**ED109444**

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**IN THE MISSOURI COURT OF APPEALS**
**EASTERN DISTRICT**

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**STATE OF MISSOURI,**

**Plaintiff / Respondent,**

**vs.**

**OGERTA HELENA HARTWEIN,**

**Defendant / Appellant.**

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

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# REPLY BRIEF OF THE APPELLANT

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## Argument

### I. Summary of the appellant's opening brief

Ogerta Helena Hartwein ("Helena"[1]), appeals from a judgment of convicting her of a felony count and a misdemeanor count and sentencing her to four years in prison (D32 p. 2). The two charges were: (1) interference with custody by taking or enticing taking her son, A.H., from the legal custody of his father, Kirk Hartwein, in June 2019 knowing she had no right to and then removing A.H. from Missouri, a class E felony; and (2) interference with custody by taking or enticing A.H. from Kirk's legal custody on February 21, 2017 knowing she had no right to, a class A misdemeanor (D12 pp. 1-2).

In her opening brief, Helena first explained that viewing the evidence most favorably to the State, it was insufficient to prove the felony count beyond a reasonable doubt (Brief of the Appellant ["Aplt.Br."] 35-44).

First, the State failed to prove the required culpable state of mind. Per the charge and verdict-directing instruction on Count 1, the State had to prove beyond a reasonable doubt that on June 14, 2019, Helena had actual knowledge of a June 10 order in her family court case entrusting A.H. to Kirk (Aplt.Br. 39-42). But the State did not prove she actually knew about the June 10 order at any time alleged, only that a docket entry stated the family court mailed it to her. The law of Missouri is this was insufficient to prove Helena's actual knowledge for a felony conviction (Aplt.Br. 39-42).

Second, the State failed to prove the required criminal act. Per the charge and jury instruction, the State also had to prove beyond a reasonable

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

doubt that between June 10 and June 14, 2019 in Missouri Helena took or enticed A.H. from Kirk's custody (Aplt.Br. 43-44). But it presented no evidence she was in Missouri at all during this time, only that she did not show up to the O'Fallon Police Department June 14 (Aplt.Br. 43-44).

In her second point, Helena explained the State also failed to prove the misdemeanor charge of "taking or enticing" A.H. on February 21, 2017 (Aplt.Br. 45-53). The State had to show A.H. Was removed from Kirk's custody that day, not that Helena just sought to remove him, which would only be an attempt (Aplt.Br. 48-50). But as the prosecutor admitted below, the evidence only showed Helena "attempting to take" A.H. (Aplt.Br. 50-53) (quoting Tr. 412-13). And because the State specifically opted on the record not to have any lesser-included offense instructions, it waived modification now on appeal to a lower misdemeanor (Aplt.Br. 46-47, 50-53).

Finally, Helena explained the trial court erred in admitting A.H.'s statements to police officers under the "forfeiture by wrongdoing" exception (Aplt.Br. 54-63). As the State conceded, these were testimonial hearsay statements the Sixth Amendment's Confrontation Clause ordinarily bars (Aplt.Br. 55-58). To apply the forfeiture by wrongdoing exception, the State had to prove Helena both procured A.H.'s physical unavailability at trial and did so for the purpose of preventing him from testifying (Aplt.Br. 59-61). The State failed to prove either, introducing no evidence A.H. was unavailable at all, let alone that Helena procured that unavailability for the purpose of preventing him from testifying (Aplt.Br. 61-63). This error prejudiced Helena, as the hearsay statements affected the jury's verdict (Aplt.Br. 63).

## II. The State's evidence on Count 1, felony interference with custody, was insufficient.

In her first point, Helena explained the evidence was insufficient to prove the felony count, Count 1, beyond a reasonable doubt, because the State did not prove either the culpable state of mind element or the criminal act element (Brief of the Appellant ["Aplt.Br."] 35-44).

### A. The State failed to prove the culpable state of mind it charged.

For the knowledge element, as the charge (D12 p. 1) and the verdict director (D24 p. 9) stated, the State had to prove beyond a reasonable doubt that on June 14, 2019, Helena had actual knowledge of the family court's June 10 order entrusting A.H. to Kirk's custody (Aplt.Br. 39-40). But all the record showed was the family court mailed a copy to Helena, with no evidence of where it was sent or in what manner (D40 pp. 84, 122).

In her opening brief, Helena cited *State v. Licata*, 501 S.W.3d 449, 453-54 (Mo. App. 2016), which rejected this offense's knowledge element could be met by "constructive knowledge," and held serving a custody order on counsel does not prove the defendant's required "actual knowledge" without more from which this could be inferred, such a evidence of a material change in the defendant's behavior at the time the order was issued (Aplt.Br. 40-42).

#### 1. As a matter of law mere proof a document was mailed, without more, is insufficient to prove the intended recipient had actual knowledge of that document.

