ED109444

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,

Plaintiff / Respondent,

vs.

OGERTA HELENA HARTWEIN,

Defendant / Appellant.

On Appeal from the Circuit Court of St. Charles County
Honorable Daniel G. Pelikan, Circuit Judge
Case No. 1911-CR02489-01

BRIEF OF THE APPELLANT

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OGERTA HELENA HARTWEIN

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of St. Charles after a jury trial convicting the appellant of a felony offense and a misdemeanor offense and sentencing her to a term of imprisonment.

This case does not involve the validity of a Missouri statute or constitutional provision or a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in St. Charles County. Under § 477.050, R.S.Mo., venue lies in the Eastern District.

Statement of Facts

A. Overview

The State charged Ogerta Helena Hartwein with two counts (D12). The first count was for interference with custody by taking or enticing taking her son, A.H., from the legal custody of his father on June 14, 2019 knowing she had no right to do so and removing A.H. from Missouri, a class E felony (D12 p. 1). The second was for interference with custody by taking or enticing A.H. from his father's legal custody within Missouri on February 21, 2017 knowing she had no right to do so, a class A misdemeanor (D12 pp. 1-2).

After an evidentiary hearing before trial (Tr. 10-80), the State obtained permission to introduce testimonial hearsay of A.H.'s statements to law enforcement under the doctrine of "forfeiture by wrongdoing" (D5; D8; D10).

After trial (Tr. 4-7, 90-488), a jury convicted Ms. Hartwein of both charges (D25; Tr. 481). The trial court then sentenced her to four years in prison (D32 p. 2). She appeals (D33; D35).

B. Background to the proceedings below

1. Marriage and 2011 dissolution

Ogerta Helena Hartwein, who goes by "Helena" (Tr. 355), married Kirk Hartwein in St. Charles County in 2005 (D41 p. 1; D49 pp. 1-2; D65 p. 5). One child, a son, A.H., was born to the Hartweins before the marriage in November 2004 (D41 p. 1; D49 p. 2; D65 p. 5).

In March 2009, Helena[1] filed a petition for dissolution of marriage in the Circuit Court of St. Charles County (D40 p. 10). Kirk filed a cross-

[1] First names are used for ease of reference only. No disrespect is intended.

petition for dissolution (D65). Each party sought sole legal and sole physical custody of A.H. (D49 p. 2; D65 p. 5).

In the dissolution proceedings, Helena accused Kirk of verbal and physical abuse of herself and A.H., who was living with her at the outset of the dissolution proceedings, as well as alcohol abuse (D63 p. 2). Kirk in turn accused Helena of verbally and physically abusing him (D64 p. 2). A guardian ad litem was appointed, who sought psychological and alcohol evaluations of the parties (D62), which the court ordered (D61; D55).

The court ordered visitation between Kirk and A.H. during the case and ordered the parties not to consume alcohol during any parenting time (D56; D57; D59). Kirk alleged Helena nonetheless refused him visitation and sought her held in contempt (D52; D53; D54; D66; D67). He also alleged she had procured a passport for A.H. and he feared her taking A.H. out of the country, including to her native Albania, and requested the court bar the parties from engaging in international travel (D68).

After a hearing, in November 2010 the court found Helena failed to comply with the visitation orders and other orders such as paying the mortgage on the marital home and complying with psychological evaluations, and held her in contempt (D45 pp. 1-4). The court modified its previous orders and ordered Helena to vacate the marital home and to turn A.H. over to Kirk's sole legal and sole physical custody (D45 pp. 4-5). It quoted a psychologist stating Helena intended to keep A.H. from Kirk (D45 pp. 5-6).

In December 2010, Helena allowed her attorney to withdraw (D40 p. 36) and then sought rehearing of the court's contempt and modification

decisions (D69). The court denied this and her attorney reentered (D40 pp. 37-38). Pending trial, Kirk again moved to hold Helena in contempt (D44).

After a trial in December 2010, the court entered a judgment dissolving the parties' marriage in February 2011 (D41). A copy is in the appendix at A12. It gave Kirk sole legal and sole physical custody of A.H. and went over what behavior of Helena's it found justified this (D41 pp. 1-5). It also expressed concern about Kirk's alcohol use, including receiving a ticket for driving while intoxicated between October and December 2010 (D41 pp. 5-6).

In the parenting plan (D41 pp. 15-18), Helena received custody, visitation, and residential time: (1) every other weekend during the schoolyear from after school on Thursday until school on Monday morning; (2) on the alternating weeks during the schoolyear, from the end of school on Wednesday to the beginning of school Friday morning; (3) for four consecutive weeks during A.H.'s summer break; and (4) on alternating holidays (D41 pp. 15-17). Each parent was to ensure the other was provided with all of A.H.'s school communications and medical care information (D41 p. 17). Helena was ordered to pay Kirk $358 per month in child support (D41 p. 8).

Helena timely appealed to this Court, challenging the trial court's disallowance of international travel with A.H., the custody determination, and the allocation of attorney fees (D42; D43). This Court affirmed in a Rule 84.16(b) order and memorandum decision (D42). In February 2017, Helena moved *pro se* to amend the 2011 judgment and again filed a notice of appeal, but this Court dismissed that appeal as untimely (D72; D73; D74).

2. Family access and initial modification proceedings

In April 2016, Kirk filed a family access motion alleging Helena had interfered with his custody of A.H. under the 2011 decree, seeking sanctions against her including a fine, payment of costs, and an order to give her less visitation (D106). Helena opposed this *pro se*, arguing Kirk had attacked her and A.H., Kirk was abusing and neglecting A.H., and A.H. feared for his safety when staying with Kirk and refused to visit Kirk (D110).

The same day as her opposition to Kirk's family access motion, Helena moved *pro se* to modify the 2011 decree as to custody and support, alleging a number of changed circumstances including Kirk not providing for A.H. and abusing A.H., Kirk having a microbiological laboratory in his house harming A.H.'s health, A.H. wishing to have Helena as his primary caretaker, and A.H. spending more time with her than the 2011 decree provided (D76 p. 4). Kirk cross-moved to hold Helena in contempt, alleging she denied him custody (D79 pp. 1-2). He also cross-moved to modify to limit Helena's visitation and increase her child support obligation (D79 pp. 2-3).

At the outset of the modification proceedings, the trial court interviewed A.H. *in camera* (D82; D83), after which it ordered Kirk and A.H. to undergo counseling (D81). Helena also sought A.H. kept from Kirk pending trial, due to her allegations about alcohol abuse, the unlawful health hazard in his house, and his abuse of A.H. (D84). The court denied her request in January 2017 (D86).

January 25, 2017, the court entered a judgment granting Kirk's family access motion, finding Helena had interfered with his custody more than 100

times (D111 p. 4). A copy is in the appendix at A32. It found she kept A.H. in her sole custody since March 2016, Kirk's laboratory did not pose a health concern for A.H., Helena had told A.H. to get off the school bus at a stop before Kirk's so she could pick him up, and it had ordered her to return A.H. to Kirk in October 2016 but she picked him up and withheld him from Kirk two days later (D111 pp. 2-4).

The court prohibited Helena from picking up A.H. from school on any day except Wednesday and Thursday after school was released per a specified schedule and stated she was allowed to drop him off at school Thursday and Friday mornings (D111 pp. 4-5). It prohibited A.H. from getting off the school bus at any stop other than Kirk's (D111 p. 4). It ordered Helena to pay Kirk's and the guardian ad litem's attorney fees (D111 p. 5). It attached a custody schedule, which is in the appendix at A37, keeping the dissolution decree's schedule in place but changing the schedule from February 2, 2017 through July 12, 2017 to give Helena custody every Thursday evening after school or at 5:30 p.m., and on the alternative week Wednesday after school or 5:30 p.m. through Friday morning when school begins or 8:00 a.m. (D111 p. 1).

3. Contempt and further modification proceedings

February 3, 2017 Kirk moved to reconsider or alternatively hold Helena in contempt of the January family access judgment, stating she continued to deny him custody (D113). In the modification case, he moved to strike her pleadings for this reason, too (D88). She filed a notice of appeal to this Court February 6 (D114), though the Court later dismissed her appeal (D128). February 17, Helena moved the court to reopen the evidence (D115).

February 23, after a hearing at which the court later stated Helena did not appear, the court entered a judgment finding her in contempt (D116). It found Kirk had not seen A.H. since the January 25 family access judgment and Helena had failed to send him to school on days Kirk was to get him (D116 p. 1). It found A.H. had been tardy or truant from school, and the guardian ad litem testified the school principal told him Helena was not going to bring A.H. to school or follow the judgment (D116 p. 2). It found Helena had received a copy of the January 25 judgment from the court, and she willfully and intentionally had failed to obey it, for which no good cause existed (D116 p. 2). It ordered Helena to participate in counseling and pay Kirk's and the guardian ad litem's attorney fees, and ordered all the parties and A.H. to appear before it March 30 to determine if an appropriate agreement to purge the contempt has been made (D116 p. 3). If not, it threatened Helena with incarceration (D116 p. 3).

April 10, Kirk moved for a warrant of commitment, stating Helena had not made an offer to purge the contempt as required and he had remained unable to exercise any meaningful custody with A.H. (D118). That same day, Helena, now represented again by counsel (D40 p. 63), appeared in court with A.H. and offered to purge the contempt by allowing Kirk to retain custody of A.H. through April 19, obtaining counseling for A.H. she had set up, beginning counseling herself, and not interfering with Kirk's custody times (D119). The court granted Helena's request to purge the contempt on the condition that after April 19 she follow the prior ordered schedule (D120).

April 21, Kirk filed a "brief" asking the court to reconsider its order allowing Helena to purge contempt and again requesting a warrant of commitment for her (D122). Through counsel, Helena responded the February 23 contempt judgment was void because no separate process was issued for it (D123). The court agreed, set aside the February 23 judgment, and allowed Kirk to file an application for an order to show cause (D124), which he did, and the court entered an order to show cause (D125).

