

NO. 81897-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA CHRISAUNDRRA BOSS,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENT BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
1. THE LAWFULNESS OF THE CUSTODY ORDER IS NOT AN IMPLIED ELEMENT OF THE CRIME OF CUSTODIAL INTERFERENCE.....	8
2. THE TRIAL COURT PROPERLY DECIDED WHETHER CPS HAD A LAWFUL RIGHT TO PHYSICAL CUSTODY OF THE CHILD.....	11
3. THE COMMENT ON THE EVIDENCE WAS NOT PREJUDICIAL.....	14
4. THE UNDISPUTED EVIDENCE ESTABLISHED THAT BOSS WAS AWARE OF CPS'S RIGHT TO CUSTODY OF THE CHILD.....	16
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Neder v. United States, 527 U.S. 1,
119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 18

Washington State:

State v. Boss, 144 Wn. App. 878,
184 P.3d 1264 (2008), rev. granted,
165 Wn.2d 1019 (2009)..... 5, 14, 16

State v. Bradshaw, 152 Wn.2d 528,
98 P.3d 1190 (2004)..... 8

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 18

State v. Carver, 113 Wn.2d 591,
781 P.2d 1308 (1989)..... 12, 13, 14, 18

State v. Clausing, 147 Wn.2d 620,
56 P.3d 550 (2002)..... 11

State v. Eastmond, 129 Wn.2d 497,
919 P.2d 577 (1996)..... 17

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007)..... 16

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

State v. Lampley, 136 Wn. App. 836,
151 P.3d 1001 (2006)..... 15

State v. Levy, 156 Wn.2d 709,
132 P.3d 1076 (2006)..... 15

<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	16
<u>State v. Miller</u> , 156 Wn.2d 23, 123 P.3d 827 (2005).....	11, 13, 14
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	17
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	16
<u>State v. Wadsworth</u> , 139 Wn.2d 724, 991 P.2d 80 (2000).....	8
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	17

Constitutional Provisions

Washington State:

Const. art. IV, § 16.....	11
---------------------------	----

Statutes

Washington State:

RCW 9A.40.060.....	2, 9
RCW 9A.40.080.....	18

Rules and Regulations

Washington State:

RAP 12.1.....	5
RAP 2.5.....	7, 16, 17

A. ISSUES PRESENTED

1. Whether the trial court could decide, as a matter of law, that Child Protective Services (CPS) had a lawful right to custody of the child.

2. Whether any comment on the evidence was not prejudicial given that the evidence at issue was undisputed.

3. Whether appellant Cynthia Boss failed to preserve her claim that the "to convict" instruction was missing an implied element given that she did not raise the issue on appeal until oral argument and has never attempted to show how the asserted error had practical and identifiable consequences in the trial of the case.

4. Whether any error in omitting an implied element in the "to convict" instruction was harmless beyond a reasonable doubt.

B. STATEMENT OF THE CASE

The facts of the crime are set forth in detail in the opinion of the Court of Appeals. In summary, CPS obtained court orders and a writ of habeas corpus granting CPS custody of Boss's infant child, O.J.B.-P. Ex. 2, 3 and 11. After Boss was served with the orders and writ, she refused to divulge the child's whereabouts and was placed into custody. RP(2/7/07) 112-15; RP(2/8/07) 43-46. The court released Boss after she promised to make the child available to CPS. RP(2/7/07) 114-17; RP(2/8/07) 48-49. Boss moved out of her apartment, failed to appear for

her next court hearing, and the child was later located in Texas.

RP(2/7/07) 115-16, 122, 129-31; RP(2/8/07) 17-18, 53.

The State charged Boss with one count of custodial interference in the first degree.¹ At trial, Boss moved *in limine* to preclude the State from introducing evidence relating to CPS's basis for seeking the custody orders, specifically, CPS's history with Boss and her older children.² RP(1/31/07) at 2-3. After the prosecutor indicated that the State did not intend to offer this evidence, Boss's attorney suggested that he wished to challenge the validity of the custody order. He complained that the court issued the order based upon what it "knew about the other children" and that the State should have been required to show that there were grounds to believe that O.J.B.-P was in danger. *Id.* at 3-5.

In response to Boss's argument about the custody order, the court stated, "[t]hat's for the judge, not the jury, I would assume. Otherwise, all that stuff that you don't want in, it is all coming in." *Id.* at 5. When the

¹ The custodial interference statute provides that "[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... [by an] agency, or other person having a lawful right to physical custody of such person, the relative takes, entices, retains, detains, or conceals the child... [from an] agency, or other person having a lawful right to physical custody of such person and... [i]ntends to hold the child ... permanently or for a protracted period. RCW 9A.40.060(1).

