FILED

JAN 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

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

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
PO Box 9166
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A. ASSIGNMENTS OF ERROR

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

B. ISSUES

1. Intent to deprive a parent of a legal right to physical custody of his children is an essential element of first degree custodial interference. The State failed to present evidence that the defendant knew the parent had any legal right to physical custody. Is the evidence sufficient under the Due Process clause to support the conviction?
2. The trial court failed to inform the defendant of the maximum penalty for the charged offenses. The defendant demonstrated a failure to appreciate the seriousness of the charges. She informed the court of her intended defense, that her actions were motivated by the father's prior history of abuse and harassment, which the court determined to be

irrelevant. Did the court violate the defendant's Sixth Amendment right to counsel by finding she knowingly and voluntarily waived that right?

3. When the defendant has advised the court that her defense is that she removed her children from the state to protect them from abuse and harassment rather than to deprive their other parent of any legal right to physical custody, does the court abuse its discretion by erroneously excluding, as irrelevant or inadmissible hearsay, evidence that is relevant to the proposed defense and does not fall within the definition of hearsay?

C. STATEMENT OF THE CASE

Jennifer Kirwin has three children: Jacob, age 13, Mackensie, age 11, and Zachary, age 7. (RP 7) Ms. Kirwin was divorced from the children's father, Todd Kirwin, in March 2005. (RP 7) Following the divorce the children lived with Ms. Kirwin. (RP 7) Mr. Kirwin was given opportunities to visit his children. (RP 8)

In April 2009, Mr. Kirwin attempted to contact Ms. Kirwin regarding visitation, but he was unable to reach her by telephone. (RP 8) He went to her home but she was not there. (RP 8) In May he initiated

legal proceedings and on June 12, 2009, the court entered orders granting him full custody of the children. (RP 10-11; exh 1 and 2) Mr. Kirwin then contacted police and requested assistance in finding his children. (RP 12)

Ms. Kirwin and her children were found in California in early July and returned to Spokane. (RP 12-13) The State charged Ms. Kirwin with three counts of custodial interference, 9A.40.060(1)(C), allegedly committed between June 12 and June 22, 2009. (CP 1-2) The information alleged that on or between these dates Ms. Kirwin took and concealed her children from Mr. Kirwin with intent to deny access to the children by Mr. Kirwin, a parent having a lawful right to physical custody of the children. (CP 1-2)

The State presented testimony by Mr. Kirwin, two of the children, and Ms. Kirwin's mother, showing that between April and July 2009, Ms. Kirwin and her children traveled to Utah, Nevada and California.

Ms. Kirwin's theory of the case was that she had taken the children out of state for their protection because Mr. Kirwin was abusive and had an extensive history of harassment, including initiating groundless *pro se* legal actions that had compelled her to incur excessive legal expenses. (RP 12)

The jury returned guilty verdicts and the court imposed sentences of 90 days in jail on each charge. (CP 59)

D. ARGUMENT

1. THE STATE FAILED TO PRESENT EVIDENCE TO SUPPORT THE INFERENCE THAT MS. KIRWIN KNEW MR. KIRWIN HAD A LEGAL RIGHT TO PHYSICAL CUSTODY OF THE CHILDREN.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*citing State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

"[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (*citing State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

(*citing State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

The State presented no evidence that Mr. Kirwin had any legal right to physical custody of his children before the court entered orders modifying the parenting plan and granting Mr. Kirwin such rights. The State did not present evidence that Mr. Kirwin communicated with Ms. Kirwin between June 12 and June 22 or that he or anyone informed her of the June 12 orders. No evidence was presented to the jury from which any reasonable person could infer Ms. Kirwin knew Mr. Kirwin had a legal right to physical custody of the children. Lacking that knowledge, Ms. Kirwin could not have acted with the intent to deprive Mr. Kirwin of such custody.

2. THE COURT FAILED TO ADVISE MS. KIRWIN OF THE MAXIMUM PENALTY FOR THE CRIMES WITH WHICH SHE WAS CHARGED SO THAT SHE COULD MAKE A KNOWING AND INFORMED WAIVER OF HER RIGHT TO COUNSEL.

