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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000927-MR

PATRICIA KARSNER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 16-CR-00551

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: DIXON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Patricia Karsner was convicted of custodial interference following a jury trial and sentenced to one-year imprisonment. We conclude Karsner was entitled to a directed verdict of acquittal and reverse.

Karsner and Warren Tooley are the parents of two children, E.E. born on August 26, 1999, and S.J. born on December 21, 2000. On September 21,

2015, the children, who were fourteen and sixteen years old, lived in Radcliff with Karsner, where they had resided for two years. Prior to that, they lived with Tooley in Louisville for six to seven years.

On September 21, 2015, following a hearing, the Jefferson Family Court issued an order granting immediate custody to Tooley finding that the children were seriously endangered in Karsner's custody and it was in the children's best interests that Tooley be given immediate custody. The order further stated that Karsner was to immediately relinquish custody to Tooley and that interference of any kind by Karsner "shall be punishable as a contempt, and may constitute custodial interference." Although Karsner was notified of the hearing, she did not attend.¹

With the order in hand, on September 21, 2015, Tooley sought the assistance of the Radcliff Police Department to enforce the order. Sergeant Jarett Kirkpatrick looked at the order, which he found to be "different," and agreed to assist Tooley with the transfer of the children. Kirkpatrick and two other officers went with Tooley to Karsner's home.

When Tooley and the officers arrived, they were met at the front door by Michael Nation, Karsner's boyfriend. Tooley informed Nation that he had a

¹ We do not have the record in the Jefferson Family Court case and make no determination as to whether this was a valid custody order.

court order to take the children. Karsner was not home at the time but the children were. E.E. was on the first floor, close enough to hear Nation speaking. S.J., who had been upstairs, came downstairs and also heard the conversation.

Sergeant Kirkpatrick testified that S.J. became upset and was crying. He testified he could have taken her at that point but chose not to believing it would be “unprofessional.”

In the meantime, Nation phoned Karsner and informed her what was happening. While waiting for Karsner to arrive, Nation attempted to calm the children and assured them it would be worked out. He then directed the children to wait in the kitchen at the rear of the house.

Karsner arrived approximately five minutes later. She was shown the order and told to relinquish the children. Karsner responded: “I’m not going to do that.” Sergeant Kirkpatrick informed her that she could be held in contempt of court and Karsner repeated she would not give custody of the children to Tooley or Sergeant Kirkpatrick and ordered them to leave her property. Sergeant Kirkpatrick testified that Karsner continued to defy his instruction for about ten to fifteen minutes.

The officers concluded their encounter with Karsner without arresting her and without taking the children. They told Tooley he could return to family court or talk with his attorney. After speaking with his attorney, Tooley went to

the Hardin County Attorney's Office that same day, where he filed a criminal complaint for custodial interference against Karsner. A warrant was not issued until 1:23 p.m. on September 23.

E.E. testified that at some point during the encounter among Karsner, Tooley and the officers, she and her sister ran away from the home because they did not want to go with Tooley. She testified they left through the back door and no one saw them leave. E.E. further testified she and S.J. stayed away from home the next two days, sleeping in the car of E.E.'s boyfriend and avoiding Karsner's calls. E.E. testified she and S.J. returned home on September 23, 2015, sometime after 11:00 a.m. and Karsner called the police to report the children had returned.

Nation testified he and Karsner discovered the children were missing when they went into the home to tell them they would have to stay with Tooley until the matter could be resolved in family court. Although he testified Karsner called police to report the children missing, there was no evidence of that report introduced at trial.

At 3:25 p.m. on September 23, 2015, two Radcliff police officers arrived at Karsner's home and arrested Karsner. The children were then placed in Tooley's custody.

Karsner raises various issues on appeal. However, because we conclude she was entitled to a directed verdict of acquittal, we do not address the remaining issues.

Karsner argues the Commonwealth failed to produce sufficient proof to establish the crime of custodial interference. Her argument was properly preserved by a motion for directed verdict of acquittal at the conclusion of the Commonwealth's proof and at the close of the case as well as in her written motion for judgment notwithstanding the verdict.

