 69. The child was returned to Washington and Ms. Boss was charged with custodial interference in the first degree. CP 1; 2/7/07RP 130.

During the State's case-in-chief the prosecutor moved the court to take judicial notice of the prior court orders giving custody of the child to CPS. 2/8/07RP 2. Ms. Boss agreed that the court could take judicial notice of the orders, but contended the lawfulness of the orders was an element of the offense which the jury must find beyond a reasonable doubt. 2/8/07RP 3-4. Specifically, Ms. Boss contended that the underlying factual scenario presented to the court which issued the orders was flawed and thus, it was for the jury to determine whether the resulting orders were lawful. 2/8/07RP 4-11, 79-86.

The court disagreed, ruling the determination of the lawfulness of the custody order was a legal determination to be made by the court:

It is a legal determination that I believe always is made by the Court, it is no different than other to convict, like, drugs where we instruct [the jury] specifically that a specific drug is not a lawful drug, or protection order violations, things like that, where it is the judge that makes the legal determination and does instruct the jury.

2/8/07RP 4. The court subsequently instructed the jury in Instructions 9 and 10 that CPS had a lawful right to the physical custody of O.J.B-P. CP 43-44.

During closing arguments, Ms. Boss argued the underlying petition and other documentation submitted to the court which issued the custody orders was flawed and thus the resulting orders were not lawful and she could not be guilty of this charged offense.

2/9/07RP 13-23. The jury nevertheless, convicted Ms. Boss as charged. CP 53.

On appeal, Ms. Boss challenged the trial court's failure to include in the "to-convict" instruction the essential elements of custodial interference in the first degree of whether the court order granting custody of O.J.B-P. to CPS was valid, and whether Ms. Boss had knowledge of CPS's lawful right to physical custody of

O.J.B-P. The Court of Appeals ruled that as to the first issue, the trial court properly concluded the lawfulness of the custody order was a legal conclusion to be determined by the trial court. *State v. Boss*, 144 Wn.App. 878, 885-86, 184 P.3d 1264 (2008), *review granted*, 165 P.3d 1019 (2009). The Court agreed with Ms. Boss that whether CPS had a lawful right of physical custody was an element of the offense of custodial interference, but that the issue was not a manifest constitutional error which allowed Ms. Boss to raise it for the first time on appeal where she failed to raise it in the trial court. *Id.* at 892-94. Finally, the Court of Appeals found the trial court impermissibly commented on the evidence in the “to-convict” instruction, in essence directing a verdict on the element of the lawful right to physical custody by CPS, but that the error was harmless in light of the trial court’s conclusion that the custody order was valid and subsequently admitted at trial. *Id.* at 889-90.

C. ARGUMENT

1. THE LAWFULNESS OF THE CUSTODY ORDER AND WHETHER CPS HAD A RIGHT TO PHYSICAL CUSTODY OF THE CHILD WERE ELEMENTS OF THE OFFENSE WHICH WERE REQUIRED TO BE IN THE "TO-CONVICT" INSTRUCTION

- a. All of the elements of the offense are required to be in the "to-convict" instruction. Under the Fourteenth Amendment to the United States Constitution, the State is required to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The court's instructions to the jury must clearly set forth the elements of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

This Court has repeatedly held that the all of the elements of the crime must be contained in the "to-convict" instruction. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. DeRyke*, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003); *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The rationale behind the rule is that "[t]he jury

has a right to regard the 'to-convict' instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction." *Oster*, 147 Wn.2d at 147. The adequacy of a "to-convict" jury instruction is reviewed *de novo*. *Mills*, 154 Wn.2d at 7; *DeRyke*, 149 Wn.2d 906.

Further, this Court has held that

[t]he omission of an element from that [to-convict] instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal.

Mills, 154 Wn.2d at 6.¹ See also *State v. Scott*, 110 Wn.2d 682, 687 n.5, 757 P.2d 492 (1988) (defining errors in jury instructions of constitutional magnitude that are manifest under RAP 2.5, which included directing a verdict and omitting an element of the crime charged).