The right to counsel during a criminal proceeding is guaranteed under article I, § 22 of the Washington Constitution and amendment VI of the United States Constitution. Similarly, the accused is also guaranteed the right to refuse counsel and present his or her own defense at criminal proceedings. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525,

45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). However, waiver of the right to counsel must be knowing, intelligent, voluntary, and unequivocal. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

The standard of review of the decision of a trial court accepting a defendant's request to proceed *pro se* is abuse of discretion. *State v. Vermillion,* 66 Wn. App. 332, 340, 832 P.2d 95 (1992).

In *Faretta,* our Supreme Court determined that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta*, 422 U.S. at 835 (*quoting Adams v. United States,* 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed 268 (1942)). In *Acrey*, the Supreme Court held that at a minimum the defendant must have been informed of "the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind defendant in the presentation of his case." *Acrey*, 103 Wn.2d at 211.

The court told Ms. Kirwin that the standard range for her offenses was up to 12 months in jail but that she "could under certain circumstances be sentenced to a sentence including prison." (RP 4) The court did not indicate that the maximum penalty for the offense was five

years in prison: "These are yes or no questions, okay? There are three counts custodial interference against you. You understand, yes or no, that you could conceivably be sentenced to prison if you're found guilty of these offenses? Do you understand that?" (RP 4)

Ms. Kirwin did not appear to understand the seriousness of her offenses and thus the risks involved in representing herself. Asked whether she understood that "there are formal rules that govern how a case is presented and how a trial is conducted" Ms. Kirwin responded: "Yes, Your Honor. It's custodial interference. It's not a murder." (RP 8) She assured the court that she was capable of representing herself in this criminal case because she had experience representing herself in civil proceedings related to her marriage dissolution. (RP 8, 11, 13)

At the conclusion of the colloquy, Ms. Kirwin explained to the court that she did not wish to be represented by an attorney because she needed to present the extensive evidence of Mr. Kirwin's legal harassment and abuse beginning in 2004, and no attorney would take the time to review this extensive history of the case. (RP 12-13) The court did not suggest to Ms. Kirwin that such evidence would be inadmissible.

In finding that Ms. Kirwin had knowingly and intelligently waived her right to counsel, the court disregarded her evident failure to appreciate the seriousness of the charges against her or her obvious failure to

understand that her entire defense could be excluded under the rules of evidence. In failing to appoint counsel to represent Ms. Kirwin, the court violated her right to counsel under the Sixth Amendment and Const. Art. 1, § 22.

3. THE COURT ABUSED ITS DISCRETION IN EXCLUDING ADMISSIBLE EVIDENCE.

A defendant in a criminal case has a constitutional right to present the testimony of witnesses in order to establish a defense. *State v. Cheatam*, 150 Wn.2d 626, 648, 81 P.3d 830 (2003).

Ms. Kirwin's theory of the case was that she did not act with intent to deprive Mr. Kirwin of his legal right to physical custody of the children but rather to protect the children, herself, and her family from Mr. Kirwin's repeated harassment and abuse. Intent was an essential element of the offense with which she was charged. She sought to introduce evidence in support of this theory during her cross-examination of the State's witnesses, who included her former husband, her mother, and her three children. The court's numerous erroneous rulings on the admissibility of evidence deprived Ms. Kirwin of the opportunity to present this defense.

a. The Court Improperly Characterized And Excluded Evidence As Hearsay.

Hearsay is generally inadmissible. ER 803. " 'Hearsay' is 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(c). A trial court's refusal to admit evidence under the hearsay exception to ER 804(b)(3) is reviewed for abuse of discretion. *State v. McDonald,* 138 Wn.2d 680, 693, 981 P.2d 443 (1999).

During Mr. Kirwin's direct testimony the State introduced into evidence orders the court entered in Ms. Kirwin's absence which referenced her obligation to obtain a psychological evaluation. (Exh 1 and 2). A jury might readily infer from this evidence that Mr. Kirwin had obtained information showing that Ms. Kirwin had a mental illness. In cross-examination, Ms. Kirwin sought to elicit from Mr. Kirwin evidence as to whether there was any factual basis for this obligation, and the court then elicited testimony from Mr. Kirwin showing that he had previously asserted Ms. Kirwin had "a mental issue":

> Q. (BY MS. KIRWIN) Well, did I ever have a mental disorder?
> MR. LOVE: Objection. Relevance.
> THE COURT: I will permit.
> A. I have no idea.
> Q. You told the guardian ad litem I did.
> MR. LOVE: Objection. Argumentative. Not in the form of a question.

