

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2023 Session

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. WENDY D. HANCOCK

**Appeal from the Circuit Court for Williamson County
No. W-CR190482 Joseph A. Woodruff, Judge**

No. M2022-00483-CCA-R3-CD

In August of 2018, the Tennessee Department of Children’s Services (“DCS”) secured an ex parte order placing B.B.,¹ the minor daughter of Wendy Dawn Hancock, Defendant, in the custody of DCS after a referral prompted an investigation. During the span of several days, Defendant and B.B. stayed at both a hotel in Lebanon and Defendant’s attorney’s, Connie Reguli’s (“Ms. Reguli’s”) home in Brentwood without ever being formally served with the ex parte order. Police eventually located B.B. and Defendant in Brentwood. Defendant was indicted for one count of custodial interference, in violation of Tennessee Code Annotated section 39-13-306. Ms. Reguli was also charged with several offenses for her actions. Defendant sought a dismissal of the indictment before trial. The trial court denied the motion. After a jury trial, Defendant was found guilty of custodial interference. She was sentenced to two years on supervised probation. The trial court denied the motion for new trial; Defendant appealed. On appeal, Defendant argues that: (1) the indictment should be dismissed because it fails to allege all of the elements of custodial interference; (2) the trial court improperly instructed the jury on the elements of custodial interference; (3) the trial court improperly instructed the jury that the ex parte custody order was “valid and enforceable”; (4) the evidence was insufficient to support the conviction; and (5) Tennessee should adopt an advice of counsel defense for specific intent crimes. Because the trial court improperly instructed the jury essentially removing one of the elements of the offense and lowering the burden of proof, we reverse the judgment of the trial court and vacate Defendant’s conviction. We remand the case to the trial court for any further proceedings that may be necessary.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed,
Conviction Vacated, and Remanded**

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR. and TOM GREENHOLTZ, JJ., joined.

¹ It is the policy of this Court to refer to minors by their initials.

J. Gregory Burlison (at trial), and M. Todd Ridley- (on appeal), Assistant Public Defender – Appellate Division, Franklin, Tennessee, for the appellant, Wendy Dawn Hancock.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Kim Helper, District Attorney General; and Mary Katherine Evins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Williamson County Grand Jury issued an indictment in July of 2019 naming both Defendant and Ms. Reguli. In Count One, Defendant was charged with custodial interference as follows:

[Defendant], being the natural parent of B.B. date of birth of 1-26-2006, a child younger than eighteen (18) years of age heretofore, to-wit, between August 15, 2018 and August 16, 2018, inclusive, before the finding of this presentment, in said County and State, unlawfully, feloniously, and knowingly, did detain said child within this state with the intent to violate a temporary or permanent judgment or court order regarding the custody or care of the child, in violation of Tennessee Code Annotated 39-13-306, a class E felony, and against the peace and dignity of the State of Tennessee.

The indictment was based on actions Defendant took after the issuance of an ex parte order placing her daughter, B.B., in the custody of DCS. The remaining counts of the indictment charged Ms. Reguli with one count of facilitation of custodial interference and two counts of accessory after the fact for her role in the events leading up to B.B.'s placement in DCS custody.

The statute Defendant was alleged to have violated, Tennessee Code Annotated section 39-13-306, provides:

(a) It is the offense of custodial interference for a natural or adoptive parent, step-parent, grandparent, brother, sister, aunt, uncle, niece, or nephew of a child younger than eighteen (18) years of age to:

(1) Remove the child from this state knowing that the removal violates a child custody determination as defined in § 36-6-205, the rightful custody of a mother as defined in § 36-2-303, or a temporary or permanent judgment or court order regarding the custody or care of the child;

(2) Detain the child within this state or remove the child from this state after the expiration of the noncustodial natural or adoptive parent or guardian's lawful period of visitation, with the intent to violate the rightful custody of a mother as defined in § 36-2-303, or a temporary or permanent judgment or a court order regarding the custody or care of the child;

(3) Harbor or hide the child within or outside this state, knowing that possession of the child was unlawfully obtained by another person in violation of the rightful custody of a mother as defined in § 36-2-303, or a temporary or permanent judgment or a court order;

(4) Act as an accessory to any act prohibited by this section; or

(5) Detain the child within or remove the child from this state during the noncustodial parent's lawful period of visitation, with the intent to violate the court-ordered visitation of the noncustodial parent, or a temporary or permanent judgment regarding visitation with the child.