In response, not addressing *Licata* and citing no authority, the State argues "the evidence of the mailing of the order on June 10 to [Helena]'s address repeatedly provided to the court by [Helena] provided a reasonable

inference that appellant knew of the June order" (Brief of the Respondent ["Resp.Br."] 12).

The State's response is in error. First, the reason the State cites no authority for evidence of mailing a document automatically being proof beyond a reasonable doubt the recipient had actual knowledge of that document is no authority supports this. The law of Missouri is the contrary: mailing a document only shows constructive notice, and is insufficient to prove actual knowledge of the document beyond a reasonable doubt.

In *Licata*, this Court suggested merely mailing a custody order *is not* sufficient proof of actual knowledge for felony interference with custody. 501 S.W.3d at 453-54. In a footnote, it contrasted the required actual knowledge in a felony interference with custody case to case law for mailing a driver's license revocation notice being sufficient for the *lower* knowledge element for misdemeanor driving while revoked under § 302.321, R.S.Mo. *Licata*, 501 S.W.3d at 454, n. 4. Section 302.321 only requires "act[ing] with criminal negligence with respect to knowledge" of the revocation, meaning the person reasonably should have known that her license was revoked. *See State v. Ise*, 460 S.W.3d 448, 456-57 (Mo. App. 2015).

The Court in *Licata* held this constructive knowledge is not enough: there must be some *additional* evidence to show the defendant *did know* of the order. In *Licata*, that evidence was that immediately after entry of the order, the defendant 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. 501 S.W.3d at 453-54. The State points to no such additional evidence here (Resp.Br. 12-13), because there was none.

To be sure, as a matter of law, evidence that a document was mailed to someone, without more, *does not ipso facto* prove the intended recipient had actual knowledge of that document.

Actual knowledge can be shown through registered or certified mail where the recipient is shown to have received the mailing. *See, e.g.*, *Larabee v. Washington*, 793 S.W.2d 357, 361 (Mo. App. 1990) (prejudgment interest settlement offer statute required notice by certified mail, which if sent that way would make for proof of actual knowledge); *James v. Hutchinson*, 211 S.W.2d 507, 509-10 (Mo. App. 1948) (contract requiring actual notice of extension satisfied where recipient received it by registered mail).

But to prove beyond a reasonable doubt that the person knew of the document to support a criminal charge, the intended recipient still must be shown *actually* to have received it. *Cf. State ex rel. O'Brien v. Moreland*, 703 S.W.2d 597, 600 (Mo. App. 1986). In *O'Brien*, the defendant was charged with criminal contempt for violating an injunction enjoining her from trespassing on or interfering with a particular building. *Id.* at 598. An order was posted several places in the building, including its outside door and the door of an office suite that the defendant used. *Id.* at 600. But because there was no evidence the defendant herself actually had seen these, this was not an "adequate showing that the existence of the October 1 court order was brought to [the defendant]'s attention," and this Court granted a writ of habeas corpus discharging the defendant. *Id.*

**2. The State's argument otherwise rests on a series of impermissibly stacked inferences.**

This makes sense, because the State's argument otherwise engages in impermissible inference-stacking to reach its preferred result. "An 'inference' is a conclusion drawn by reason from facts established by proof …." *State v. Foster*, 930 S.W.2d 62, 64 (Mo. App. 1996) (citation omitted). "While [the Court] accept[s] as true all inferences favorable to the State, they must be *logical* inferences that may be drawn from the evidence." *State v. Gonzalez*, 235 S.W.3d 20, 25 (Mo. App. 2007) (citation omitted) (emphasis in the original). As a result, "a verdict cannot rest upon the piling of an inference upon an inference where there are no *facts* supporting the first inference." *State v. McMullin*, 136 S.W.3d 566, 572 (Mo. App. 2004) (emphasis in the original).

"[T]he inference stacking rule prohibits an inference 'where an initial inference is drawn from a fact, and other inferences are built solely and cumulatively upon the first, so that the conclusion reached is too remote and has no sound logical foundation in fact.'" *State v. Putney*, 473 S.W.3d 210, 220 (Mo. App. 2015). *See State v. Anderson*, 386 S.W.3d 186, 193 (Mo. App. 2012) (stating rule and reversing cocaine possession conviction for depending on "drawing inferences from other inferences"); *McMullin*, 136 S.W.3d at 572 (stating rule and reversing conviction for violating order of protection because key "inference [was] based upon another inference").