Throughout 2017 and 2018, the court held hearings on Kirk's contempt motion and the modification case, both of which were taken under advisement in November 2018 (D40 pp. 60-80, 104-20). Helena's attorney withdrew and entered several times during this period in both the family access case and the modification case (D40 pp. 68-82, 111-120; D96; D97; D98; D127; D129), finally withdrawing and again leaving Helena *pro se* in February 2019 (D130). After counsel's withdrawal but before judgment, the only record of Helena appearing in court is once in March 2019 (D40 p. 83).

4. Contempt and modification judgments

On June 10, 2019, the court entered a judgment again finding Helena in contempt of the January 2017 family access judgment (D132). A copy is in the appendix at A55. It found she knew A.H. was at her home and in her care when it was Kirk's custody time, she did not call Kirk to let him know, she did not return A.H., she would not encourage A.H. to have time with Kirk or discipline him for refusing, and she did so because she was concerned Kirk had a toxic laboratory in his basement (D132 pp. 2-4). It found no credible evidence Kirk's laboratory was a health hazard, and A.H.'s health problems

generally happened when he lived with Helena, not Kirk (D132 p. 4). It ordered Helena to participate in counseling and stated she could purge the contempt by attending five sessions of counseling within 60 days and by delivering A.H. to the O'Fallon Police Department on June 14 to commence his time with Kirk (D132 p. 5). It ordered the parties to appear June 18 to determine if a purge agreement exists, and threatened incarceration otherwise (D132 p. 5). The docket states a certified copy of this judgment was "mailed to [Kirk]'s attorney and pro se [Helena] on 6-10-19" (D40 p. 122).

Also June 10, the court entered a judgment of modification (D99). A copy is in the appendix at A38. It found Kirk had not physically seen A.H. since January 2017 (D99 p. 4). It repeated many of the findings from the contempt judgment (D99 pp. 4-12). It found Helena keeping A.H. from Kirk was a substantial and continuing change of circumstance warranting modification (D99 p. 14). It continued sole legal and physical custody with Kirk, but restricted Helena to supervised visitation of up to two hours per week up to three times per week, and only after she completed five counseling sessions, after which she could have communication with A.H. in Kirk's presence (D99 pp. 14-15). It repeated its order for Helena to bring A.H. to the police department June 14 (D99 p. 15). It awarded Kirk $5,000 in attorney fees (D99 p. 16). The docket also states a certified copy of this judgment was "mailed to [Kirk]'s attorney and pro se [Helena] on 6-10-19" (D40 p. 84).

June 18, the court held a hearing but stated Helena failed to appear and also had failed to appear at the June 14 custody exchange ordered in the June 10 judgment (D133). The next day, the court entered a warrant of

commitment, ordered the Sheriff to take Helena into custody, and set a bond of $5,000 (D134; D135).

In July 2019, new counsel entered the case for Helena and asked to purge the contempt, stating she was residing in North Carolina, had scheduled counseling there, and would pay $500 per month until the attorney fees to Kirk's attorney were paid (D136). The court denied her motion (D137). That counsel then withdrew (D139).

In August 2019, Helena was arrested per the court's warrant and posted a bond for $5,000 (D141; 142; 143). The next month, she moved *pro se* to purge the contempt (D144). She stated she had been a resident of North Carolina since November 2018 and did not find out about the June 10 judgment until July 2019 through her new counsel (D144 pp. 1-2). She stated she had completed five counseling sessions and would continue paying Kirk's attorney's fee award (D144 p. 2). She also moved *pro se* to set aside the June 10 contempt judgment because she was not aware of it until July 10, A.H. was returned to Kirk's custody June 28, and she had lived in North Carolina since November 2018 (D145 pp. 1-2). She also requested to undergo counseling in North Carolina, where she lived (D146), and a North Carolina counselor submitted a letter stating she had five sessions with him (D147). In response to these motions, the court ordered Helena to appear in court October 11 (D148). It then granted her request to change the counselor, but refused to set aside the judgment (D150; D151).

October 17, Helena moved *pro se* to remove the conditions on her contact with A.H. (D103), which the court denied (D105).

C. Proceedings below

1. Charges

In June 2019, less than a week after the court issued the warrant of commitment against Helena, the St. Charles County Prosecutor filed a two-count information against her (D39). In its final substitute information before trial, the State charged Helena with these two counts:

- Interference with custody in violation of § 565.150, R.S.Mo., a class E felony, because "on or about June 14, 2019, in the County of St. Charles, State of Missouri, [Helena], knowing that [she] had no legal right to do so, took or enticed [A.H.] from the legal custody of Kirk Hartwein to whom the custody of A.H. had been entrusted by order of St. Charles County Associate Circuit Court, State of Missouri on June 10, 2019 and defendant detained A.H. in another state;" and
- Interference with custody in violation of § 565.150, R.S.Mo., a class A misdemeanor, because "on or about February 21, 2017, in the County of St. Charles, State of Missouri, [Helena], knowing that [she] had no legal right to do so, took or enticed A.H. from the legal custody of Kirk Hartwein to whom the custody of A.H. had been entrusted by order of St. Charles County Associate Circuit Court, State of Missouri."

(D12 pp. 1-2). A copy is in the appendix at A6.

Helena pleaded not guilty to both counts (D32 p. 1).

2. State's request to introduce hearsay

In March 2020 and again in June 2020, the prosecutor moved the trial court to find Helena had forfeited her constitutional right to confront the

witnesses against her so the State could introduce hearsay statements of A.H. to law enforcement at trial (D5; D8). A hearing was held June 23, at which Helena's counsel objected to the State's request, arguing that to prove a forfeiture of confrontation rights the State had to prove: (1) Helena was presently sequestering A.H.; and (2) she did so with the specific intent to prevent A.H. from testifying, neither of which it could prove (Tr. 14-15). The following is a summary of the evidence at that hearing.

First, O'Fallon Police Sergeants Scott Weeke and Derek Myers testified about an incident at A.H.'s school on February 21, 2017 (Tr. 21-40).

Sergeant Weeke testified that on February 21, 2017, he responded to Fort Zumwalt South Middle School to a report of a person violating a court order by picking up their child (Tr. 21). He said Sergeant Myers reported Kirk had contacted him saying Helena had been trying to pick up A.H. from school, and also gave him a court order (Tr. 23), though nothing indicated Helena had received that order (Tr. 33). He and Officer Adam Backowski were dispatched to the school to ensure A.H. boarded his bus and Helena did not interfere, after which they went to A.H.'s bus stop (Tr. 24-25). He said they saw Helena in the vicinity of the bus stop and asked her why she was there (Tr. 26). Eventually the bus arrived, and Kirk also was present (Tr. 27).

Sergeant Weeke said he questioned A.H. in the back seat of his vehicle (Tr. 28). A.H. told him he did not want to live with Kirk because he was abused emotionally, underfed, and there was a lab in the basement (Tr. 28). He said he thought A.H. had been coached to say these things (Tr. 29). A.H.

told him he had not seen Kirk since the previous October and Helena had been picking him up from his bus stop every day (Tr. 31). Sergeant Weeke admitted Helena did not tell him she intended to keep A.H. from testifying in court, nor did A.H. tell him that (Tr. 33-34).

Sergeant Myers said he was contacted by a school resource officer regarding Helena attempting to pick up A.H. from school (Tr. 37). He said he spoke with Kirk, who told him Helena sometimes would wait near A.H.'s bus stop and try to pick him up (Tr. 38). He said he responded to the bus stop and spoke with A.H., who was in the backseat of Sergeant Weeke's vehicle and was extremely upset and crying (Tr. 39). A.H. told him he had a very negative opinion of Kirk, did not want to go to Kirk's house, and had been living with Helena since "roughly November of the previous year" (Tr. 39). A.H. said he was supposed to get off at the bus stop and walk back to meet Helena and leave with her (Tr. 39-40). Eventually, A.H. left the bus stop with Kirk (Tr. 40). A.H. never told him his mother was keeping him from testifying in court, nor did Helena (Tr. 41).

Next, O'Fallon Police Officer Nicholas Valenti and Melissa Brinker, the mother of a friend of A.H., testified about events in October 2019 (Tr. 43-70).

Officer Valenti said that on October 12, 2019, he responded to Kirk's residence for a report of a runaway juvenile (Tr. 43). He saw A.H. on the front steps of the house, who told him he was locked out (Tr. 44). A.H. said he had been out since the previous night (Tr. 45). He said he learned A.H. was supposed to have a meeting with Helena earlier that day, A.H. had not gone to the meeting, but Kirk had (Tr. 46).

Officer Valenti said he responded to Kirk's house the next day after a report A.H. had run away again the previous night after a "disturbance" in the home (Tr. 47). He contacted Helena to ask if she knew where A.H. was, and she said she did not (Tr. 47). He said that at some point, though without specifying a date, he questioned Helena at the police station and "got the feeling she knew something" (Tr. 48). He said that during a break, Helena received a call from her mother (A.H.'s grandmother) who said A.H. had reached out to the grandmother (Tr. 49). Helena arranged to have a three-way call with herself, her mother, and Officer Valenti, and though the conversation was in English and Albanian, Helena translated her mother's Albanian (Tr. 49-50). During the call, he learned A.H. had contacted his grandmother via iCloud message (Tr. 50).

Officer Valenti said that on October 16, he responded to A.H.'s school to clear up the prior missing child report, where he met with the school's resource officer, the principal, and A.H. (Tr. 52). He said A.H. told him he had been getting rides to school, but would not tell him who gave him the rides (Tr. 52). A.H. told him he wanted to live with Helena, but denied having any contact with Helena while he had been missing (Tr. 53). A.H. told him about a physical altercation at Kirk's home where Kirk's girlfriend held A.H.'s arms while Kirk grabbed A.H.'s phone from him (Tr. 62-63). He also learned A.H. had made a statement on October 12 regarding Kirk assaulting him, though he did not say when he learned that or when the assault occurred (Tr. 53-54).