“[W]here a motion for directed verdict has been denied, the question on appeal is whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Rankin v. Commonwealth*, 327 S.W.3d 492, 499-500 (Ky. 2010). In ruling on a motion for directed verdict, “a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury.” *Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013).

Kentucky's custodial interference statute, Kentucky Revised Statutes (KRS) 509.070, provides:

- (1) A person is guilty of custodial interference when, knowing that he has no legal right to do so, he takes,

entices or keeps from lawful custody any mentally disabled or other person entrusted by authority of law to the custody of another person or to an institution.

(2) It is a defense to custodial interference that the person taken from lawful custody was returned by the defendant voluntarily and before arrest or the issuance of a warrant for arrest.

(3) Custodial interference is a Class D felony unless the person taken from lawful custody is returned voluntarily by the defendant.

As explained by the 1974 Kentucky Crime Commission/LRC Commentary to KRS 509.060, the combined effect of the custodial interference statute and those prohibiting kidnapping and unlawful imprisonment makes “unlawful imprisonment and kidnapping inapplicable to situations involving the acquisition of control over another because of familial affection or considerations, and to create a special offense to deal with conduct involving an interference with lawful custody.”

KRS 509.070 requires Karsner took, enticed or kept the children from Tooley’s custody. By all witness accounts of the events that occurred on September 21, 2015, Karsner did not have any contact with the children during the time Tooley and the officers were at the home. While there was evidence that she objected to Tooley or the officers taking custody, she did not communicate with the children to discourage them from going with Tooley or touch the children during the encounter with the officers and Tooley. Therefore, she could not have taken or enticed the children so as to deprive Tooley of custody.

The Commonwealth argues Karsner's verbal objection to Tooley or the officers taking the children after being confronted with the Jefferson Family Court order was conduct that prevented the custody exchange and, therefore, done to "keep" the children from Tooley. Essentially, it argues Karsner's objection to relinquishing custody to the officers or to Tooley was sufficient evidence upon which she could be found guilty of custodial interference because she had a duty to facilitate the custody exchange.² Although failure to comply with the order may have properly resulted in contempt charges, we cannot agree that her verbal refusal to comply with the custody order was sufficient to find her guilty of a Class D felony.

KRS 509.070(1) requires that the defendant knowingly engage in overt conduct that prevents a lawful custodian from exercising his or her rights to custody. No doubt, Karsner was distraught and defiant when she arrived at the home and learned Tooley and the officers were there to take her children. However, Karsner's verbal expression of discontent with their sudden appearance at her residence was not a crime under KRS 509.070. The Commonwealth failed

² The Commonwealth argues that Karsner had a legal duty to act because of the Jefferson Circuit Court order and, therefore, was guilty of a criminal offense. KRS 501.030. Criminal liability under KRS 509.070 does not depend merely on the existence of a custody order. It requires that Karsner either took, enticed or kept the children from Tooley's custody.

to produce even a scintilla of evidence that she engaged in any overt conduct to defeat Tooley's right to custody.

There was no evidence that Karsner physically restrained the children to prevent them from going with Tooley, concealed their whereabouts, absconded with the children or interfered with any attempt by the officers to take the children. In fact, Sergeant Kirkpatrick testified he made no attempt to take the children when he was at the home on September 21, 2015, even though Karsner did not physically prevent him from doing so. As Karsner correctly states, she could not have kept E.E. and S.J. from Tooley's custody because both children ran away during the encounter among Karsner, Tooley and the officers.

Custodial interference statutes are intended to protect any custodian from deprivation of his or her rights. However, KRS 509.070(1) criminalizes overt conduct that interferes with those rights and not mere verbal objections to custody. Here, there was no evidence produced by the Commonwealth that Karsner engaged in any overt conduct with the intent to keep the children from Tooley's custody. There being no evidence upon which a reasonable juror could find that Karsner took, enticed or kept the children from Tooley's custody, Karsner was entitled to a directed verdict of acquittal.

For the reason stated, the judgment of the Hardin Circuit Court is reversed.

ALL CONCUR.

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