> THE COURT: Did you ever make a statement to that effect?
> THE WITNESS: I made a statement that I believe Jennifer had a mental issue that needed to be looked at.
> Q. (BY MS. KIRWIN) Did a psychologist tell you I had a bipolar mental illness?
> A. No.
> Q. Because it is stated a counselor told you --
> THE COURT: Are you making a question or making a statement?
> MS. KIRWIN: I am asking a question.
> . . .
> Q. (BY MS. KIRWIN) Did any psychologist, counselor or guardian ad litem tell you I had a mental disorder?
> MR. LOVE: That is hearsay.
> THE COURT: Sustained as to hearsay.
> MS. KIRWIN: It is in the court file.

(RP 21) It is evident from the context that Ms. Kirwin was seeking to determine whether Mr. Kirwin believed there was a factual basis for the implication that she had a mental disorder. After the court elicited Mr. Kirwin's hearsay statement that he had told someone she "had a mental issue" Ms. Kirwin sought to elicit testimony as to whether Mr. Kirwin had a basis for making such a statement.

Ms. Kirwin was not attempting to elicit third-party testimony that she had a mental illness; she was not offering an out-of-court statement for the truth of the matter asserted. The court erred in eliciting hearsay evidence from Mr. Kirwin, and compounded the error by preventing Ms. Kirwin from showing that there was no foundation for the evidence elicited.

In questioning one of her children, Ms. Kirwin attempted to show that Mr. Kirwin had made inappropriate or threatening statements to his children:

> Q. (BY MS. KIRWIN) Did you ever say that the house you live in is haunted in the basement?
> A. Yes.
> Q. Did dad laugh at you three?
> A. No.
> Q. Who was scared to go to that house?
> A. Zach.
> Q. What did he tell Zach?
> MR. LOVE: Objection. Hearsay.
> THE COURT: Sustained as to hearsay.

(RP 61) Mr. Kirwin's statements to his son were not offered for the truth of the matter asserted, but rather to show that he had made untrue, and perhaps frightening, statements to the child. The evidence was improperly excluded as hearsay.

While questioning her mother in cross-examination, Ms. Kirwin asked about a statement a police officer had made and the court sustained the State's hearsay objection:

> Q. (BY MS. KIRWIN) Did you ever meet an Officer Mann?
> A. Yes.
> Q. When?
> A. Officer Mann filed a report against my ex-son-in-law, Todd Kirwin, for trying to run my husband and I off the road, off of Francis, and I went in and filed it with Officer Mann.

> Q. Did she say anything to you when you filed it?
> MR. LOVE: Objection. Hearsay.
> THE COURT: Sustained as to hearsay.

(RP 105) Although it was unclear from the testimony whether the out-of-court statement was proffered for the truth of the matter asserted, the court denied Ms. Kirwin the opportunity to make an offer of proof:

> Q. (BY MS. KIRWIN) Well --
> THE COURT: Sustained as to hearsay, ma'am. It is an out-of-court statement –

(RP 105) "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991). By precluding Ms. Kirwin from making an offer of proof, the trial court deprived itself of the information necessary to make a rationally informed ruling on the hearsay objection and deprived this court of the record necessary to review the court's ruling. The court abused its discretion in excluding the evidence without permitting the proponent to make an offer of proof.

Ms. Kirwin sought to show that her decision to take her children away from their home was prompted by Mr. Kirwin's repeated harassment of her and her family. (RP 108-09) The court improperly sustained the

State's unfounded hearsay objections and spontaneously instructed the jury to disregard the testimony:

> Q. During the period of approximately March of 2009, did anybody from his family drive by your house?
> THE WITNESS: He himself did. Does that count? Mr. Kirwin.
> THE COURT: That was?
> THE WITNESS: He was parked on my street several times and my neighbors'.
> THE COURT: In March of 2009?
> THE WITNESS: Yes, in March of 2009.
> Q. (BY MS. KIRWIN) Did the neighbors ever say anything to you?
> MR. LOVE: Objection. Hearsay.
> THE COURT: Sustained. You are asking for comments from people who are not in court to be examined.
> Q. (BY MS. KIRWIN) Did anyone in the neighborhood ask Mr. Kirwin to leave?
> A. Yes.
> MR. LOVE: Objection as to hearsay.
> THE COURT: Sustained. Jury will disregard the answer. You are asking for comments from people not in court. Please avoid hearsay. Don't ask questions about what other people said, please.