² Boss's two older children were the subject of dependency proceedings due to allegations of physical and sexual abuse. CP 2-5. Both children had been placed in court-ordered protective custody. CP 2.

court questioned whether Boss could challenge the validity of the custody order, Boss's attorney acknowledged "the general proposition that if there is an order in place from the court, one must obey the order and not try to do an end-run around it," and stated that he could find no law directly on point. Id. at 6.

A week later, during jury selection, Boss's counsel subsequently conceded that "the lawfulness of the order... isn't something we can necessarily attack in this proceeding." RP(2/7/07) at 4. Boss made no objection when the State offered the orders and writ into evidence at trial. RP(2/8/07) at 105-11.

Near the end of trial, the State asked the court to instruct the jury that CPS had a lawful right to custody of the child. RP(2/8/07) at 2. After Boss objected, the trial judge responded that whether CPS had a lawful right to custody was a legal determination and indicated he would hear argument from counsel as to why CPS did not have a lawful right to custody. Id. at 4-5.

COURT: [I]f you have some argument other than for the record that it is not -- it didn't have lawful right to custody, then, I will certainly consider that, and if they didn't, I will dismiss the case.

DEFENSE COUNSEL: Well, it is debatable, but it is not something I want to explore with the jury because it gets into that debate, and the debate is messy. There was -- the sole statutory ground that the State had for issuing the order

was that there was no suitable parents or other custodian to take custody.... to me, that is a debatable matter. I'm happy to debate that outside the presence of the Court [sic], but I do not want to have to get into that with the jury.

COURT: ... maybe it is debatable, but a judicial officer made a decision, and if they had discretion to make that decision, then, it is a lawful order... If they were acting beyond their jurisdiction or discretion that is not a lawful order. So I guess I will invite you to show me, from the record, where that's the case and I will take a look at that.

Id. at 5-6. After further discussion with the court, Boss's counsel conceded that the custody orders were not unlawful. Id. at 10-11.

Boss later clarified that she was not asking the court to find the order unlawful, but requested that the court not instruct the jury that the order was lawful. Id. at 85-86. The court inquired, "How is a jury supposed to know what a lawful order is?" Id. at 86. Boss's counsel responded, "I don't know the answer to that." Id.

The court then instructed the jury that "[a]s of May 11, 2006, DSHS, Children's Protective Services and the State of Washington had lawful right to physical custody of [O.J.B.-P]." CP 44 (Instruction No. 9).

On appeal, Boss claimed that the "to convict" instruction erroneously omitted two essential elements of the crime: (1) the validity of the custody order, and (2) Boss's knowledge of the validity of the custody order. Brief of Appellant at 1, 7. At oral argument, Boss modified her argument on the second claim of error, and argued that her knowledge of

the State's right to physical custody of the child was an implied element of the offense. State v. Boss, 144 Wn. App. 878, 887, 184 P.3d 1264 (2008), rev. granted, 165 Wn.2d 1019 (2009). In addition, at oral argument, the court, *sua sponte*, raised the issue of whether the trial court had commented on the evidence by instructing the jury that CPS had a lawful right to custody of O.J.B.-P.³

The Court of Appeals affirmed Boss's conviction. The court concluded that the validity of the custody order was a question for the trial court to decide as a matter of law. 144 Wn. App. at 884-86. Looking to the plain language of the statute, the court held that "[t]he defendant's knowledge of the validity of a custody order is not an element of the offense of custodial interference in the first degree." Id. at 887.

The court found that Boss's knowledge of the State's right to physical custody of the child was an implied element of the offense, reasoning that "[a]bsent knowledge of the government's right to physical custody of a parent's child, the parent acts without culpability in denying such physical custody to agents of the government." 144 Wn. App. at 893. However, the court concluded that Boss could not raise this issue for the

³ Presumably, the Court of Appeals in its discretion found that the issue "should be considered to properly decide [the] case" even though it was not raised in the briefs on review. See RAP 12.1(b).

first time on appeal because she did not show that it was manifest constitutional error.

Boss cannot make a plausible showing that the claimed error had practical and identifiable consequences in her trial because she cannot show that she was actually prejudiced by the claimed error. At trial, the evidence was overwhelming that Boss actually knew of the court orders giving CPS the right to physical custody of O.J.B-P. In fact, the record reveals that Boss did not contest this evidence and that the question of her knowledge was never a focus of the trial court litigation.

Id. at 894.