¹ The Court of Appeals agreed the error was of constitutional magnitude but ruled the error was not manifest, citing this Court's decision in *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). *Boss*, 144 Wn.App. at 894. In *Kirkman*, this Court determined there was no decision finding a manifest error infringing a constitutional right where a witness expresses an opinion regarding the ultimate issue at trial. *Kirkman*, 159 Wn.2d at 935-36. Thus although of constitutional magnitude, this Court held the error was not manifest. *Id.* Here, this Court's decisions in *Scott* and *Mills* have expressly held the failure to include an essential element in the to-convict instruction *is* a manifest error infringing a constitutional right, allowing the error to be raised for the first time on appeal. *Mills*, 154 Wn.2d at 6. Further, this Court in *Kirkman* did not overrule *Scott* or *Mills*. Thus, contrary to the Court of Appeals' determination, *Kirkman* is inapplicable here and Ms. Boss should have been allowed to raise the issue for the first time on appeal.

b. The lawfulness of the custody order and CPS's right to physical custody of the child were elements of the offense of custodial interference in the first degree which were required to be included in the "to-convict" instruction. It is the function of the Legislature to define the elements of a specific crime. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 5 L. Ed. 37 (1820); *Hendrix v. City of Seattle*, 76 Wn.2d 142, 155, 456 P.2d 696 (1969), cert. denied, 397 U.S. 948 (1970), overruled on other grounds by *McInturf v. Horton*, 85 Wn.2d 704, 707, 538 P.2d 499 (1975). Thus, it is proper to first look to the statute to determine the elements of a crime. Cf. *Emmanuel*, 42 Wn.2d at 820. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005). "The elements of a crime are those facts 'that the prosecution must prove to sustain a conviction.'" *Miller*, 156 Wn.2d at 27, quoting *Black's Law Dictionary* 559 (8th ed. 2004). In determining the elements of an offense, "[i]t is proper to first look to the statute to determine the elements of the crime." *Miller*, 156 Wn.2d at 23.

Custodial interference in the first degree requires:

(1) A relative of a child under the age of eighteen . . . is guilty of custodial interference in the first degree if, with the intent to deny access to the child . . . , the relative takes, entices, retains, detains, or conceals the child . . . from a parent, guardian institution,

agency, or other person having a lawful right to physical custody of such person and:

(a) Intends to hold the child . . . permanently or for a protracted period;

RCW 9A.40.060(1)(a) (emphasis added). Thus, the elements of the offense of custodial interference in the first degree are (1) a relative of a child, (2) with intent to deny access to the child, (3) takes the child, (4) from someone who has legal custody, (5) and intends to permanently or for a protracted period hold the child. *State v. Ohrt*, 71 Wn.App. 721, 726, 862 P.2d 140, *review denied*, 123 Wn.2d 1029, 877 P.2d 695 (1994). Whether the person or entity from who the child is taken has lawful custody of that child is an element of the offense as is whether the person or entity has the right to physical custody of the child.

i. CPS's right to physical custody of O.J. B-P.

The Court of Appeals determined, and that determination has not been challenged in a cross-petition by the State, that

it was for the jury to determine whether it believed the State's evidence and witnesses and whether the State had proved beyond a reasonable doubt that CPS had a "right to physical custody of" O.J.B-P., an element of the charged offense.

Boss, 144 Wn.App. at 889 (emphasis added). The Court characterized it as an implied element, but a review of the plain

terms of RCW 9A.40.060(1) indicates the right to physical custody is an express element of the charged offense.

Parents have right to custody in their children absent a court order modifying their custody. *State v. LaCaze*, 95 Wn.2d 760, 763, 630 P.2d 436 (1981). Put another way, a parent presumptively has a lawful right to physical custody unless a court order has taken that right away. *Ohrt*, 71 Wn.App. at 724.

As the Court of Appeals correctly held, the right of physical custody was a factual element to be determined by the jury. *Boss*, 144 Wn.App. at 889. This holding is consistent with prior decisions. See *State v. Lund*, 63 Wn.App. 553, 559, 821 P.2d 508 (1991) (“Intent to deny access to the child by a person having a lawful right to physical custody is an element of the crime of custodial interference”). As a result, the to-convict jury instruction was required to include the element of whether CPS had the lawful right to physical custody of O.J.B-P. The to-convict instruction failed to include this element which was error.

ii. Lawfulness of the court order granting CPS physical custody of O.J.B-P. Similar to the argument regarding the CPS’s right to physical custody of the child, whether CPS’s order for physical custody of O.J.B-P. was a *lawful* order was also an

express element of RCW 9A.40.060(1) (“or other person having a lawful right to physical custody of such person . . .”). Again, similar to the element of the right to physical custody, the jury was required to be instructed in the to-convict instruction regarding this element. *Mills*, 154 Wn.2d at 7.

The Court of Appeals here relied upon this Court’s decision in *Miller* to find the lawfulness of the court order was not required to be in the to-convict instruction because this element was merely a “legal” determination not a “factual” determination. *Boss*, 144 Wn.App. at 884-85. But *Miller* provides no assistance in this matter.