(RP 108-09) The statement that the court ruled inadmissible could not have been offered for the truth of the matter asserted; asking someone to leave is not a statement having any truth value.

The erroneous hearsay rulings violated Ms. Kirwin's right to present a defense.

b) The Court Improperly Excluded Evidence Relevant To Ms. Kirwin's Defense.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of that action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. *State v. Darden,* 145 Wash.2d 612, 621, 41 P.3d 1189 (2002).

In cross-examining her former husband, Ms. Kirwin asked whether he had ever violated a no-contact order and whether he had attended anger management classes, but the court sustained the State's relevance objections. (RP 14, 17) She asked "Did you ever lock Mackenzie [their daughter] in a bedroom and ask for her to take her shirt off?" (RP 22) The court sustained the State's relevance objection. (RP 22)

Ms. Kirwin asked Mr. Kirwin "Did you abandon Jacob, Mackenzie and Zachary the summer of 2005?" (RP 23) The court sustained the State's relevance objection because the question involved conduct prior to the date of the alleged offense. (RP 23) The court granted the State's objection to her question as to whether Mr. Kirwin had been $10,000 behind in child support, finding the question argumentative. (RP 24)

When Ms. Kirwin asked Mr. Kirwin if he had been told he was guilty of custodial interference, the court instructed her that if she asked another irrelevant or argumentative instruction she would be prevented from continuing cross-examination. (RP 24)

During cross-examination of Jacob and Mackenzie Kirwin, Ms. Kirwin asked her children whether they remembered an emergency visit to a particular doctor's office in February 2009. (RP 54, 84) The court sustained the State's relevance objections because that date was "outside the time frame." (RP 54, 84) The court also sustained an objection to Ms. Kirwin's asking Jacob whether anyone had gotten hurt in the seven months preceding trial (and following the children's going to live with their father) apparently because this, too, was not within the "time frame."

The record does not provide any explanation for the court's ruling that only events that occurred between March and July 2009 could have any relevance to Ms. Kirwin's state of mind at the time of the alleged offenses.

Each of Ms. Kirwin's questions was designed to elicit evidence tending to support her belief that before she took them to California she and her children were being abused and harassed. This evidence was relevant to her theory of the case, namely that her intent in taking the children to California was to protect them from such abuse.

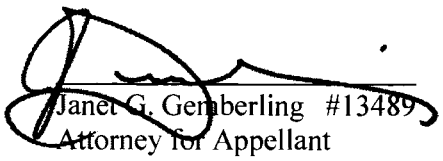
In repeatedly sustaining the State's objections on grounds of irrelevance, the court violated Ms. Kirwin's right to present a defense by preventing her from presenting this evidence to the jury.

E. CONCLUSION

The evidence was insufficient to support the conviction; the charges should be dismissed. Alternatively the conviction was obtained in violation of Ms. Kirwin's constitutional rights to the assistance of counsel and to present a defense; the conviction should be reversed and the matter remanded for a new trial.

Dated this 30th day of December, 2010.

GEMBERLING & DOORIS, P.S.



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DIVISION III

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

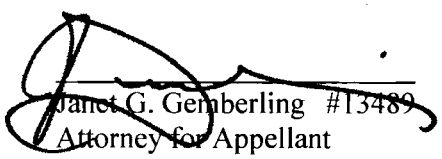
I certify under penalty of perjury under the laws of the State of Washington that on December 30, 2010, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
mlindsey@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on December 30, 2010, I mailed a copy of the Appellant's Brief in this matter to:

Jennifer L. Kirwin
c/o YWCA
930 N. Monroe #1
Spokane, WA 99201

Signed at San Rafael, California on December 30, 2010.



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