IN THE COURT OF APPEALS OF IOWA

No. 7-261 / 06-0572
Filed August 8, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SUSAN ELIZABETH CORBETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Kim M. Riley, District Associate Judge.

Susan Elizabeth Corbett appeals from her conviction and sentence for violation of a custodial order, following a jury trial. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant County Attorney, and Richard H. Dunn, County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

Susan Elizabeth Corbett appeals from her conviction and sentence for violation of a custodial order, following a jury trial. We affirm.

Susan Corbett and Jaime Brass were divorced in April 2003. They shared legal custody of their minor son, Christopher. Jaime was awarded physical care with visitation rights to Susan. On November 14, 2003, Susan picked up Christopher for visitation. The parties arranged to meet two days later at a convenience store in Grinnell for Jaime to pick up Christopher. On November 16, Jaime was in Grinnell at the scheduled time. He waited for about fifty minutes, but Susan and the child did not show up. Jaime then returned to Iowa Falls where he lived with his parents.

Susan did not have a telephone at her residence, but she used a voice mail service provided by a Seattle company. Jaime left daily messages on Susan's voice mail through December 7, 2003, but never received any return phone calls from Susan. Jaime reported Christopher missing on December 2, 2003. In early March 2004, authorities located Christopher living with Susan in West Plains, Missouri.

Susan was charged with violation of a custodial order. A jury trial commenced on November 3, 2005. The issue at trial was whether Susan concealed the child from Jaime, the custodial parent. Susan denied she concealed Christopher. She testified that she drove to Grinnell with Christopher on November 16, 2003, but her trip was delayed because Christopher acted hysterically and refused to get into the vehicle that morning. She eventually calmed him down and put him in the van. They arrived in Grinnell at around 7:00

p.m. but Jaime was gone. Susan testified that after arriving in Grinnell, she called Jaime and Jaime's attorney to explain the situation but could not reach either of them. She waited until 9:00 p.m. and finally took Christopher back to her residence in Missouri. Susan also claimed she revealed Christopher's whereabouts in a number of letters mailed to Jaime. Susan produced nineteen computer-generated copies of these letters. Each letter bore a handwritten date on the top right corner that Susan claimed indicated when she wrote the letters. She stated she mailed one of these letters to Jaime through his employer, and the rest through his attorney, Lynn Wiese. The district court found the letters inadmissible, but allowed Susan to testify to the relevant parts of the letters.

The jury returned a guilty verdict on November 4, 2005. On December 19, 2005, Susan filed a motion for new trial which the district court overruled after a hearing. On March 28, 2006, the district court sentenced Susan to serve a term of incarceration not exceeding five years. Susan appeals, arguing the district court erred in (1) excluding the letters to the father from evidence, and (2) refusing to instruct the jury on the defense of necessity.

Admissibility of Letters

Our review on the admissibility of evidence is for abuse of discretion. *State v. Hubka, 480 N.W.2d 867,868* (Iowa 1992). We find abuses of discretion when such discretion is exercised "on ground clearly untenable or to an extent clearly unreasonable." *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). "Untenable" means a ground or reason "not supported by substantial evidence" or "based on an erroneous application of the law." *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003).

Best Evidence Rule. Iowa Rule of Evidence 5.1003 permits a duplicate to be admitted unless there is a genuine question raised as to the authenticity of the original. In the present case, the State called into question the authenticity of the originals of these letters. The letters Susan produced contained no evidence of delivery. There is no record showing Susan attempted to secure the originals by means set forth by Iowa Rules of Evidence 5.1004(3). In addition, Jaime and his attorney, Mr. Wiese, both testified that the only communication they received from Susan after November 16, 2003 were three letters sent to Mr. Wiese's office, one hand-delivered and two through postal services. The mailed letters both had Montana postmarks. One had no return address, and the other had an Iowa City return address.

After hearing the conflicting evidence, the district court found the letters Susan sought to admit were "ultimately self-serving, and easily could have been generated after the fact in an effort to bolster Defendant's own testimony." It held the State raised a genuine question as to the authenticity of the originals of the letters; therefore, the letters were inadmissible under the best evidence rule. We find the record supports the district court's finding and the exclusion of the letters was not an abuse of discretion.

Relevance. Even if we assume these letters were authentic, they would still be inadmissible for lack of relevance. With the exception of the last letter, these letters did not provide a precise location of the child. In the letter dated November 23, 2003, Susan stated she found a beautiful place in the Ozark Mountains. In the letter dated December 6, 2003, she wrote about driving to Houston with the child for a parade, but did not mention which state she was in.