Finally, the court found that the trial court had commented on the evidence by instructing the jury that, as a matter of law, the State had proven that CPS had lawful right to physical custody of the child. Id. at 889. The court found that the error was harmless, however, in light of the uncontested evidence admitted at trial. Id.

C. ARGUMENT

Boss challenges two related jury instructions in her petition. Boss claims that Instruction No. 10, the "to convict" instruction, omitted two essential elements of the crime of custodial interference in the first degree: (1) the *validity* of the custody order and (2) Boss's *knowledge* that CPS had a lawful right to custody of the child. Boss also challenges, for the first time, Instruction No. 9, claiming that the trial court commented on the

evidence by instructing the jury that CPS had a lawful right to the physical custody of O.J.B.-P.

Neither the statute nor relevant caselaw supports Boss's claim that jury was required to decide whether the underlying custody order was legally valid. The custodial interference statute requires that the person or entity deprived of custody have a "lawful right to the physical custody of such person." The jury was instructed as to this element. To the extent Boss raised a challenge to the validity of the underlying custody order, the trial court properly decided this issue as a matter of law.

Instruction No. 9 erroneously included specific facts in attempting to educate the jury concerning the lawfulness of CPS's right to custody. However, any comment on the evidence did not prejudice Boss because it was undisputed, as a factual matter, that the superior court had granted custody of O.J.B.-P. to CPS.

With respect to Boss's claim that the "to convict" instruction omitted an implied element that she must have knowledge of CPS's right to physical custody of the child, the Court of Appeals correctly concluded that this issue was not properly preserved on appeal under RAP 2.5(a) because Boss failed to show that the asserted error had practical and identifiable consequences at trial. But even if the issue had been preserved, any error was harmless beyond a reasonable doubt; it was

undisputed that Boss knew about the orders granting CPS custody of O.J.B.-P.

1. THE LAWFULNESS OF THE CUSTODY ORDER IS NOT AN IMPLIED ELEMENT OF THE CRIME OF CUSTODIAL INTERFERENCE.

Boss claims that the "to convict" instruction "omitted the element of the lawfulness of the custody order." Petition for Review at 1. However, the lawfulness of the custody order is not an element of the offense. The plain language of the statute requires that the deprived parent, guardian or agency have "a lawful right to physical custody" of the child. This phrase was included in the "to convict" instruction. To the extent Boss suggests that an additional element was required to be set forth in the instruction, she is incorrect.

It is the function of the Legislature to define the elements of a specific crime. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). In determining the elements of a crime, this Court looks to the plain language of the criminal statute and any relevant legislative history. State v. Bradshaw, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004). The relevant criminal statute provides:

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.

RCW 9A.40.060(1).

Here, the "to convict" instruction followed the language of the statute, virtually word for word. It provided:

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 [O.J.B.-P.], 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 [O.J.B.-P.] by an institution, agency or person having the lawful right to the physical custody of such person, took, enticed, retained, detained, or concealed [O.J.B.-P.] from an institution, agency or person having the lawful right to the physical custody of such person and intended to hold [O.J.B.-P.] permanently or for a protracted period; and

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

CP 45.

The "to convict" instruction included the statutory language that Boss deprived access to the child by an "institution, agency, or other

person having a *lawful right* to physical custody of such person." Boss never proposed a different instruction below and, in fact, proposed an instruction for the lesser included offense of second-degree custodial interference that contained identical language. CP 26-27, 47-48.

To the extent that Boss argues that the lawfulness of a custody order is an additional implied element of the crime, this claim is not well-taken. In some cases, there may be no custody order. One can commit custodial interference by denying a parent the right of access to the child, and the deprived parent's right to access may not be based upon a custody order. See State v. LaCaze, 95 Wn.2d 760, 763, 630 P.2d 436 (1981) (observing that in the absence of a court order, both parents share the right to custody of the child). In cases where there is a custody order, the validity of the custody order is relevant to determining whether the right to custody is *lawful*, but there is no basis for holding that it is an additional element of the crime. Moreover, as discussed in the next section, the issue of whether the right to custody is *lawful* is a legal issue for the court to determine. This Court should reject Boss's claim that the "to convict" instruction should have included "lawfulness of the custody order" as an element of the crime.

2. THE TRIAL COURT PROPERLY DECIDED WHETHER CPS HAD A LAWFUL RIGHT TO PHYSICAL CUSTODY OF THE CHILD.

The trial court decided that CPS had a lawful right to custody of O.J.B.-P. It was appropriate for the trial court to rule on this issue as a matter of law.