Officer Valenti agreed he was never called on a kidnapping or interference with custody call, only a missing juvenile call (Tr. 59). He said he suspected Helena had something to do with A.H. running away, but neither Helena nor A.H. indicated an intent to keep A.H. from testifying in court (Tr. 62). He also said he was aware A.H. had been taken into custody in North Carolina in June 2019 and returned to Missouri (Tr. 61-62).

Melissa Brinker, the mother of A.H.'s former best friend, testified A.H. stayed the night with her son at her house about October 11, 2019 (Tr. 66, 68-69). She knew A.H. was living with his father at the time, and A.H. told her Kirk knew where he was (Tr. 70). She said Helena came to her house looking for A.H., expressing concern for him, and also used her son's phone to send a snapchat message to A.H. (Tr. 69-70).

Besides this testimony, on the State's motion the court took judicial notice of the files in the modification case and the family access case (Tr. 18-19). After arguments by the parties, the court took the matter under advisement (Tr. 72-80). A few weeks later, it granted the State's motion for "forfeiture by wrongdoing," stating, "After testimony the Court finds that Defendant continues to have contact with the witness A.H. and withholding information as to A.H. whereabouts from law enforcement" (D10). A copy of this order is in the appendix at A9.

3. Evidence at trial

The following is a summary of the evidence at trial. Besides this witness testimony and exhibits, the court also took judicial notice of the files in the original dissolution case and the family access motion case (Tr. 272).

a. Background

Kirk testified he lived in his house in O'Fallon for about 25 years (Tr. 338-39). For 20 years before trial, he had been a microbiologist testing consumer products (Tr. 354). Sergeant Weeke said at one point he sought to look at a laboratory in Kirk's house, but Kirk refused to allow it (Tr. 333).

Kirk and Helena had A.H. together in 2004 and were married in 2005 (Tr. 338). Their divorce proceedings began in 2009, and were a contentious child custody dispute (Tr. 338-39). In February 2011 he was awarded sole legal and sole physical custody of A.H., and Helena was granted visitation (Tr. 339). He pleaded guilty to driving while intoxicated in May 2012 and to possessing synthetic cannabinoid and unlawful use of drug paraphernalia in October 2012 (Tr. 356-57). In April 2016, he filed a family access motion and then Helena filed a motion to modify custody (Tr. 344).

b. Testimony about February 21, 2017

Seth Wilber, assistant principal of Fort Zumwalt South Middle School, testified that on February 21, 2017, Helena came to the school and he met with her near the entryway, where she "alerted [him] that she was going to interfere with custodial plans" (Tr. 289-90). A.H. was in suspension that day for insubordination (Tr. 296). He had A.H. brought to the front of the building to meet with Helena, and overheard them discussing how A.H. would get home, with Helena telling A.H., "get in my car, we're going home" (Tr. 290-91). He alerted the principal and the school resource officer because he thought Helena would violate the court order and he suspected there may

be a warrant for her arrest (Tr. 291). He said Helena told him Kirk had a lab in his basement, which was causing health issues with A.H. (Tr. 295).

Officer Backowski testified he was dispatched to the school that day to respond to a possible custody interference (Tr. 301). He said he spoke with the principal and learned A.H. was on the school bus and Helena was in the lobby trying to pick up A.H. (Tr. 302). Once A.H. departed on the correct bus, Officer Backowski contacted his sergeant and then left to report to A.H.'s bus stop (Tr. 303). When he arrived at the bus stop, he saw Helena about a block away sitting in her vehicle, he came up to her, and she identified herself (Tr. 305). Officer Backowski said A.H. did get off the bus at the correct stop that day (Tr. 307). He conceded that as far as he knew, A.H. "was never in the custody of his mother … on that date" (Tr. 307).

Sergeant Weeke testified he received a report that day that Helena was attempting to pick up A.H. in violation of a court order and dispatched Officer Backowski to the school to make sure A.H. got on the correct bus and Helena did not pick him up (Tr. 309-10). He said Officer Backowski told him A.H. had left the school on the correct bus and Helena had left the area (Tr. 310). He then responded to the area of A.H.'s bus stop and discovered Helena nearby (Tr. 313-14). He questioned Helena why she was there and whether she had any contact with A.H. that day, and she responded she was there to ensure A.H.'s safety but neither had any contact with him that day nor knew where he went after school (Tr. 313-15). When the bus pulled up at the correct stop, Kirk was there waiting for A.H. (Tr. 315-16). Kirk allowed him to speak with A.H., which he did in the back of his vehicle (Tr. 316).

Sergeant Weeke said A.H. told him he did not want to go to Kirk's house and "started making the same allegations that his mother did" about the lab, being underfed, and being subjected to emotional abuse (Tr. 316-17). A.H. seemed upset, but he felt A.H. had been coached what to say and how to say it (Tr. 317). He said A.H. told him he had not seen Kirk since October or November the previous year, he and Helena often arranged for her to pick him up from a bus stop before the stop where he was supposed to get off, and that was what the plan had been that day (Tr. 317). Sergeant Weeke said Sergeant Myers eventually arrived and continued speaking with A.H. while he went back to speak with Helena (Tr. 318). He said he confronted her with the information A.H. gave him about the arranged pickup, and she told him it was untrue (Tr. 318). He said Helena confirmed she was aware of the court order, and he told her if she did not leave the area, she would be in violation, upon which she left (Tr. 319). Sergeant Weeke conceded he had no information Helena had taken custody of A.H. that day (Tr. 324-25).

Sergeant Myers testified that on February 21, 2017, he was contacted by the middle school's resource officer with information Helena was planning to pick up A.H. from school in violation of a court order (Tr. 327). He then contacted Sergeant Weeke, who responded to the school with Officer Backowski, and "they stated that [Helena] did show up to pick up" A.H. (Tr. 327-28). He said he then contacted Kirk to tell him what had happened and then eventually responded to A.H.'s bus stop (Tr. 328-29).

Sergeant Myers testified he spoke with A.H. while he was in Sergeant Weeke's vehicle (Tr. 330). A.H. was "emotionally overwhelmed," "crying and

shaking," and "couldn't form sentences" (Tr. 330). He did not appear to be acting (Tr. 332). A.H. told him he had been living with Helena since November, and on that day was supposed to "get off the bus and walk back from the bus to his mother's car" (Tr. 331). He said he did not want to go with his father (Tr. 332).

c. Testimony about June 2019 and after

Kirk said that per the June 10, 2019 custody modification, he was to meet Helena at the O'Fallon Police Department on June 14, where she would hand over A.H. (Tr. 350). He said he waited at the police station for 30 minutes, but Helena did not arrive and he did not know A.H.'s whereabouts (Tr. 350).

O'Fallon Police Officer Robert Fincher said he was told June 14 to be present at the station that day for Helena to exchange custody of A.H. with Kirk (Tr. 385). This was scheduled for 10:00 a.m., but Helena and A.H. never arrived (Tr. 386). He waited for 25 minutes, and when Helena did not arrive he went to the O'Fallon address on Parsons Bend registered to her (Tr. 386). He said the house was dark and the yard was unkept, no one was there, and he tried to contact her with a telephone number Kirk provided but only received a busy signal (Tr. 387).

Officer Fincher said that on June 24, Kirk contacted him again to try and locate A.H. (Tr. 387). He went back to the Parsons Bend residence (Tr. 384). This time someone answered the door, but the person said they had never heard of Helena and identified Steven Carpenter as the house's resident (Tr. 388). Mr. Carpenter, who was Helena's tenant at that address

and had lived there since May 2019, testified he was contacted by the police on June 24, 2019, and he gave them her address and telephone number in Raleigh, North Carolina, which she gave him so he could forward her mail (Tr. 394-96). He said that when he first saw the house in April 2019 before he moved into it in May 2019, it was empty, with no furniture (Tr. 398).

Officer Fincher said he learned about Helena's whereabouts from Mr. Carpenter (Tr. 389). He then applied for and received warrants for parental kidnapping (Tr. 389). He contacted the Raleigh, North Carolina fugitive division, and they were able to contact Helena (Tr. 389). June 28, Helena was apprehended in North Carolina, upon which Officer Fincher contacted Kirk to inform him A.H. had been located and was safe (Tr. 390). Officer Fincher said the extradition of Helena from North Carolina did not go through, so he contacted the U.S. Marshall Service to pick her up (Tr. 390).

Raleigh, North Carolina Police Sergeant Keith Heckman testified he was made aware of the Missouri warrant for Helena's address, spoke on the telephone with a Missouri police officer, and received a copy of the warrant, photographs of Helena, and vehicle registration information (Tr. 400-01). He found an address with city water service in Helena's name and went there to set up surveillance (Tr. 401). Eventually, a vehicle matching the description he had been given arrived at the house, and based on the photographs he had received he identified Helena as the driver (Tr. 402). About ten minutes later, another vehicle also matching a description he had received left the house, and he thought Helena was driving, with her mother in the passenger seat and A.H. in the back seat (Tr. 403). He and the surveillance team

followed in an unmarked car and eventually he called in a marked police car to make a traffic stop (Tr. 404). He then approached the vehicle and identified Helena as the driver, upon which she was removed from the car and placed in handcuffs (Tr. 404). A.H. identified himself and also was removed from the car, as was Helena's mother (Tr. 404). Everyone was transported to a police station, where the case was handed over to another squad to contact Kirk and arrange for him to take custody of A.H. (Tr. 405). Helena was taken to jail (Tr. 405). A.H. tried to run away from the police station (Tr. 406-07).

Kirk said he learned on June 28, 2019 that A.H. was in North Carolina with Helena and her mother (Tr. 351). He and his mother flew there get A.H. (Tr. 352). Kirk said that in July 2019, about five days after he returned from North Carolina with A.H., he placed A.H. in a treatment center because A.H. was not eating, bathing, or taking prescribed medication (Tr. 359). A.H. initially was there for ten days, but Kirk placed him back in the center again "later on that month for about another week to ten days" (Tr. 360).

