

28972-9-III
COURT OF APPEALS

FILED
September 27, 2011
Court of Appeals
Division III
State of Washington

DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER L. KIRWIN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ISSUES

1. Did the trial court instruct the jury on an uncharged alternative theory of first degree custodial interference?
2. Assuming that the court did instruct only on an uncharged alternative, does an appellate court review a sufficiency of the evidence challenge to the charged or uncharged alternative?

B. STATEMENT OF THE CASE

Ms. Kirwin was charged with first degree custodial interference under RCW 9A.40.060(1):

COUNT I: FIRST DEGREE CUSTODIAL INTERFERENCE, committed as follows:

That the defendant, JENNIFER L KIRWIN, a relative of [CHILD'S NAME], a child under the age of 18, in the State of Washington, on or about between June 12, 2009 and June 22, 2009, with the intent to deny access to [CHILD'S NAME], by TODD MICHAEL KIRWIN, a parent having a lawful right to the physical custody of [CHILD'S NAME], did take and conceal the said [CHILD'S NAME], from TODD MICHAEL KIRWIN and cause him/her to be removed from the state of usual residence.

(CP 1-2)

The court instructed the jury that, with respect to each child:

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

- (1) That the defendant was a parent;
- (2) That on or about between June 12 and June 17 22, 2009, the defendant intentionally took, enticed, retained or concealed her child from the other parent having the lawful right to time with the child pursuant to a court ordered parenting plan;
- (3) That the defendant acted with the intent to deny the other parent from access to the child;
- (4) That the defendant caused the child to be removed from the state of usual residence; and,
- (5) That any of these acts occurred in the State of Washington.

(RP 157-58)

The jury found Ms. Kirwin guilty of the offenses defined by the jury instruction.

C. ARGUMENT

1. THE TRIAL COURT INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE THEORY OF FIRST DEGREE CUSTODIAL INTERFERENCE.

The state and federal constitutions require that an accused be informed of the charges he or she must face at trial. Const. Art. I, § 22; Sixth Amendment.

When a statute provides that a crime may be committed in alternative ways, the information may charge one or all of the alternatives as long as they are not repugnant to each other. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). Separate subsections within a

statute proscribing an offense represent alternative ways to commit that offense. *State v. Smith*, 159 Wn.2d 778, 784-85, 154 P.2d 873 (2007).

If the information alleges only one statutory means of committing a crime, it is error for the trial court to instruct on uncharged alternatives, regardless of the strength of the evidence. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003); *Bray*, 52 Wn. App. at 34.

The offense of first degree custodial interference may be committed in any one of three alternative ways: (1) by being a relative of the child and keeping the child from a person who has a lawful right to physical custody;¹ (2) by being a parent and keeping the child from the other parent who has a right to time with the child;² or (3) being a person

¹ RCW 9A.40.060(1) provides, in relevant part:

(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 . . . by a parent . . . having a lawful right to physical custody of such person*, the relative takes, entices, retains, detains, or conceals the child . . . from a parent . . . having a lawful right to physical custody of such person and: . . . (c) Causes the child . . . to be removed from the state of usual residence . . .”

RCW 9A.40.060(1) (emphasis added).

² RCW 9A.40.060(2) provides, in relevant part:

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

RCW 9A.40.060(2).

who, in the absence of a court order, helps one parent to keep the child from the other parent. *See* RCW 9A.40.060.

Here, the charging document expressly alleged the first alternative including an “intent to deny access to [CHILD’S NAME], by TODD MICHAEL KIRWIN, a parent having a lawful right to the physical custody of [CHILD’S NAME]” (CP 1)

The jury instruction, however, states the statutory elements of the second alternative, requiring the jury to find the parent “intentionally took, enticed, retained or concealed her child from the other parent having the lawful right to time with the child pursuant to a court ordered parenting plan.” (RP 157)

The difference between the two alternative means of committing custodial interference is not insignificant. The first alternative requires intent to violate an order granting custody to the person from whom the child is taken, while the second alternative requires an intent to violate a parenting plan that grants time with the child.

The trial court instructed the jury on an uncharged alternative way of committing first degree custodial interference.

2. WHEN THE TRIAL COURT INSTRUCTED THE JURY ONLY ON AN UNCHARGED ALTERNATIVE, AN APPELLATE COURT REVIEWS THE SUFFICIENCY OF THE EVIDENCE BY DETERMINING BEYOND A REASONABLE DOUBT WHETHER A JURY THAT HAD BEEN INSTRUCTED ON THE CHARGED OFFENSE WOULD REACH THE SAME RESULT.

Because conviction of an uncharged offense violates due process, an appellate court need not determine whether the evidence is sufficient to prove the essential elements of the uncharged offense beyond a reasonable doubt.

The “to convict” instruction in this case omitted several essential elements of the charged offense. The test for determining the sufficiency of the evidence when the “to convict” instruction omits essential elements of the offense is whether the reviewing court is “convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.” *State v. O’Donnell*, 142 Wn. App. 314, 323, 174 P.3d 1205 (2007) (quoting *State v. Van Tuyl*, 132 Wn. App. 750, 758, 133 P.3d 955 (2006)) (quoting *State v. Linehan*, 147 Wn.2d 638, 654, 56 P.3d 542 (2002))

The error in this case was omitting from the “to convict” instruction any requirement that Ms. Kirwin knew of the existence of a custody order and intentionally violated the order:

Knowledge of the existence of a custody order is inherent in the intentional element of the offense. A person cannot “intentionally” commit first degree custodial interference without being on notice of the underlying order. The State must establish a custody order existed and the defendant intentionally violated the order. The State must establish a defendant is aware of the existence of the order to prove the defendant intentionally violated it.

State v. Boss, 167 Wn.2d 710, 719-20, 223 P.3d 506 (2009).³

The State did not present any evidence that Ms. Kirwin had actual knowledge that Mr. Kirwin had obtained an order granting him physical custody of the children. The evidence showed that Mr. Kirwin did not see Ms. Kirwin or the children after some time in May, and did not obtain the custody order until June. (RP 8-12)

No court could find beyond a reasonable doubt that any jury that was instructed on the elements of the charged offense would have found Ms. Kirwin guilty.

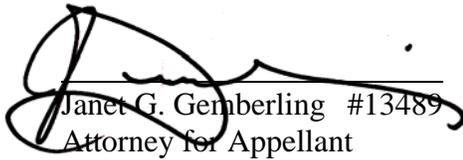
³ *Boss* involved a mother who withheld her child from CPS after the court had entered an order granting CPS physical custody of the child. *Boss* was charged under the first alternative, as a relative who withheld custody, and the jury instruction stated the essential elements of the first alternative. 167 Wn. 2d at 717. The issue was whether the instruction should have specified that the accused must have knowledge of the existence of a custody order. The court held that the jury instruction need not separately specify such knowledge because knowledge of the order was essential to proving intent to violate the order. 167 Wn. 2d at 719-20.

D. CONCLUSION

When the jury is instructed on the elements of an uncharged offense, the resulting conviction can only be affirmed if the evidence is sufficient to convince the reviewing court beyond a reasonable doubt any reasonable jury would have found the elements of the charged offense. Because the State failed to present any evidence to support an essential element of the charged offense, Ms. Kirwin's convictions should be reversed and dismissed.

Dated this 27th day of September, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

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

I certify under penalty of perjury under the laws of the State of Washington that on September 27, 2011, I served a copy of the Appellant's Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on September 27, 2011, I mailed a copy of the Appellant's Supplemental Brief in this matter to:

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Signed at Spokane, Washington on September 27, 2011.


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