Washington Constitution article IV, section 16, provides that the court “shall declare the law.” Questions of law are for the court, not the jury, to resolve. State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

This Court has explained:

Legal questions are decided by the court, not the jury, for good reason. By arguing to the court, the lawyers have the opportunity to argue canons of construction; applicable law, including case precedent; and all the other traditional elements that make up legal argument. A judge trained in law then decides whether or not the proposition is legally correct. And he or she can then craft an instruction for the jury. To allow a lay person to answer a legal question puts the lawyers in the impossible position of making these legal arguments to a lay jury.

State v. Clausing, 147 Wn.2d 620, 629, 56 P.3d 550 (2002).

In this case, Boss did not dispute that the superior court had issued the custody orders and writs. Instead, she questioned the court's basis for issuing the orders, a legal issue properly decided by the court. As this Court's prior decision on the crime of custodial interference demonstrates,

the existence of a "lawful right to physical custody" is a matter of law for the court to decide.

In State v. Carver, 113 Wn.2d 591, 781 P.2d 1308 (1989), the defendant father challenged his custodial interference conviction on the basis that the mother did not have a lawful right to custody of their child. The father had initiated dissolution proceedings in California and obtained an order of temporary custody of his daughter from a California court. After a brief reconciliation, the mother initiated dissolution proceedings in Washington, and a court commissioner granted temporary custody to the mother and enjoined either party from taking the daughter out of state. After the father took the child to California, he was charged with and convicted of custodial interference.

On appeal, the father claimed there was "insufficient evidence" that the mother had a "lawful right to physical custody" of the child, claiming that the Washington court's grant of custody to the mother was invalid. Id. at 605. This Court observed that "[t]he resolution of this issue turns on whether or not the Superior Court Commissioner had the power to modify the California decree." Id. at 606. After engaging in a lengthy analysis of the relevant law, the Court concluded that the court commissioner had the authority to award custody of the child to the mother. Id. at 611.

Under Boss's interpretation of the statute, presumably a jury should have decided whether the court commissioner's order was valid in Carver. But given the potentially complicated legal issues presented, it is inconceivable that the legislature expected that a jury would decide whether a custody order is legally valid. Discussing a similar issue with respect to the crime of felony violation of a court order, this Court noted:

[I]ssues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. Collectively, we will refer to these issues as applying to the "applicability" of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged.

Miller, 156 Wn.2d at 31.

Boss's trial counsel acknowledged that the legal issues presented were not properly for the jury. When the trial judge questioned Boss's attorney how the jury could decide whether the custody order was valid, he candidly responded, "I don't know the answer to that." RP(2/8/07) at 86. Indeed, Boss did not want the jury to hear the evidence relating to the issuance of the orders and writ. "[I]t is not something I want to

explore with the jury because it gets into that debate, and the debate is messy." Id. at 5. In this case, it was appropriate for the trial court, not the jury, to determine the validity of the orders granting CPS custody of O.J.B.-P. Consistent with Carver and Miller, the trial court properly considered the issue of whether the custody orders were valid.⁴

3. THE COMMENT ON THE EVIDENCE WAS NOT PREJUDICIAL.

Though the Court of Appeals found that it was proper for the trial court to decide whether CPS had lawful custody of a child, it held, *sua sponte*, that Instruction No. 9 constituted an improper comment on the evidence. The court explained:

By instructing the jury that, as a matter of law, the State had proven that CPS "had lawful right to physical custody of" O.J.B.-P., the trial court improperly took the resolution of this factual question from the jury. While it was for the trial court to determine the validity of the May 11 custody order in the course of determining the admissibility of a copy of that order as an exhibit, it was for the jury to determine whether it believed the State's evidence and witnesses and whether the State had proven 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.

A judge comments on the evidence when he or she instructs the jury that factual issues have been established as a matter of law. State v.

⁴ Boss has never claimed that the trial court erred as a matter of law in concluding that the custody orders were valid.

Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[A] court may comment on the evidence when it incorporates specific facts in a jury instruction." State v. Lampley, 136 Wn. App. 836, 842-43, 151 P.3d 1001 (2006).

Here, Instruction No. 9 unnecessarily incorporated specific facts in the jury instruction. The purpose of the instruction was to educate the jury as to lawfulness of the right to custody. The court could have accomplished a similar purpose by instructing the jury that "an institution, agency or person has the lawful right to the physical custody of another person when granted by court order." Such an instruction would have avoided incorporating the specific facts of this case.