Here, the only actual evidence in the record is that the family court mailed the June 10, 2019 order "to … pro se petitioner on 6-10-19" (D40 p. 122). To get to this being "a reasonable inference that appellant knew of the

June order" by June 14 (Resp.Br. 12), the State jumps through a series of hoops, themselves based on inferences:

1. The State infers the order was mailed to Helena's "most current address" because "[t]he initial dissolution decree required [Helena] to provide parties with notification of any change in address at least sixty days prior to moving" (Resp.Br. 12); and
2. The jury could disbelieve testimony that Helena no longer was at that address (Resp.Br. 12); so,
3. Therefore, "the evidence of the mailing of the order on June 10 to appellant's address repeatedly provided to the court by appellant provided a reasonable inference that appellant knew of the June order" (Resp.Br. 12).

The State's result that Helena actually received the June 10 notice on or before June 14 plainly is based on a series of improperly stacked inferences, themselves not grounded in facts. First, the State infers the order was mailed to Helena's most current address in O'Fallon. No evidence actually supports that, such as a copy of the mailing, but instead this is the State's own inference without a fact. It is entirely possible that the court mailed it to a different address. Next, the State infers that from the fact Helena did not formally change her address, she still lived at the address to which it inferred the letter had been sent. But no evidence actually supports that, either, only another inference. Finally, from these two separate inferences, the State infers Helena received that mailing, which it further infers was on or before June 14. But no evidence supports that, either. No

evidence was introduced of the manner in which the order was mailed or when or where it was received.

The State's conclusion is an impermissible series of stacked inferences. The law of Missouri is that a felony conviction cannot be so shakily supported.

### 3. The State had to prove Helena's knowledge of the June 10 order as it charged, not its alternative knowledge theory it now posits for the first time.

Finally, the State argues that "[e]ven if the evidence was insufficient to show knowledge of the June 10 order, there was still sufficient evidence that appellant knew that she did not have the right to take or entice A.H. from his father's custody on or about June 10" (Resp.Br. 13). It argues this is because she *also* was violating the original custody decree (Resp.Br. 13).

The State ignores it *did not* charge Helena with a knowing violation of the original custody decree or give that to the jury to weigh. As Helena explained in her opening brief, and the State does not address, 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 (Aplt.Br. 37-38). "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).

Here, the State's Count 1 charged Helena with taking or enticing A.H. "on or about **June 14, 2019**, knowing that [she] had no legal right to do so, … 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**" (D12 p. 1) (emphasis added).

While the State argues now that Helena also had no right to custody of A.H. on June 14, 2019 under the pre-June 10 order, either, it did not put this question to the jury, likely because as Helena has pointed out the prior order *did* give her custody for four consecutive weeks during the summer (Aplt.Br. 41). The prosecutor certainly *could* have charged Helena that way, but the jury might well have acquitted her of that, because a reasonable person could believe she did have custody June 14 under the prior order, and the prosecutor made a calculated decision not to give Helena that argument. (Moreover, the State's case that she was violating the order is that she already had moved to North Carolina before June 10, which would negate the knowledge element for the June 10 order anyway and the criminal act element for June 10-14.)

The State solely charged Helena with knowledge of the June 10, 2019 order. It cannot now attempt to convict her of a knowledge element with which it did not charge her.

**B. The State failed to prove the criminal act element.**

Helena also explained that the State 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" (Aplt.Br. 43-44) (quoting D12 p. 1). The jury was specifically instructed that it 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).

Helena explained the State did not prove she did anything in Missouri on June 14, as "[t]he 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).

The State does not dispute this, but instead argues that the language "on or about" meant it could present evidence of Helena committing the required criminal act at some point within three years before the information was filed against her (Resp.Br. 14-15).

The State's argument is in error. First, "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). Here, the State's charge specifically was for the range of June 10 to June 14: "on or about **June 14, 2019**," Helena 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**" (D12 p. 1). The charge could not begin before the June 10 order, and the act itself was alleged to be "on or about June 14" (D12 p. 1).

The State argues there is a "reasonable inference from evidence that [Helena] was planning to take A.H. to North Carolina" that she "either personally took A.H. to North Carolina or arranged for his transportation

there, thereby supporting a finding of taking or enticing" (Resp.Br. 14). But the State's charge was that she did this specifically *after* June 10, 2019 and *on or about* June 14, 2019. It introduced no evidence that she did this during that time, nor does the State point to any such evidence now in its brief (Resp.Br. 14-15). Instead, as Helena pointed out in her opening brief, taking the State's evidence as true it is entirely possible that A.H. had been in North Carolina for a considerable time before then, which was not what the State charged (Aplt.Br. 43-44). There was simply no evidence Helena was in Missouri at all during the period after June 10, 2019, or of her whereabouts at all until June 28, when Kirk found out she and A.H. were in North Carolina (Aplt.Br. 10).

At the very least, the State had to prove Helena committed the criminal act charged *in Missouri* during the time period charged. *State v. Bennish*, 479 S.W.3d 678, 685 (Mo. App. 2015). It did not. The State could have charged Helena with interference with Kirk's custody under the prior order by taking or enticing A.H. to North Carolina between November 2018 and July 2019. Instead, it charged her with doing so under the June 10 order on or about June 14, 2014. It failed to prove this charge during that time.