Kirk reported to police A.H. ran away from his residence September 20-22 (Tr. 360). He said A.H. had left his residence September 20 for a friend's house without advising Kirk where he was going (Tr. 360-62).

Kirk said the evening of October 11, A.H. was missing from his room (Tr. 363-64). He had left the door open until a certain time and then locked it (Tr. 363). He later learned A.H. had spent the night in a shed at the house of a friend, Anthony Kornberger (Tr. 364). A.H. returned home October 12 (Tr. 364). In the meantime, during the day on October 12, there was a supervised

visitation scheduled with Helena and A.H., but neither Helena nor A.H. arrived (Tr. 364). Kirk said A.H. then ran away again October 17 (Tr. 366).

Anthony Kornberger, A.H.'s friend, said A.H. knocked on his window at night in October 2019 and said Kirk had abused him and he had run away (Tr. 427). He said A.H. told him Kirk and his girlfriend had held him down and were hitting him (Tr. 428). He said he let A.H. stay in the shed in his backyard and gave him food and water (Tr. 429). He said he later received a text message from A.H. saying he had left the shed (Tr. 429). He said A.H. told him his mother had gotten a job and a house in North Carolina and "they were moving" (Tr. 430).

Andrew Spiegel, assistant principal at Fort Zumwalt North High School, testified about a meeting he had in October 2019 with A.H., Officer Valenti, and their school resource officer (Tr. 423). He said A.H. related there had been an altercation with his father, and he would run away again if released to his father (Tr. 424). A.H. said it had something to do with his father being drunk and pushing him down while the father's girlfriend held him down, but he was able to free himself before running away (Tr. 424-25).

At trial, Kirk testified to four items from A.H.'s room in his house, which were admitted into evidence (Tr. 370):

- Exhibit B: a posterboard with graffiti art A.H. made, including the word "redrum" from *The Shining*, the word "liar," a dollar sign, a peace symbol, and a *Playboy* bunny symbol (Tr. 369);
- Exhibit C: a whiteboard stating, "Fuck Kirk!" (Tr. 369);

- Exhibit D: a piece of cardboard stating "Fuck Kirk" and "Piece of shit" (Tr. 369); and
- Exhibit E: a writing containing "[m]aybe 100 small writings of the word kill" (Tr. 369).

In November 2019, Kirk heard A.H. was involved with a group caught shoplifting at Walmart (Tr. 366). Kirk's mother picked A.H. up from a police station in St. Louis (Tr. 366). The next day, A.H. ran away again (Tr. 366). Kirk said that was the last time he saw A.H. (Tr. 366).

4. Trial and judgment

The case was tried before a jury over two days in September 2020 (Tr. 4-7). The State's witnesses were Mr. Wilber, Officer Backowski, Sergeant Weeke, Sergeant Myers, Kirk, Officer Fincher, Mr. Carpenter, and Sergeant Heckman (Tr. 4-6). The defense's witnesses were Mr. Spiegel and Anthony Kornberger (Tr. 7).

At the close of the State's evidence, Helena's counsel moved for a judgment of acquittal on both counts (Tr. 410).

As to count 2, the misdemeanor concerning February 21, 2017, counsel argued one of the elements the State had to prove was Helena took or enticed A.H. from the legal custody of Kirk that day, and it had not, as there was no evidence Kirk ever lost legal custody of A.H. or Helena had custody of A.H. that date (Tr. 411-12). The court asked the State for its response, given the first element on the verdict director stated, "the defendant took or enticed AH from the legal custody of Kirk Hartwein" (Tr. 412). The prosecutor responded they were dealing with interference with custody, not necessarily physically

taking A.H., and the State had made its case on the enticement portion of the charge because Helena's conduct on that date of going to the school and then to the bus stop and "attempting to take him" was enticement (Tr. 412-13).

As to Count 1, the felony concerning June 14, 2019, counsel argued the State failed to prove Helena knew of the June 10 court order that day, and showing this was required for her to knowingly have interfered with a custody order (Tr. 413-16). He argued there was no evidence Helena took or enticed A.H. that date (Tr. 416). He argued that if anything, A.H. was a child who did not want to live with his father and ran away on his own (Tr. 416).

The court overruled the motion for judgment of acquittal (Tr. 418). Counsel renewed the motion at the close of the defense's evidence, which the court also overruled (Tr. 435-36). At the instructions conference, the parties agreed no lesser-included offense instructions would be given, and the State withdrew the one it had proposed (Tr. 443).

The jury found Helena guilty on both counts (D25; Tr. 481-83). Defense counsel timely moved for new trial (D30). Among other things, the motion argued the court had erred in overruling the motions for judgment of acquittal and in granting the State's motion for forfeiture by wrongdoing (D30 pp. 1-2). The court denied the motion (D31; Tr. 516).

In December 2020, the court sentenced Helena to four years in prison on the felony count and one year on the misdemeanor count, to be served concurrently (D32; Tr. 513-14). Helena filed a timely notice of appeal to this Court (D33), which became effective in February 2021 (D35).

Points Relied On

I. The trial court erred in overruling Helena's motions for judgment of acquittal on Count 1, interference with custody in violation of § 565.150, R.S.Mo., a class E felony *because* the State failed to prove beyond a reasonable doubt the necessary elements of Count 1 that: (1) on or about June 14, 2019 Helena knew of the June 10 court order she was charged with violating, or (2) on or about June 14, 2019 Helena took or enticed A.H. from Missouri *in that* even viewing the evidence in the light most favorable to the State, there was no evidence Helena had any knowledge of the June 10 court order on June 14 (or indeed at any time until after A.H. was already out of her custody), or that Helena was in Missouri on June 14, 2019 or performed any actions with regard to A.H. in Missouri on that date.

State v. Licata, 501 S.W.3d 449 (Mo. App. 2016)
State v. Price, 980 S.W.2d 143 (Mo. App. 1998)
State v. Jackson, 896 S.W.2d 77 (Mo. App. 1995)
State v. Palmer, 822 S.W.2d 536 (Mo. App. 1992)
§ 565.150, R.S.Mo.

II. The trial court erred in overruling Helena's motions for judgment of acquittal on Count 2, interference with custody in violation of § 565.150, R.S.Mo., a class A misdemeanor *because* under § 562.012, R.S.Mo. an attempt to commit an offense must be specifically charged as an attempt or instructed as a lesser-included offense, the State opting on the record not to instruct on a lesser-included offense means only the primary offense is before the Court, the criminal act of "enticement" requires the object of the alleged luring be accomplished or else it is only attempted enticement, and the State failed to prove beyond a reasonable doubt the necessary element of Count 2 that on February 21, 2017 Helena took or enticed A.H. from Kirk's legal custody *in that* Helena was not charged with attempted interference with custody, the State waived any lesser-included offenses on the record, and even viewing the evidence in the light most favorable to the State, there was no evidence A.H. was lured out of Kirk's legal custody or into Helena's custody on February 21, 2017.

State v. Blair, 443 S.W.3d 677 (Mo. App. 2014)
State v. Davies, 330 S.W.3d 775 (Mo. App. 2010)
State v. Hoffman, 125 S.W.2d 55 (Mo. 1939)
State v. Brandenberg, 134 S.W. 529 (Mo. 1911)
§ 562.012, R.S.Mo.
§ 565.150, R.S.Mo.

III. The trial court erred in admitting Sergeants Weeke's and Myers' testimony of what A.H. allegedly told them *because* this was testimonial hearsay the admission of which violated Helena's rights to a fair trial and to confront the witnesses against her guaranteed in U.S. Const. Amend. VI and Mo. Const. art. I, § 18(a), the forfeiture by wrongdoing exception to this only applies when the State proves the defendant procured the hearsay declarant's unavailability at trial intending to prevent the declarant from testifying against the defendant, and the admission of the hearsay prejudiced Helena *in that* A.H.'s alleged statements to Sergeants Weeke and Myers were testimonial, there was no evidence that Helena procured A.H.'s unavailability to prevent him from testifying against her, and the error affected the outcome of the trial as this was not a case of overwhelming evidence and it left Helena unable to test through cross-examination the veracity of A.H.'s statements that she directed him to get off the bus and come with her.

State v. Buechting, 633 S.W.3d 367 (Mo. App. 2021)

Crawford v. Washington, 541 U.S. 36 (2004)

Giles v. California, 554 U.S. 353 (2008)

State v. Belone, 285 P.3d 378 (Kan. 2012)

U.S. Const. Amend. VI

Mo. Const. art. I § 18(a)

Argument

I. The trial court erred in overruling Helena's motions for judgment of acquittal on Count 1, interference with custody in violation of § 565.150, R.S.Mo., a class E felony *because* the State failed to prove beyond a reasonable doubt the necessary elements of Count 1 that: (1) on or about June 14, 2019 Helena knew of the June 10 court order she was charged with violating, or (2) on or about June 14, 2019 Helena took or enticed A.H. from Missouri *in that* even viewing the evidence in the light most favorable to the State, there was no evidence Helena had any knowledge of the June 10 court order on June 14 (or indeed at any time until after A.H. was already out of her custody), or that Helena was in Missouri on June 14, 2019 or performed any actions with regard to A.H. in Missouri on that date.

Preservation Statement

This point is preserved for appellate review. Helena moved for a judgment of acquittal at the close of both the State's evidence and all evidence, making the argument in this point (Tr. 413-17, 435). After trial, she timely renewed those motions (D30 p. 1). Moreover, in a criminal case, "arguments concerning the sufficiency of the evidence, even those not preserved for appeal, are reviewed on the merits, not for plain error." *State v. Zetina-Torres*, 482 S.W.3d 801, 808-09 (Mo. banc 2016).

