

28972-9-III
COURT OF APPEALS
DIVISION III

FILED
September 13, 2011
Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER L. KIRWIN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I.

ARGUMENT

This Court has requested a response from the parties regarding a sufficiency of the evidence analysis in this case.

With respect to the court, the State argues that the underlying premise of the court's question is faulty. There is no uncharged crime. The uncharged crime language should be stricken from any analysis. The crime of which the defendant was convicted was not an uncharged crime, but rather the crime listed in the information *plus* an additional element.

The information charges the defendant with First Degree Custodial Interference and states that the defendant, a relative of each of the three children, on or about between June 12, 2009 and June 22, 2009, with intent to deny access to the father, Todd M. Kirwin, a parent having a lawful right to physical custody of each of the three children, did take and conceal each of the children from Todd Kirwin and cause the child to be removed from the state of usual residence. CP 1-2.

The caption on the information indicates that the defendant was being charged with RCW 9A.40.060(1)(C)DV-F. CP 1-2. The language in the information essentially mirrors that language contained in the information.

When the trial court instructed the jury, an additional element was added from RCW 9A.40.060(2). That element was that the other parent had a lawful right to time with the child pursuant to a court ordered parenting plan. RCW 9A.40.060(2).

The jury was not instructed under the entirety of RCW 9A.04.060(2). For unknown reasons, only the single element of the existence of a "parenting plan" was grafted onto the jury instructions from RCW 9A.04.060(2). Thus, the defendant was not convicted of an alternative crime, but rather the crime charged, plus an added element.

The defendant did not take exception to this aspect of the jury instructions. Actually, the additional element worked to the disadvantage of the State. The State needed to prove an additional element that did not have to be there under the correct rendering of RCW 9A.40.060(1)(c).

The State submits that since there was no "alternative crime" submitted to the jury, the sufficiency of the evidence should be analyzed as it would be in any other case. In this case there is no doubt that the defendant was a parent of each of the victim children. The dates that the children were removed from school and taken on a meandering sojourn through several other states are likewise uncontested. The fact that the

defendant acted with intent to deny the other parent access to the children is apparent in the acts themselves.¹

As far as the “parenting plan” there is some testimony from Mr. Kirwin that would indicate the existence of a custody plan prior to June 12, 2009. Mr. Kirwin stated that he had gone to court *pro se* on the issues of divorce and custody. 2/22 RP 7-8. A copy of an order giving full custody to Mr. Kirwin on June 12, 2009 was entered into evidence. Exh. P1, P2.

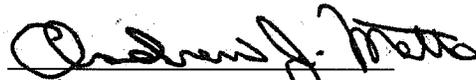
II.

CONCLUSION

For the reasons stated, the State maintains the jury was not charged with an alternative uncharged crime. The issue of sufficiency of the evidence should be resolved in the normal fashion.

Dated this 12th day of September, 2011.

STEVEN J. TUCKER
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¹ “M.K. testified that “She told us that she wanted to start a new life away from out dad.” RP 69.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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

I certify under penalty of perjury under the laws of the State of Washington, that on September 13, 2011, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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and mailed a copy to:

Jennifer L. Kirwin
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9/13/2011
(Date)

Spokane, WA
(Place)

Heather Owens
(Signature)