Instructions that constitute a comment on the evidence are presumed prejudicial unless the State proves otherwise or the record affirmatively establishes that no prejudice occurred. Levy, 156 Wn.2d at 723. The record here affirmatively establishes that no prejudice occurred. As the Court of Appeals aptly summarized:

The custody order issued by the juvenile court gave the State custody of O.J.B-P., declaring, in pertinent part, that O.J.B-P. "shall be taken into custody ... under the supervision of DSHS." The custody order was admitted into evidence without objection. At trial, Tonya Do, a CPS social worker, testified that the custody order placed O.J.B-P. in CPS custody. At trial, Boss offered no evidence to rebut this testimony.

Accordingly, in this case, "no one could realistically conclude that the element was not met."

Boss, 144 Wn. App. at 889.

4. THE UNDISPUTED EVIDENCE ESTABLISHED THAT BOSS WAS AWARE OF CPS'S RIGHT TO CUSTODY OF THE CHILD.

The Court of Appeals agreed with Boss that her knowledge of the State's right to physical custody of the child was an implied element of the offense of custodial interference.⁵ The court also held that Boss could not raise this issue for the first time on appeal under RAP 2.5(a). However, even if Boss could raise this issue, the omission of this element was clearly harmless.

As a general rule, issues cannot be raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). There is a limited exception where the issue being raised involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The defendant must make a plausible showing that the asserted error had practical and identifiable

⁵ Boss has abandoned her original argument that her "knowledge of the lawfulness of the [custody] order" is an element of the crime. Brief of Appellant at 1. She did not seek review of the Court of Appeals's rejection of this claim. See Petition for Review at 1-2.

consequences in the trial of the case. Id. "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Here, the Court of Appeals properly concluded that Boss failed to preserve this issue under RAP 2.5(a). Boss did not make this claim at trial, proposed a lesser included instruction with the same error, and only raised the issue during oral argument at the Court of Appeals. Boss never attempted to show how the omission of this implied element had practical and identifiable consequences in the trial of this case. In contrast, in cases where this Court has allowed a defendant to raise a missing element claim for the first time on appeal, the court found that error had clearly prejudiced the defendant.⁶ This Court should hold that this issue was not properly preserved on appeal.

Even if the issue was properly preserved on appeal, Boss would not be entitled to reversal of her conviction because any error was clearly harmless.

At the outset, the State agrees that an individual, unaware that another party has a right to physical custody of the child, is not guilty of

⁶ State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) (holding that defendant was prejudiced by jury instruction's failure to include missing element); State v. Eastmond, 129 Wn.2d 497, 504, 919 P.2d 577 (1996) (holding that, due to omission of element, jury could have misunderstood the findings required for a conviction).

custodial interference when he or she denies that party access to the child. The custodial interference statutes were designed to prevent a child's relatives or parents from taking or hiding the child from the lawful guardian or custodian. Carver, 113 Wn.2d at 600. Several of the affirmative defenses to the crime contemplate that the defendant is aware of the other party's right to custody. For example, it is a defense that the defendant, after making a good faith effort to provide notice to the person entitled to access to the child, failed to provide access "due to reasons that a reasonable person would believe were directly related to the welfare of the child." RCW 9A.40.080(2)(d). Similarly, it is a defense that the deprived party failed to exercise his or her rights to physical custody of the child for a protracted period of time. RCW 9A.40.080(2)(b). These defenses would make little sense if the defendant was not required to be aware that the deprived party had a right to custody of the child.

In this case, the failure to include the implied knowledge element was clearly harmless. When an element is omitted from a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Here, the evidence was overwhelming and undisputed that Boss was aware of the court orders granting CPS custody of O.J.B.-P. At

a hearing on May 31, 2006, Boss was given copies of the orders and the writ. RP(2/7/07) at 112-13, 121. At a court hearing, she promised to inform the court and CPS of the location of the child. RP(2/7/07) at 112-22. In opening statement, defense counsel acknowledged that Boss had been given "an order to give up the baby." RP (2/7/07) at 94. In sum, there was simply no dispute that Boss knew about the orders. Any failure to include the element was harmless beyond a reasonable doubt.

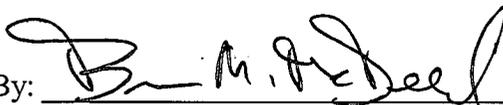
D. CONCLUSION

For all the foregoing reasons, Boss's conviction for first degree custodial interference should be affirmed.

DATED this 3^d day of April, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the SUPPLEMENT BRIEF OF RESPONDENT, in STATE V. CYNTHIA BOSS, Cause No. 81897-5, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

4/3/09

Date