* * *

Standard of Review

"[T]his Court's review of the sufficiency of the evidence is limited to whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of the defendant's guilt beyond a reasonable doubt." *State v. Jeffrey*, 400 S.W.3d 303, 312-13 (Mo. banc 2013). The Court "accept[s] as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore[s] all contrary evidence and inferences." *Id.* at 313. If no "rational fact-finder 'could have found the essential elements of the crime beyond a reasonable doubt,'" this Court will reverse the trial court's judgment and discharge the defendant. *Id.* "Substantial evidence is evidence from which a juror could reasonably find the issue in harmony with the verdict." *State v. Bruce*, 53 S.W.3d 195, 198 (Mo. App. 2001) (citation omitted).

* * *

Count 1 charged Helena with felony interference with custody by taking or enticing A.H. from Kirk's custody on June 14, 2019 knowing she was violating a court order issued June 10, and then removing him from Missouri. To meet its burden on this count, the State had to prove beyond a reasonable doubt that Helena (1) knew about the June 10 order on June 14, and (2) took or enticed A.H. in Missouri on June 14. But the State failed to introduce any evidence from which a juror even could infer she knew of the order at any time before July 2019, after A.H. already was out of her custody, or that she performed any action in Missouri on June 14 at all. The trial court therefore erred in denying her a judgment of acquittal on Count 1.

A. When a charge specifies the act alleged to be the defendant's crime, the State must prove that specific act, and if the evidence of that specific act is insufficient, the conviction must be reversed.

"To convict an individual of a crime in a jury trial, the state must prove each element of the offense beyond a reasonable doubt." *State v. Roggenbuck*, 387 S.W.3d 376, 382 (Mo. banc 2012). "The state is held to proof of elements of the offense actually charged, not one that might have been charged." *State v. Glass*, 439 S.W.3d 838, 842 (Mo. App. 2014). This is because the "primary purpose of" an information is "that of providing notice to the accused so that the accused may prepare an adequate defense against the charges brought." *State v. Lee*, 841 S.W.2d 648, 650 (Mo. banc 1992).

So, "[w]here a statute prohibits an offense that may be committed in different ways, the information must charge one or more of the different methods." *State v. Burkemper*, 882 S.W.2d 193, 196 (Mo. App. 1994). The State then "is held to proof of that act; and a defendant may be convicted only on that act." *State v. Jackson*, 896 S.W.2d 77, 82 (Mo. App. 1995) (citation omitted). And "[w]hen the evidence fails to show that a defendant committed a crime in the specific manner charged, reversal is required." *Glass*, 439 S.W.3d at 842; *see, e.g.*:

- *State v. Payne*, 250 S.W.3d 815, 818-21 (Mo. App. 2008) (where information charged crimes were committed with a "dagger," but there was no evidence of any dagger, evidence was insufficient);
- *State v. Price*, 980 S.W.2d 143, 144 (Mo. App. 1998) (where indictment charged defendant with "receiving" stolen property, but there was no evidence anyone other than he had stolen it, evidence was insufficient);

- *Jackson*, 896 S.W.2d at 82-83 (where information charged defendant with two acts of sodomy committed in a "bathroom," but the only evidence was his alleged acts of sodomy occurred in a bedroom and a living room, evidence was insufficient);
- *State v. Palmer*, 822 S.W.2d 536, 541 (Mo. App. 1992) (where information charged defendant left scene of accident "knowing that personal injury had resulted from it," but there was no evidence he knew personal injury had resulted from the accident, evidence he instead had known "damage [had] been caused to property" was insufficient); and
- *State v. Edsall*, 781 S.W.2d 561, 562-63 (Mo. App. 1989) (where information charged defendant with assault in the third degree for causing physical injury to another "by striking [the victim] with [defendant's] fists," but the victim could not testify as to whether the defendant "hit [him], shoved [him], or what," the evidence was insufficient).

This includes proving specifically charged dates and locations of an offense. "When the State charges a crime within a specific date range, evidence must be presented showing the crime occurred within that timeframe." *State v. King*, 626 S.W.3d 828, 839 (Mo. App. 2021). And if the charge alleges the offense occurred in Missouri (as indeed it must, as this is a jurisdictional requirement), then the State must prove this, too. *State v. Bennish*, 479 S.W.3d 678, 685 (Mo. App. 2015).

B. To convict Helena of Count 1, the State had to prove beyond a reasonable doubt that on June 14, 2019, she had actual knowledge of the family court's June 10 order, and it did not.

Count 1 charged Helena with interference with custody in violation of § 565.150, R.S.Mo., a class E felony, because

> on or about June 14, 2019, in the County of St. Charles, State of Missouri, [Helena], knowing that [she] had no legal right to do so, took or enticed [A.H.] from the legal custody of Kirk Hartwein to whom the custody of A.H. had been entrusted by order of St. Charles County Associate Circuit Court, State of Missouri on June 10, 2019 and defendant detained A.H. in another state.

(D12 p. 1; App. A6).

As the verdict director parsed out for the jury, this meant to convict Helena, the State had to prove beyond a reasonable doubt:

> First, that on or about June 14, 2019, in the State of Missouri, the defendant took or enticed A.H. from the legal custody of Kirk Hartwein, and
>
> Second, that A.H. had been entrusted by order of a court to the custody of Kirk Hartwein, and
>
> Third that defendant knew she had no legal right to so take or entice A.H. from the legal custody of Kirk Hartwein, and
>
> Fourth, that defendant detained A.H. in another state.

(D24 p. 9; App. A10).

One of these elements the State had to prove is that at the time Helena committed the alleged act on June 14, 2019, she "knew she had no right to" do so (D12 p. 1). The charging document specified this was because "A.H. had been entrusted" to Kirk's custody "by order of St. Charles County Associate Circuit Court, State of Missouri on June 10, 2019" (D12 p. 1; App. A6). So, the State had to prove that on June 14 when Helena allegedly took or enticed

A.H., she knew of the June 10 order. *See State v. Licata*, 501 S.W.3d 449, 453-54 (Mo. App. 2016) (State had to prove beyond a reasonable doubt defendant knew on date of offense of order granting other party custody).

"Knowledge" is a crucial element of this charge. The State must "prove [the defendant]'s own knowledge" of the order granting the other party custody. *Id.* at 454. In Missouri, a person "is not guilty of an offense unless he acts with a culpable mental state, that is, unless he acts purposely or knowingly or recklessly or with criminal negligence." § 562.016.1 R.S.Mo. So, for the State to meet its burden on interference with custody, it must prove beyond a reasonable doubt the defendant took or enticed "*knowing* that he or she has no legal right to do so …." § 565.150.1 (emphasis added). Even "the mere fact that [the defendant]'s attorney knew of the order cannot serve to alleviate the State of its burden …." *Licata*, 501 S.W.3d at 454.

In *Licata*, a mother had custody of her child until an order modified it and commanded her to turn the child over to the father. 501 S.W.3d at 453. When she failed to do so, she was charged with interference with custody. *Id.* She argued the State failed to prove she knew of the order at the time she did not turn over the child. *Id.* This Court this agreed this was necessary and the fact her attorney knew of the order did not prove she did. *Id.* at 453-54. But it held there was enough evidence from which a jury could infer the attorney informed her of the order, including that immediately after its entry, she fled to a shelter to keep herself and the child hidden from the father and then fled the state to make herself unreachable by legal process. *Id.* at 454.

Here, there is no evidence from which a jury even could infer that on June 14, 2019, when Helena was alleged to have taken or enticed A.H. from Kirk's custody, she knew of the June 10 order giving Kirk custody. At the time of that order's entry, because the court had set aside the prior contempt judgment (D124), the only judgments in effect were the January 2017 family access judgment, which only made changes to the parenting schedule through July 12, 2017 and otherwise left the original 2011 decree in place (D111 p. 1; D112; App. A32, A37), and the original decree itself (D41). That original decree's provisions therefore governed custody at the time of the June 10 order, and it granted Helena four consecutive weeks during A.H.'s summer break (D41 p. 15; App. A26).

So, until the June 10 order, Helena had a right to custody on June 14. The charge in Count 1 recognizes this, stating she had to know "A.H. had been entrusted" to Kirk's custody "by order of St. Charles County Associate Circuit Court, State of Missouri on June 10, 2019" (D12 p. 1).

But at the time of the June 10 order, Helena did not even have counsel. The modification and contempt cases were taken under advisement in November 2018 (D40 pp. 80, 119). In February 2019, her attorney withdrew and left her *pro se* (D130). The record only shows she appeared in the family court one time after that, in March 2019 (D40 p. 83).

The June 10 order, entered seven months after the cases were taken under advisement, four months after Helena's attorney withdrew, and three months after her last involvement in the case, was not entered in open court (D40 pp. 84, 122; D99; D132). The dockets state the court mailed copies to

Helena (D40 pp. 84, 122), but do not say where they were sent, nor are return receipts in the record. And the custody exchange the court ordered was only four days later on June 14. So, there is no evidence Helena had actual knowledge of the June 10 order on June 14.

Unlike in *Licata*, there is no evidence of any change in Helena's or A.H.'s status in proximity to the June 10 order from which the jury could infer she actually knew about the order on June 14. The order found Kirk had not seen A.H. since January 2017 (D99 p. 4), and there was no evidence of how long A.H. had been in North Carolina. Mr. Carpenter, Helena's tenant, stated he had lived in her house in O'Fallon since May, and as early as April before he moved in it was empty (Tr. 398). Officer Fincher said that when he went to Helena's house June 14, it looked vacant and the front yard was unkept (Tr. 392). Indeed, Helena later told the family court she had been living in North Carolina since November 2018 (D145 pp. 1-2).

Instead, the only evidence of when Helena learned of the June 10 order is it was on July 10, 2019 (D145 pp. 1-2), when new counsel informed her of it and then tried to purge the contempt (D136). This was after A.H. already had been removed from her custody on June 28 (Tr. 390).

So, there is no direct or circumstantial evidence Helena knew of the June 10 order on June 14, when she allegedly took or enticed A.H. in Missouri, or at any time before A.H. was removed from her custody on June 28. Therefore, the State failed to prove beyond a reasonable doubt that on June 14, Helena knew she did not have lawful custody of A.H., a necessary element of Count 1. The Court should reverse the judgment on Count 1.