## III. The State's evidence on Count 2, misdemeanor interference with custody, was insufficient.

In her second point, Helena explained the evidence was insufficient to prove the misdemeanor count, Count 2, beyond a reasonable doubt, because as the prosecutor admitted at trial, the State's evidence only showed she *attempted* to entice A.H. into her custody on February 21, 2017, not that she actually enticed him (Brief of the Appellant ["Aplt.Br."] 45-53).

In response, the State largely fails to address Helena's arguments, much less refute them. Any argument Helena would make in response to the State's brief would be re-argument.

First, the State argues "entice" in § 565.150, R.S.Mo. means "attempts to entice" (Resp.Br. 17-18). But Helena already explained that reading "entice" as "attempt to entice" would nullify the attempt statute in § 562.012, R.S.Mo. (Aplt.Br. 50). The State does not address this at all.

The State also argues that in any case, this Court has the power to modify Helena's conviction on Count 2 to a Class B misdemeanor, rather than Class A, claiming the State did not waive an attempt conviction (Resp.Br. 20-21). But this is untrue, as the State specifically opted *not* to instruct on any lesser included offenses (Aplt.Br. 52-53), which the State concedes "would amount to a waiver of such action" (Resp.Br. 21) (citing *State v. Blair*, 443 S.W.3d 677, 686 (Mo. App. 2014)).

## IV. The trial court erred in admitting police statements of A.H.'s testimonial hearsay.

Finally, in her third point, Helena explained a new trial is required because the trial court erred in allowing the prosecution to admit testimonial hearsay statements from A.H. to police under the "forfeiture by wrongdoing" exception to the Sixth Amendment's Confrontation Clause (Aplt.Br. 54-63).

The State initially argues Helena "did not preserve this claim" because she did not object to this evidence at trial (Resp.Br. 23). This is in error.

At the hearing over the State's request to invoke the forfeiture by wrongdoing exception, when one of the officers began testifying about A.H.'s statements, Helena's counsel asked for "an ongoing objection to any of the … evidence that happened previously" with A.H., as opposed to his present whereabouts (Tr. 21-22). The trial court granted this request, stating, "Absolutely" (Tr. 22).

It is well-established that granting a continuing objection is enough to preserve the admission of the objected-to evidence at trial. *State v. Baker*, 103 S.W.3d 711, 715 (Mo. banc 2003). And this continuing objection can be at the pretrial hearing and does not have to be at trial itself. *State v. Flieger*, 776 S.W.2d 25, 28 (Mo. App. 1989) (counsel asking for a continuing objection at pretrial hearing was sufficient to preserve issue of admission of that evidence at trial for appellate review). Accordingly, this issue is fully preserved for appeal.[2]

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[2] If somehow not preserved, the State is incorrect that this issue cannot be reviewed for plain error, *see State v. Ivey*, 427 S.W.3d 854, 860-64 (Mo. App. 2014) (reviewing admission of evidence under forfeiture by wrongdoing exception for plain error), and Helena requests that review.

The State argues A.H.'s statements at issue were not testimonial (Resp.Br. 25). This is contrary to the argument it made below, where it conceded the statements 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), leaving that issue not in dispute before the trial court. The State is estopped from taking a different position now. *Sheppard v. East*, 192 S.W.3d 518, 524 (Mo. App. 2006) (respondent on appeal is estopped from taking a legally inconsistent position from what it argued below). Regardless, as Helena explained in her opening brief, and as the State conceded below, A.H.'s statements reasonably could be anticipated to be used against Helena in investigating and prosecuting a crime, so they are testimonial (Aplt.Br. 57-58).

Citing no authority, the State also argues Helena prevented A.H. from testifying within the meaning of the forfeiture by wrongdoing exception because she "poison[ed] her son against K.H. and to favor her so that he would never aid in a prosecution of her" (Resp.Br. 27). It also says that in 2019-2020, A.H. continued to run away from home (Resp.Br. 27-28). As Helena already explained, and the State does not address, none of this was the required evidence that Helena *physically made A.H. unavailable*, and that she did so *for the purpose of preventing him from testifying*. That the prosecution does not believe a witness will help it or the witness himself had run away many months before trial was not evidence of either of these requirements (Aplt.Br. 59-63).

## 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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by /s/Jonathan Sternberg

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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), as this brief contains 3,820 words.

/s/Jonathan Sternberg
Attorney

## Certificate of Service

I certify that I signed the original of this reply brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on April 22, 2022, I filed a true and accurate Adobe PDF copy of this reply brief of the appellant via the Court's electronic filing system, which notified the following of that filing:

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