This Court in *Miller* determined that the validity of a no-contact order was not an element of violation of a no-contact order because the Legislature did not expressly include validity in the underlying statute. *Miller* 156 Wn.2d at 31. This Court opined that the Legislature likely did not include validity in the statute because it turned on a question of law. *Id.* But here, the Legislature expressly included the lawfulness of the court order in RCW 9A.40.060(1), thus requiring the element to be in the to-convict instruction. *Mills*, 154 Wn.2d at 7.

Similar to the right to physical custody, it was for the jury to decide whether to believe the State's allegations in CPS's underlying petition for the custody order. Ms. Boss contended in closing argument that many of the allegations in the petition for were unfounded or false. 4/2/07RP 13-23. The to-convict jury instruction was required to include the element of whether the custody order was lawful. Since it did not, the court erred. *Mills*, 154 Wn.2d at 7.

c. Ms. Boss is entitled to reversal of her conviction as the trial court failed to instruct the jury on all of the elements of the offense. A conviction will be reversed where the to-convict omits an element of the offense and the jury is not instructed on all of the elements of the offense in the remaining jury instructions. *DeRyke*, 149 Wn.2d at 912. Where the jury is not so instructed, the defendant is entitled to automatic reversal:

DeRyke would be eligible for automatic reversal only if the trial court failed to instruct the jurors on all the elements. Because instruction 12 included the elements of attempt and instruction 10 defined the crime allegedly attempted, he is not entitled to an automatic reversal.

Id. See also *Mills*, 154 Wn.2d at 15 ("Under the instructions in this case, we hold that the jury was not instructed on all the elements

required to convict Mills of felony harassment under 9A.46.020. Accordingly, we reverse the Court of Appeals and remand for a new trial.”).

Unlike *DeRyke* and *Mills* where the elements omitted from the to-convict were included elsewhere in the jury instructions, here the jury was never instructed that it must determine the lawfulness of the custody order or whether CPS had a right to the physical custody of O.J.B-P anywhere in the jury instructions. In fact, as the Court of Appeals highlighted, the jury was instructed by the trial court that these elements had already been proven as a matter of law, thus taking these elements away from the jury altogether. Instruction 9, the only other jury instruction other than the to-convict that dealt with these elements, instructed the jury that CPS “had the lawful right to physical custody.” CP 43. As a result, the jury was not instructed on all of the elements by the trial court. Accordingly, Ms. Boss is entitled to automatic reversal and remand for a new trial. *DeRyke*, 149 Wn.2d at 912.

2. THE COURT'S COMMENT ON THE EVIDENCE BY DIRECTING A VERDICT ON THE ELEMENT OF THE CHARGED OFFENSE WAS NOT A HARMLESS ERROR

a. The court may not comment on the evidence to the

jury. Art. IV, § 16² prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case. *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). "The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

² Art IV, § 16 states: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Id. "It is thus error for a judge to instruct the jury that 'matters of fact have been established as a matter of law.'" *State v. Zimmerman*, 130 Wn.App. 170, 174, 121 P.3d 1216 (2005), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The defendant need not show prejudice resulting from the court's comment. The Washington Supreme Court has stated:

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. art. 4, § 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. In such a case, "[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment."

Lane, 125 Wn.2d at 838-39 (Internal citations omitted).

The fact Ms. Boss did not object to the court's instruction does not preclude review by this Court. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006) ("We have long held that even if the defendant fails to object at trial, error may be raised on appeal if it 'invades a fundamental right of the accused.'"), quoting *Becker*, 132 Wn.2d at 64; *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968) ("Since a comment on the evidence violates a

constitutional prohibition, the defendant's failure to object or move for a mistrial does not foreclose raising this issue on appeal.”).

The Court of Appeals here ruled the trial court's instructions 9 and 10 constituted comments on the evidence as the instructions effectively directed a verdict on the element of CPS's right to physical custody of O.J.B-P. *Boss*, 144 Wn.App. at 888-90. But the Court found the error harmless. *Id.*

b. The comment was not harmless in light of the fact the jury was never required to find the disputed element. Since the court's impermissible comment infringed Ms. Brandon's right under Art. IV, § 16 of the Washington Constitution, the court's comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 723; *Lane*, 125 Wn.2d at 838-39.

In *Levy*, this Court found the court's comment on the evidence harmless because it did not relieve the jury of determining all of the elements of the offense. *Levy*, 156 Wn.2d at 727. In contrast, here the trial court relieved the jury from determining whether Boss had the lawful right to physical custody of O.J.B-P. by finding that element *as a matter of law*.