(b) It is also the offense of custodial interference for a natural or adoptive parent, step-parent, grandparent, brother, sister, aunt, uncle, niece, or nephew of an incompetent person to:

(1) Remove the incompetent person from this state knowing that the removal violates a temporary or permanent judgment or a court order regarding the custody or care of the incompetent person;

(2) Harbor or hide the incompetent person within or outside this state, knowing that possession of the incompetent person was unlawfully obtained by another person in violation of a temporary or permanent judgment or a court order; or

(3) Act as an accessory to any act prohibited by this section.

(c) It is a defense to custodial interference:

(1) That the person who removed the child or incompetent person reasonably believed that, at the time the child or incompetent was removed, the failure to remove the child or incompetent person would have resulted in a clear and present danger to the health, safety, or welfare of the child or incompetent person; or

(2) That the individual detained or moved in contravention of the rightful custody of a mother as defined in § 36-2-303, or of the order of custody or care, was returned by the defendant voluntarily and before arrest or the issuance of a warrant for arrest.

(d) If conduct that is in violation of this section is also a violation of § 39-13-304 or § 39-13-305(a)(1), (a)(3), or (a)(4), the offense may be prosecuted under any of the applicable statutes.

(e)(1) Except as provided in subdivision (e)(2), custodial interference is a Class E felony, unless the person taken from lawful custody is returned

voluntarily by the defendant, in which case custodial interference is a Class A misdemeanor.

(2) Custodial interference under subdivision (a)(5) is a Class C misdemeanor.

T.C.A. § 39-13-306.

Defendant filed a motion to dismiss the indictment. In the motion, Defendant argued that the indictment misstated the law and omitted two elements of the offense. In particular, Defendant took issue with the indictment's failure to specify which subsection of the statute applied. Defendant, a resident of Dekalb County, also argued that the ex parte order was invalid because it was issued by a Smith County judge rather than a Dekalb County judge without any authority to do so. As such, Defendant insisted that the order was void ab initio because it was entered by a court without jurisdiction to do so. Defendant eventually abandoned the jurisdiction argument.

The trial court held a hearing on the motion to dismiss the indictment. At the hearing, the State explained that it was proceeding under subsection (a)(2) of the statute, even though the indictment did not specify. Defendant argued that the indictment was fatally defective because it failed to allege that she detained B.B. after the expiration of the noncustodial natural parent's lawful period of visitation. Moreover, Defendant argued that the State could not, as a matter of law, prove Defendant detained B.B. after the expiration of the noncustodial parent's period of visitation because she was the custodial parent. The trial court took the motion under advisement and asked the parties to submit proposed jury instructions for custodial interference.

In the order denying the motion, the trial court found that the case "involved defining the essential elements of the offense of custodial interference" and did not require the court to "find any facts." The trial court determined that because Defendant was charged with an E felony and was not alleged to have removed the child from the State, Defendant was charged pursuant to subsection (a)(2) of the statute even though the indictment did not specify the section. The trial court noted that the State "confirmed it [was] relying only on portions of subsection (a)(2)." The trial court also determined "as a matter of law that expiration of a period of visitation is not an essential element of Tenn[essee] Code Ann[otated] [section] 39-13-306(a)(2) in this case where Defendant exercised custody." The trial court further determined that the phrase "'after the expiration of the noncustodial . . . parent or guardian's lawful period of visitation' does not apply to a detaining custodial parent." The trial court found that applying the statute to the facts of this case made it an offense "for a natural . . . parent . . . of a child younger than eighteen (18) years of age to: . . . [d]etain the child within this state . . . with the intent to violate . . . a temporary or permanent . . . court order regarding the custody of care of the child." The

court also found that the pattern jury instruction was not adequate for the “undisputed” facts of the case so the trial court would fashion its own jury instruction on the elements of the offense. The trial court commented that the Defendant’s construction of the statute would “lead to the absurd result that custodial parents can never be liable for an intentional violation of a court order regarding the custody or care of their natural child.” The trial court set forth the jury instruction it intended to give at trial. The instruction differed from the pattern jury instruction. The trial court deemed the indictment “legally sufficient” because it “stated all essential elements of the offense.”