The letter dated January 13, 2004 made references to her mail being forwarded from Iowa City to her in Missouri. These vague geographic references, combined with the Montana postmarks on the two letters received by Jaime, were confusing and misleading. They were not sufficiently specific to reveal Christopher's whereabouts. The last letter, dated February 21, 2004, provided Susan's address and an instruction to reach there. However, it was written more than three months after she had failed to return Christopher, by which the crime had already been committed. Thus, these letters' probative value in disproving the concealment element is very limited.

In addition, the letters contained inadmissible hearsay unfairly prejudicial to Jaime. They included statements and assertive conduct attributed to Christopher about where he wanted to live and his negative feelings towards his father and grandmother. They also made references to Jaime's contempt hearing and drug usage. These prejudicial matters were irrelevant and unsupported by any evidence in the record. The district court found the limited probative value of the letters was substantially outweighed by the danger of unfair prejudice. We agree. Even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Taylor*, 689 N.W.2d 116, 123 (Iowa 2004). The letters were therefore properly excluded.

Harmless Error. Even if an abuse of discretion is found, reversal is not required unless prejudice is shown. *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004). In the present case, although the district court found the letters themselves were inadmissible, it permitted Susan to testify about the letters

allegedly mailed to Jaime, the dates they were written, and the references to her location. In its ruling on defendant's motion for new trial, the district court reasoned:

> Since Defendant was permitted to testify that she sent the letters to Mr. Brass, and informed him of her location, the jury's determination as to whether Defendant "concealed" the child from the custodian parent would not be directly affected by receipt of the letters as evidence.

We agree with this analysis, and conclude the jury's verdict would not have been different even if the letters were admitted. Error, if any, in excluding the letters is harmless.

Jury Instruction:

The district court denied Susan's request to instruct the jury on her proposed necessity defense. The relevant part of the proposed jury instruction states:

> [I]n order to find the defendant's conduct "necessary," she must provide some evidence to all of the following conditions:
> 1. The defendant is faced with a specific threat of substantial injury in the immediate future either to herself or her child;
> 2. There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such compliant illusionary;
> 3. There is no time to resort to the courts.

We review jury instruction issues for correction of errors of law. *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). A trial court must instruct on a defendant's theory of defense provided the defendant makes a timely request, the requested theory of defense instruction is supported by substantial evidence, and the requested instruction is a correct statement of the law. *State v. Johnson*, 534 N.W.2d 118, 124 (Iowa Ct. App. 1995). A defendant raising the necessity

defense has the burden of generating a fact question on each element to warrant submission of the defense to the jury. *State v. Walton*, 311 N.W.2d 113, 115 (Iowa 1981).

The necessity defense has very limited application in Iowa law. Our law has not recognized necessity as an affirmative defense to the crime of violation of a custodian order. Without deciding whether the necessity defense is available to an allegation of violation of a custodial order or whether the proposed instruction is a correct statement of law, we find the district court's rejection of the proposed instruction was correct because Susan failed to generate a fact question on necessity. *See id*.

First, there is insufficient evidence to show a specific threat of imminent substantial injury to the child. Susan's suspicion of abuse is based on her two-year-old son's protests to being taken back to Jaime. Susan testified that when she attempted to put Christopher into the van for the five hundred miles return trip on November 16, 2003, Christopher struggled hysterically and screamed, "No hurt me. No grandma's house. No hurt me." The struggle lasted one and one-half hours, and Susan became concerned about how Christopher was treated under Jaime's custody. However, she provided no corroborating evidence supporting the suspected abuse. There was no evidence of bruises, scars or injures. Susan's testimony that her son was "unhappy going there" and he "had some nightmares" and "trust issues" falls far short of an imminent threat of bodily harm requiring concealment of the child from his father for months.

In addition, Susan had opportunities to seek immediate help from authorities but failed to do so. She never informed law enforcement of the

suspected abuse. She testified she consulted some domestic violence resources, locally or over the Internet, "in the week and days following" her return to Missouri. It is not clear what was accomplished or learned from the contacts. She stated she called some attorneys "in the weeks that followed," but found out she could not afford one. The district court found that "the evidence offered by the Defendant failed to establish an emergency situation existed." It concluded that "Defendant's testimony did not rise to a level to generate a fact question on necessity." No error of law was made in that determination.

AFFIRMED.