Ms. Boss's matter is akin to the jury instruction in *Becker*, *supra*. In *Becker*, in the special verdict, the court effectively instructed the jury that one of the disputed elements of the offense had been proven as a matter of law. *Becker*, 132 Wn.2d 65. On appeal, this Court found the special verdict to be an impermissible comment on the evidence and reversed the conviction. *Id* ("By effectively removing a disputed issue from the jury's consideration, the special verdict form relieved the State of its burden to prove all elements of the sentence enhancement statute."). Further, this Court rejected the State's argument that it had produced sufficient evidence of the element, finding it "irrelevant to whether the jury instruction was correctly drafted." *Id*.

The jury instruction here also found one of the elements of the offense of first degree child interference to be proven as a matter of law. The Court of Appeals found the comment to be harmless in light of the fact the State had provided sufficient proof. *Boss*, 144 Wn.App. at 890. But, as this Court held in *Becker*, the fact the State had provided sufficient proof is irrelevant. *Becker*, 132 Wn.2d at 65. The only thing that matters is whether the trial court's comment took an element away from the jury's consideration. *Id*. That is precisely what happened here. As in

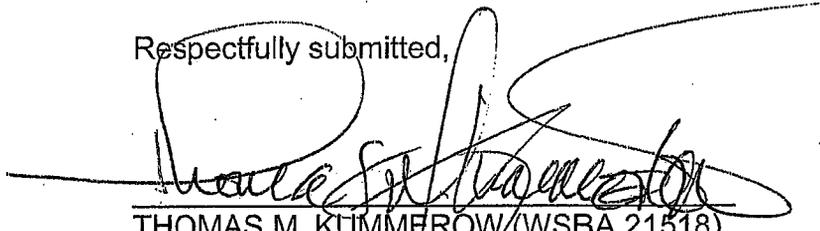
Becker, Ms. Boss is entitled to reversal of her conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated, Ms. Boss submits this Court must reverse her conviction for first degree custodial interference and remand for a new trial.

DATED this 2nd day of April 2009.

Respectfully submitted,



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APPENDIX A

RCW 9A.40.060

(1) A relative of a child under the age of eighteen or of an incompetent person is guilty of custodial interference in the first degree if, with the intent to deny access to the child or incompetent person by a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person, the relative takes, entices, retains, detains, or conceals the child or incompetent person from a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person and:

(a) Intends to hold the child or incompetent person permanently or for a protracted period; or

(b) Exposes the child or incompetent person to a substantial risk of illness or physical injury; or

(c) Causes the child or incompetent person to be removed from the state of usual residence; or

(d) Retains, detains, or conceals the child or incompetent person in another state after expiration of any authorized visitation period with intent to intimidate or harass a parent, guardian, institution, agency, or other person having lawful right to physical custody or to prevent a parent, guardian, institution, agency, or other person with lawful right to physical custody from regaining custody.

(2) A parent of a child is guilty of custodial interference in the first degree if the parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan, and:

(a) Intends to hold the child permanently or for a protracted period; or

(b) Exposes the child to a substantial risk of illness or physical injury; or

(c) Causes the child to be removed from the state of usual residence.

(3) A parent or other person acting under the directions of the parent is guilty of custodial interference in the first degree if the parent or other person intentionally takes, entices, retains, or conceals a child, under the age of eighteen years and for whom no lawful custody order or parenting plan has been entered by a court of competent jurisdiction, from the other parent with intent to deprive the other parent from access to the child permanently or for a protracted period.

(4) Custodial interference in the first degree is a class C felony.

CREDIT(S)

[1988 c 55 § 1; 1994 c 162 §1; 1984 c. 95 § 1

APPENDIX B

No. 9

As of May 11, 2006, DSHS, Children's Protective Services and the State of Washington had lawful right to physical custody of Omaria Boss-Pelts.

APPENDIX C

No. 10

To convict the defendant of the crime of custodial interference in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That the defendant is a relative of Omaria Boss-Pelts, a child under the age of eighteen;

(2) That on or about the period of time intervening between May 31, 2006 through August 22, 2006, the defendant, with the intent to deny access to Omaria Boss-Pelts by an institution, agency or person having a lawful right to the physical custody of such person, took, enticed, retained, detained, or concealed Omaria Boss-Pelts from an institution, agency or person having a lawful right to the physical custody of such person and intended to hold Omaria Boss-Pelts permanently or for a protracted period; and

(3) That ^{any of} the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.