C. To convict Helena of Count 1, the State also had to prove beyond a reasonable doubt that on June 14, 2019 in Missouri she took or enticed A.H. from Kirk's custody, and it did not.

Besides knowledge that the June 10 order had been entered giving Kirk custody June 14, the "culpable mental state" element, the State also failed to prove "on or about June 14, 2019, in the … State of Missouri, [Helena], … took or enticed [A.H.] from the legal custody of Kirk Hartwein" (D12 p. 1; App. A6). In the words of the verdict director, the jury had to be able to find beyond a reasonable doubt "that on or about June 14, 2019, in the State of Missouri, the defendant took or enticed A.H. from the legal custody of Kirk Hartwein" (D24 p. 9; App. A10).

The only evidence about what happened on June 14 was the testimony of Kirk and Officer Fincher that per the June 10 order, Helena was to show up at the O'Fallon Police Department with A.H. so as to turn A.H. over to Kirk, and she and A.H. never showed up (Tr. 350, 385-86).

But there was no evidence Helena or A.H. were in Missouri at all on June 14 or at any date close to it. Kirk had not seen A.H. since January 2017 (D99 p. 4) and offered no testimony about A.H.'s or Helena's whereabouts in the meantime. There was no evidence of how long either A.H. or Helena had been in North Carolina, except Helena's statement to the family court she had been living in North Carolina since November 2018 (D145 pp. 1-2). And again, Mr. Carpenter, Helena's tenant, stated he had lived in her house in O'Fallon since May, and as early as April before he moved in it was empty (Tr. 398). Officer Fincher said that when he went to Helena's house June 14, it looked vacant and the front yard was unkept (Tr. 392).

There is no evidence Helena was in Missouri at all on or about June 14, 2019 or she took or enticed A.H. from Kirk's custody in Missouri that day. The fact she did not show up at the O'Fallon Police Department with A.H., especially given the lack of any evidence she knew she had to, is not evidence of any actions she took or even evidence from which any actions in Missouri can be inferred. Under the evidence, it is entirely possible A.H. had been with her in North Carolina for weeks if not months, meaning Helena could not have performed any actions in Missouri at all on June 14. The State's case against Helena on Count 1 fails for this reason, too.

The State failed to prove two crucial elements of Count 1, its felony charge, both the culpable mental state and the criminal act in Missouri itself. This Court should reverse the trial court's judgment on Count 1 outright, without remand.

II. The trial court erred in overruling Helena's motions for judgment of acquittal on Count 2, interference with custody in violation of § 565.150, R.S.Mo., a class A misdemeanor *because* under § 562.012, R.S.Mo. an attempt to commit an offense must be specifically charged as an attempt or instructed as a lesser-included offense, the State opting on the record not to instruct on a lesser-included offense means only the primary offense is before the Court, the criminal act of "enticement" requires the object of the alleged luring be accomplished or else it is only attempted enticement, and the State failed to prove beyond a reasonable doubt the necessary element of Count 2 that on February 21, 2017 Helena took or enticed A.H. from Kirk's legal custody *in that* Helena was not charged with attempted interference with custody, the State waived any lesser-included offenses on the record, and even viewing the evidence in the light most favorable to the State, there was no evidence A.H. was lured out of Kirk's legal custody or into Helena's custody on February 21, 2017.

Preservation Statement

This point is preserved for appellate review. Helena moved for a judgment of acquittal at the close of both the State's evidence and all evidence, making the argument in this point (Tr. 411-12, 435). After trial, she timely renewed those motions (D30 p. 1). Moreover, in a criminal case, "arguments concerning the sufficiency of the evidence, even those not preserved for appeal, are reviewed on the merits, not for plain error." *Zetina-Torres*, 482 S.W.3d at 808-09.

* * *

Standard of Review

The applicable standard of review is stated above in Point I at p. 36.

* * *

Count 2 charged Helena with misdemeanor interference with custody by taking or enticing A.H. from Kirk's custody on February 17, 2021. There was no evidence Kirk ever lost custody of A.H. on that date, and instead the prosecutor argued to the trial court that Helena only "attempted" to deprive him of custody that day. But the State charged Helena with the primary offense of interference with custody, not *attempted* interference, and it waived any lesser-included offense instructions on the record. Therefore, it had to prove Helena took or enticed A.H. from Kirk's custody on February 17, 2021, not that she just attempted to do so. It did not. The trial court therefore erred in denying Helena's motion for judgment of acquittal on Count 1.

A. Under § 562.012, R.S.Mo., an attempt to commit an offense is a lesser criminal classification than the primary offense, and to charge someone with an attempt to commit an offense the State must specifically do so either in the charging document or by a lesser-included offense instruction at trial.

Section 562.012.1, R.S.Mo. provides "[g]uilt for an offense may be based upon an attempt to commit an offense if, with the purpose of committing the offense, a person performs any act which is a substantial step towards the commission of the offense." It defines a "substantial step" as "conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." *Id.* It then provides that unless the statute creating an offense says otherwise, "when guilt for a felony or misdemeanor is

based upon an attempt to commit that offense, the felony or misdemeanor shall be classified one step lower than the class provided for the felony or misdemeanor in the statute creating the offense." *Id.* at .3.

Here, Count 2 charged Helena with interference with custody in violation of § 565.150, R.S.Mo., a class A misdemeanor. Therefore, under § 562.012.3, an attempt to interfere with custody in violation of § 565.150 would be a class B misdemeanor.

Because an attempt to commit an offense is different than the primary offense, adds an element of "substantial step," and has a lower classification, generally an attempt must be charged as such to apprise the defendant of what she is charged with. *State v. Heslop*, 842 S.W.2d 72, 77 (Mo. banc 1992). Alternatively, as "[a]n attempt is a lesser-included offense of completing a crime," it can be charged by a lesser-included offense instruction at trial. *State v. Conner*, 583 S.W.3d 102, 108 (Mo. App. 2019).

But where the State only charges a defendant with a primary offense, not attempt, and then elects on the record not to submit any lesser-included offense instructions, it must be held to proof of the primary offense alone, and if that fails the defendant's conviction must be reversed. *See, e.g.*, *State v. Blair*, 443 S.W.3d 677, 686 (Mo. App. 2014) (even where evidence might be sufficient to support attempt to commit offense, if "the trial court and prosecutor did, in fact, engage in discussion of lesser-included-offense submission to the jury, and the prosecutor overtly indicated a conscious and strategic decision *not* to do so," the State should not be "reward[ed] … for its conscious and deliberate decision not to submit the lesser offense").

B. To prove interference with custody by taking or enticing someone from another's custody, the State must prove that the defendant's action caused the child to be removed from the other's custody, not that she unsuccessfully sought to do so.

In Count 2, the State charged Helena with interference with custody in violation of § 565.150, R.S.Mo., a class A misdemeanor, because

> on or about February 21, 2017, in the County of St. Charles, State of Missouri, [Helena], knowing that [she] had no legal right to do so, took or enticed A.H. from the legal custody of Kirk Hartwein to whom the custody of A.H. had been entrusted by order of St. Charles County Associate Circuit Court, State of Missouri.

(D12 pp. 1-2; App. A6-7). This point concerns the "took or enticed" portion of this charge: as the verdict director put it, the jury had to find beyond a reasonable doubt "that on or about February 21, 2017, in the State of Missouri, the defendant took or enticed A.H. from the legal custody of Kirk Hartwein" (D24 p. 10; App. A11).

Taking or enticing from legal custody is the criminal act in § 565.150: "[a] person commits the offense of interference with custody if … he or she takes or entices from legal custody any person entrusted by order of a court to the custody of another person or institution." § 565.150.1.

Section 565.150 does not define "entice." But from the plain meaning of the word, its use in other statutes, and the history of § 565.150, it is apparent it means to convince the person to come away from the other's custody. To prove a defendant enticed someone away from another's custody, to constitute a completed offense the person must have actually left the other's custody. Otherwise, enticing without success at most would be an attempt to entice under § 562.012.

"Enticement" generally is defined as "[t]he act or an instance of wrongfully soliciting or luring a person to do something." BLACK'S LAW DICT. 673 (11th ed. 2019). Missouri's statute for the well-known sexual offense of "[e]nticement of a child" applies this same definition: when a person "persuades, solicits, coaxes, entices, or lures … any person who is less than fifteen years of age for the purpose of engaging in sexual conduct." § 566.151.1, R.S.Mo. If persuading, soliciting, coaxing, enticing, or luring the child to engage in sexual conduct is unsuccessful, it is an "attempt to commit enticement of a child …." *Id.* at .3. *See State v. Davies*, 330 S.W.3d 775, 787 (Mo. App. 2010) (communicating with alleged minor to meet her for sexual conduct without success was attempted enticement, not enticement).

The history of § 565.150 shows this same meaning. It "replaced an earlier statute dealing with enticement of insane persons and children under 12 away from their lawful custodians. *See* § 559.250, RSMo 1969." *State v. Edmisten*, 674 S.W.2d 576, 577 (Mo. App. 1984). The prior statute penalized anyone who would "maliciously, forcibly or fraudulently lead, take or carry away or decoy or entice away any child under the age of twelve years, with the intent to detain or conceal such child from its parent, guardian or other person having the lawful charge of such child …." *State v. Hoffman*, 125 S.W.2d 55, 55 (Mo. 1939). Its purpose was "to cover any case of taking away and detaining, which would not come within the terms of the kidnapping statute." *Id.* at 56 (citation omitted). It "place[d] no limit of time upon the detention or concealment, nor does it require that the child taken away shall be detained. It requires only that the child shall be taken away with the

intent to detain it." *Id.* Enticement was only one of the methods by which the detention could be effected. *See also State v. Brandenberg*, 134 S.W. 529, 529 (Mo. 1911) (calling enticement "decoying away").

The present statute continues this same rubric. The child must be enticed – solicited or lured – "from legal custody … to the custody of another person …." § 565.150.1. *Trying to* solicit or lure a child away from legal custody to the custody of another person would at most be an attempt to entice the child, like the attempt to commit the sexual offense of enticement. It would not be enticement, because the child would not have gone from legal custody to the custody of another.

Finally, to the extent "entice" in § 565.150.1 is capable of meaning both "enticement" *and* "attempted enticement" and none of the ordinary rules of construction applied here resolves that ambiguity, "the rule of lenity intervenes to require that the more lenient interpretation govern …." *State v. Liberty*, 370 S.W.3d 537, 549 (Mo. banc 2012). That especially makes sense because § 565.150 is subject to the general attempt statute in § 562.012, and reading the primary statute as including an attempt would nullify § 562.012.

C. The State failed to prove Helena took or enticed A.H. away from Kirk's custody on February 21, 2017, because as the prosecutor openly conceded at trial, A.H. never left Kirk's custody or entered her custody that day, and the prosecutor then waived any lesser-included offense.

Here, the only evidence at trial about February 21, 2017 was that day, A.H. never left Kirk's legal custody or entered Helena's custody. The prosecutor conceded this at trial, but argued – incorrectly, per the above – that showing an "attempt" to take A.H. away from Kirk's custody was

sufficient to prove the primary offense of interfering with custody by enticement (Tr. 412-13). The prosecutor then specifically withdrew a proposed lesser-included offense instruction on the record, stating the State would not include it.

By failing to prove A.H. left Kirk's custody that day and then withdrawing any lesser-included offense instruction, the State failed to prove any offense for Count 2, and the conviction on that count must be reversed.

The State's witnesses regarding Count 2 confirmed A.H. was not removed from Kirk's custody that day, Helena left without A.H., and A.H. remained in Kirk's custody. Officer Backowski testified A.H. ultimately got off the school bus at the correct stop that day, and as far as he knew A.H. "was never in the custody of his mother … on that date" (Tr. 307). Sergeant Weeke testified Helena left the area of the bus stop upon being asked to, and he had no information to offer that Helena obtained custody of A.H. that day or A.H. left Kirk's custody that day (Tr. 319, 324-25).

Therefore, in his motion for judgment of acquittal, Helena's counsel argued the State failed to prove she took or enticed A.H. from the legal custody of Kirk that day, as there was no evidence Kirk ever lost legal custody of A.H. on that date (Tr. 411-12). When the court asked the State for its response, given that the first element on the verdict director stated, "the defendant took or enticed A.H. from the legal custody of Kirk Hartwein" (Tr. 412), the prosecutor responded the State proved "enticement" because Helena's conduct on that date of going to the school and then to the bus stop and "*attempting* to take him" was enticement (Tr. 412-13) (emphasis added).

As explained above, the prosecutor's suggestion, citing no authority, that "attempting" to take A.H. from Kirk's custody without successfully doing so is the primary offense of interference with custody by enticing away from one's legal custody to another's custody is untrue. That would be the inchoate offense of "attempted" enticement under § 562.012, not the primary offense of enticement. And it would be a Class B misdemeanor, not Class A. § 562.012.3. The prosecutor conceded A.H. *was not* taken or enticed away, and only argued Helena "attempted" to do so.

Therefore, the State failed to prove the criminal act charged in Count 2 beyond a reasonable doubt. Indeed, it conceded it failed to prove this, merely arguing it proved "attempt," which it incorrectly argued was sufficient.

But thereafter, at the instruction conference, the State specifically opted not to have any lesser-included offense instruction, and Helena's counsel declined to, either:

> THE COURT: The first verdict director, 419.60, is Instruction Number 8. The lesser included, 419.60, is Instruction Number 9.
>
> [Prosecutor]: Judge, the State's not asking that to be submitted. I think it's nested if the Defense is asking for it.
>
> [Defense counsel]: No.
>
> THE COURT: You're not asking that be submitted?
>
> [Defense counsel]: No.
>
> THE COURT: Okay. We will withdraw that, but I presumed when you submitted it to me in the packet you were going to be asking for it.
>
> [Prosecutor]: We just prepared it out of an abundance of caution, Judge.

> THE COURT: All right. *So 419.60, the lesser included, at the request of the parties, will not be submitted.*

(Tr. 442-43) (emphasis added).

Therefore, not only did the State fail to prove the primary offense of interference with custody, because A.H. was never removed from Kirk's custody on February 21, 2017, but also despite its insistence it was only arguing Helena "attempted to" remove A.H., it then *withdrew* a proposed lesser included offense instruction. It left the jury charged "all or nothing."

It is true that when evidence is insufficient for a jury to find a primary offense but "sufficient for the jury to find each of the elements of the lesser offense, and the jury was required to find those elements to enter 'the ill-fated conviction on the greater offense,'" it can be within this Court's "discretion to 'enter a conviction for a lesser offense.'" *Blair*, 443 S.W.3d at 686. But the law of Missouri is the State's conscious decision to forego any lesser-included offenses makes doing so improper. *Id.*

In *Blair*, where proof of robbery was insufficient, and instead the State only proved attempted robbery, "the trial court and prosecutor did, in fact, engage in discussion of lesser-included-offense submission to the jury, and the prosecutor overtly indicated a conscious and strategic decision not to do so." *Id.* Therefore, this Court held it saw "no reason to reward the State for its conscious and deliberate decision not to submit the lesser offense, and accordingly, we choose not to exercise our discretion to enter a conviction on the lesser offense." *Id.* Instead, it reversed outright. *Id.*

The same is true here. The Court should reverse Helena's conviction on Count 2 outright, without remand or modification.

III. The trial court erred in admitting Sergeants Weeke's and Myers' testimony of what A.H. allegedly told them *because* this was testimonial hearsay the admission of which violated Helena's rights to a fair trial and to confront the witnesses against her guaranteed in U.S. Const. Amend. VI and Mo. Const. art. I, § 18(a), the forfeiture by wrongdoing exception to this only applies when the State proves the defendant procured the hearsay declarant's unavailability at trial intending to prevent the declarant from testifying against the defendant, and the admission of the hearsay prejudiced Helena *in that* A.H.'s alleged statements to Sergeants Weeke and Myers were testimonial, there was no evidence that Helena procured A.H.'s unavailability to prevent him from testifying against her, and the error affected the outcome of the trial as this was not a case of overwhelming evidence and it left Helena unable to test through cross-examination the veracity of A.H.'s statements that she directed him to get off the bus and come with her.

Preservation Statement

This point is preserved for appellate review. Helena objected to the State's request to introduce testimonial hearsay under the forfeiture by wrongdoing exception (Tr. 14-15, 72-80). She then preserved her objection in her motion for new trial (D30 p. 1).

* * *

Standard of Review

While Missouri courts frequently say the admissibility of evidence is within the trial court's discretion, this "is not accurate where an evidentiary principle or rule is violated, especially in criminal cases." *State v. Walkup*, 220 S.W.3d 748, 756 (Mo. banc 2007) (emphasis added). Rather, "whether a criminal defendant's rights were violated under the Confrontation Clause by the admission of [evidence] is a question of law that this Court reviews *de novo*." *State v. March*, 216 S.W.3d 663, 664-65 (Mo. banc 2007).

* * *

The parties agreed below that A.H.'s alleged statements to law enforcement including Sergeants Weeke and Myers were testimonial hearsay ordinarily barred by a defendant's right to confront the witnesses against her guaranteed in the U.S. and Missouri Constitutions. Instead, the State argued these statements could be admitted under the "forfeiture by wrongdoing" exception to that right. But to activate that exception, the State first had to prove Helena procured A.H.'s unavailability at trial and did so for the purpose of preventing him from testifying against her. It did not. Therefore, the trial court erred in holding the forfeiture by wrongdoing exception applied and admitting A.H.'s alleged statements to Sergeants Weeke and Myers. This prejudiced Helena, requiring a new trial.

A. Sergeants Weeke's and Myers' statements of what A.H. allegedly told them were testimonial hearsay the Confrontation Clause bars.

The Confrontation Clause of U.S. Const. Amend. VI provides, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted

with the witnesses against him." The Sixth Amendment is incorporated against the states through U.S. Const. Amend. XIV. *Pointer v. Texas*, 380 U.S. 400, 407 (1965). "The Missouri Constitution echoes" this, "guaranteeing that 'in criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face.'" *State v. Biggs*, 333 S.W.3d 472, 477 (Mo. banc 2011) (quoting Mo. Const. art. I, § 18(a)).

In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the U.S. Supreme Court held the Confrontation Clause demands *all testimonial hearsay evidence* must be excluded from a criminal prosecution unless both the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. This

> significantly changed the Confrontation Clause analysis for hearsay evidence. Before *Crawford*, an out-of-court statement could be admitted over a Confrontation Clause objection if the witness was unavailable to testify and the statement carried with it an adequate indicia of reliability. In order to have an "adequate indicia of reliability," the evidence [had] either [to] "fall within a firmly rooted hearsay exception" or have "particularized guarantees of trustworthiness."

March, 216 S.W.3d at 665 (internal citations omitted).

Conversely, post-*Crawford*, the "reliability" of hearsay evidence, "once paramount …, is now irrelevant." *March*, 216 S.W.3d at 665-66. Instead, *Crawford* barred the admission of all out-of-court testimonial statements "unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." *Id.* at 665.

While "*Crawford* did not offer a precise definition of 'testimonial statements,'" *March*, 216 S.W.3d at 666, a statement made to a police officer

during a questioning in investigation of the crime at issue is the quintessential example of the "testimonial statement" *Crawford* absolutely bars. In *Crawford*, the defendant was accused of attempting to murder and assault his wife. 541 U.S. at 38. At trial, Washington's marital privilege precluded the wife's testimony. *Id.* at 40-41. In an attempt to overcome this, the prosecution played for the jury the wife's tape-recorded statement to police describing the stabbing. *Id.* at 38. The Washington Supreme Court applied the earlier framework of *Ohio v. Roberts*, 448 U.S. 56 (1980), and allowed this because the statement had an "indicia of reliability." *Id.*

The Court in *Crawford* disagreed, holding the *Roberts* test impermissibly permitted the admission of hearsay that violated a defendant's Confrontation Clause rights, as it "allow[ed] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." 541 U.S. at 62, 68. Accordingly, when hearsay is testimonial, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* The Court further defined "testimonial hearsay" as "appl[ying] at a minimum … *to police interrogations*." *Id.* (emphasis added). The wife's statement was inadmissible. *Id.* Indeed, "[s]tatements taken by police officers in the course of interrogations" are testimonial "even under a narrow standard." *Id.* at 68.

Nor does the out-of-court statement have to be prepared specifically for the trial at issue in order to be "testimonial evidence." "Testimonial statements" encompass any statements it is reasonably apparent were created to be "available for use at *a* later trial." *Crawford*, 541 U.S. at 52

(emphasis added). Rather, the inquiry is whether "a reasonable person in [the declarant's] position would anticipate his statements being used against the accused in investigating and prosecuting *a* crime." *United States v. McGee*, 529 F.3d 691, 698 (6th Cir. 2008) (emphasis added).

Here, the State sought to introduce Sergeants Weeke's and Myers' statements of what A.H. allegedly told them when they questioned him on February 21, 2017 (D5; D8).

Sergeant Weeke testified A.H. told him he did not want to go to Kirk's house and "started making the same allegations that his mother did" about the lab, being underfed, and being subjected to emotional abuse, which he felt A.H. had been coached to say (Tr. 316-17). He said A.H. also told him he had not seen Kirk since the previous year, and he and Helena often arranged for her to pick him up from a bus stop before the stop where he was supposed to get off, and that was what the plan had been that day (Tr. 317).

Sergeant Myers testified A.H. told him he had been living with Helena since November, and on that day was supposed to "get off the bus and walk back from the bus to his mother's car" (Tr. 331). He said A.H. told him he did not want to go with his father (Tr. 332).

These were obviously testimonial hearsay statements the Confrontation Clause bars. Indeed, below the State agreed these are hearsay statements that ordinarily would be unconstitutional to admit (D5 pp. 4-5). They were "un-confronted testimonial statements of a witness who does not appear at trial," and so generally "[t]he Confrontation Clause of the Sixth Amendment bars admission of them" (D5 p. 4).

B. The equitable "forfeiture by wrongdoing" exception did not apply, because the State failed to prove Helena either procured A.H.'s unavailability at trial or did so for the purpose of preventing him from testifying against her.

Instead, the State relied on the "forfeiture by wrongdoing" exception to a defendant's confrontation rights in seeking to admit A.H.'s statements (D5; D8). The trial court agreed and granted the State's request, stating, "After testimony the Court finds that Defendant continues to have contact with the witness A.H. and withholding information as to A.H. whereabouts from law enforcement" (D10; App. A9).

This was error. To introduce A.H.'s statements to law enforcement under the "forfeiture by wrongdoing" exception, the State first had to prove both that Helena procured A.H.'s unavailability at trial and she did so for the specific purpose of preventing him from testifying against her. It did not.

The forfeiture by wrongdoing exception is an equitable principle holding that if a witness is absent or unavailable by the defendant's own wrongful procurement, then the defendant "cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *State v. McLaughlin*, 265 S.W.3d 257, 271 (Mo. banc 2008) (quoting *Reynolds v. United States*, 98 U.S. 145, 158 (1878)).

In *Giles v. California*, 554 U.S. 353 (2008), the U.S. Supreme Court limited the application of "forfeiture by wrongdoing" to circumstances in which the defendant procured the declarant's unavailability at trial (typically by engaging in the wrongdoing she was accused of), with the intent to prevent the declarant from testifying. There, the trial court allowed into evidence statements a murder victim made to a police officer responding to a domestic

violence call. *Id.* at 361. The Court agreed the forfeiture by wrongdoing doctrine constitutes an exception to the Confrontation Clause, but also held that for it to apply, the State first must prove the defendant engaged in the wrongdoing and procured the declarant's absence with the intent to prevent the declarant from testifying. *Id.* at 361-69.

But "it is not enough … that a defendant [committed an offense against] a victim with the *effect* of preventing her testimony; rather the defendant must have [done so] with the *intent* of preventing her testimony." *United States v. Hanna*, 353 F. App'x 806, 808 (4th Cir. 2009) (emphasis in the original). Notably, the trial court here did not use this required standard, but instead held the forfeiture by wrongdoing exception applied because "Defendant continues to have contact with the witness A.H. and withholding information as to A.H. whereabouts from law enforcement" (D10; App. A9).

Where the State fails to prove the defendant's purpose in the wrongdoing was to prevent the witness from testifying, Missouri courts have not hesitated to hold admitting hearsay under the "forfeiture by wrongdoing" exception was error. Just recently, in *State v. Buechting*, 633 S.W.3d 367, 377-79 (Mo. App. 2021), this Court held applying forfeiture by wrongdoing exception to admit a murder victim's hearsay statements was error, where there was no evidence the defendant killed the victim for the purpose of preventing her from reporting him for domestic abuse or testifying against him, so the exception did not apply.

Courts throughout the country have agreed. *See, e.g.*:

- *State v. Belone,* 285 P.3d 378, 381-83 (Kan. 2012) (applying forfeiture by wrongdoing was error where no evidence a murder was committed with the intent to prevent the victim from testifying);
- *State v. Jensen*, 794 N.W.2d 482, 490-93 (Wisc. App. 2010) (same);
- *State v. Jones*, 197 P.3d 815, 822 (Kan. 2008) (same where no evidence the defendant "killed the victim with the intent to prevent his subsequent testimony at the ensuing murder trial").

Here, there was no evidence Helena took or enticed A.H. from Kirk's custody with the intent to prevent A.H. from testifying. Nor was there any evidence suggesting her intent was to procure A.H.'s unavailability as a witness against her. The family court found Helena consistently had kept A.H. from Kirk for years due to her concerns for his safety. Sergeants Weeke and Myers said Helena had tried to pick A.H. up from school February 21, 2017 (Tr. 21-40), but both admitted they had no evidence she did so intending to keep A.H. from testifying against her (Tr. 33-34, 41). Officer Valenti testified A.H. had reached out to Helena's mother (his grandmother) in October 2019 and he suspected Helena had contact with A.H. in October 2019 after he had run away from Kirk's house (Tr. 47-59), but also conceded he had no evidence Helena committed any actions indicating an intent to keep A.H. from testifying in court (Tr. 62). Finally, the mother of one of A.H.'s friends testified Helena came looking for A.H. and sent a message to A.H. in October 2019, but presented nothing about such an intent, either (Tr. 69-70).

In *McLaughlin*, the Supreme Court of Missouri found "ample evidence" "Mr. McLaughlin intended to make [the victim] unavailable as a witness,

both in the burglary and in the abuse cases, and murdered her to procure her unavailability as a witness." 265 S.W.3d at 273 n.10. In the course of ending their relationship, the victim filed multiple protective orders against Mr. McLaughlin, and the State had charged him with burglary and abuse where the victim was the complaining witness. *Id.* Therefore, the trial court did not abuse its discretion in finding the defendant killed the victim in order to keep her from testifying against him. *Id.*

Similarly, in *State v. Hosier*, the Court found "ample evidence" the defendant murdered the victim to prevent her from testifying against him. 454 S.W.3d 883, 897 (Mo. banc 2015). Specifically, three witnesses indicated they saw the defendant harassing the victim and the victim sought judicial intervention. *Id.* Therefore, the statements she put in an application for an order of protection against the defendant were admissible. *Id.*

Unlike the deceased hearsay declarants at the time of trial in *McLaughlin* and *Hosier*, which the defendant's wrongdoing allegedly caused, there is no evidence Helena caused A.H.'s unavailability at the time of trial at all, let alone with the intent to prevent him from testifying. She was charged with interfering with custody on February 21, 2017, though as the State conceded A.H. was never in her custody that day at all. *See* above at pp. 50-53. She was charged with interfering with custody again on June 14, 2019, but A.H. was removed from her custody June 28, 2019.

Trial below was in September 2020. Helena was not charged with any offenses concerning the time of trial, nor was there any evidence she was causing A.H.'s unavailability at the time of trial at all. The State's only

witnesses said they had no information indicating she intended to keep A.H. from testifying. And there was no evidence even supporting the trial court's statement in June 2020 that Helena "continues to have contact with the witness A.H. and withholding information as to A.H. whereabouts from law enforcement" (D10), nor was she charged with any offense related to that.

Therefore, the trial court erred in finding the forfeiture by wrongdoing exception to Helena's Confrontation Clause rights applied, and so erred in admitting Sergeants Weeke's and Myers' testimony of A.H.'s statements.

C. The trial court's error prejudiced Helena.

The trial court's error prejudiced Helena because the State's case on both counts was not overwhelming, *see* above at pp. 39-44 and 50-53, and their statements that A.H. told them his mother was picking him up from school and did so regularly, he had not seen his father since the previous November, and his statements seemed coached affected the jury's verdict. A.H.'s statements were the only evidence directly supporting the State's allegation of attempted enticement, and without them the State was limited almost solely to Helena's statements to law enforcement concerning the February 2017 incident, which could support the jury finding no enticement.[2] Statements from A.H. himself lent the State's case on both counts an undue credibility that it would not otherwise have had.

Therefore, the trial court's error was reversible. The Court should reverse the trial court's judgment and remand this case for a new trial.

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[2] So, even if the Court determined Helena's conviction on Count 2 should be modified to attempted interference (though that would be improper, *see* above at p. 53), a new trial still would be required on that charge.

Conclusion

The Court should reverse the trial court's judgment on both counts without remand and order the appellant discharged. Alternatively, the Court should reverse the trial court's judgment and remand this case for a new trial.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 360(a)(1)(a), as this brief contains 15,478 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on December 23, 2021, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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