In addition to the request for a specific jury instruction listing all of the elements of custodial interference, Defendant also requested two specific jury instructions prior to trial - one related to mistake of fact, the other instruction related to advice of counsel.

At trial, the proof revealed that Defendant was the custodial parent of her daughter B.B. at the time of the events that gave rise to the indictment.² Tracy Hetzel, Senior Associate Counsel for the Upper Cumberland Region of DCS, explained that a “dependency and neglect” proceeding begins with a “referral” and refers to a situation involving a child that can include anything from “improper care and guardianship to being sex trafficked.” DCS employs “case managers” who investigate referrals of abuse or neglect and “social workers” who are “trained to provide services to either keep a family unit together, or to reunify them.” Many cases “never get brought to legal’s attention.” Some cases, like that of Defendant, require court involvement. Ms. Hetzel explained that prior to a child being removed from a home, a petition is filed that “allege[s] that the child is dependent and neglected, and that there’s no less drastic alternative to removal.” DCS asks the court for “custody of the child in an ex parte order” and prepares a Protective Custody Order for the judge’s signature. A case manager completes an Affidavit of Reasonable Efforts that accompanies the Petition. A summons is also prepared to be sent out for service on all parties involved and sometimes an attachment is included. The summons tells the person to “show up at court at [a certain] time” and an attachment is “an order from the Judge . . . put[ting] that child . . . in the custody of the Department.”

Ms. Hetzel worked with DeAndrea Miller, the Child Protective Services investigator on the case involving Defendant and B.B. Ms. Miller received a referral on August 6, 2018, to investigate Defendant. Defendant’s children were not in school on August 6 or 7. Defendant spoke with her attorney on August 6 about the investigation.

On August 8, Ms. Miller and law enforcement personnel went to Defendant’s home. Ms. Miller informed Defendant that a referral had been filed and that she needed to

² Defendant had another child, a son, who was also a minor, but his name is not listed on the indictment.

complete an investigation. Ms. Miller and law enforcement personnel were denied entrance to Defendant's home. Defendant would not allow Ms. Miller to speak with B.B. and refused to take a drug screen. Ms. Miller saw B.B. at the home. Defendant "yelled" at Ms. Miller. Ms. Miller returned to the home later that day and no one was home. Ms. Miller saw Defendant that evening at the Smithville Police Department, but Defendant did not speak with her.³

On August 10, Defendant's attorney Ms. Reguli left a message with Ms. Miller. In the message, Ms. Reguli told Ms. Miller that she was representing Defendant and that any future communication should be directed to her. Ms. Reguli also left a message with Mary Baker, Ms. Miller's supervisor, and called Detective James Cornelius of the Smithville Police Department to inform him that she was representing Defendant in the matter.

Ms. Miller, continuing her investigation, discovered that neither B.B. nor her brother was in school on August 13. Ms. Miller started the process for DCS to obtain custody of Defendant's children. Ms. Hetzel initiated the legal action by preparing a petition in Dekalb County Juvenile Court for an ex parte order granting custody of B.B. and her brother to DCS.⁴ An ex parte protective custody order was signed by a Smith County juvenile judge effective August 13, 2018, at 2:04 p.m.⁵ The order specified that "B.B. is hereby brought into the protective custody of the court." The order further "placed [B.B.] with [DCS] effective August 13, 2018, at 2:04 p.m. for foster care with authority to provide any appropriate plans for the care [of B.B.] . . . pending further determination of custodial status by the Court." The order specified that any visitation between the children and parents "shall be supervised" by DCS or an approved third party. The order set the matter for a hearing on August 14, 2018, at 10:00 a.m. The order was filed in Dekalb County at 3:43 p.m. B.B.'s father was served with the summons and appeared at the hearing on August 14. Defendant was not served immediately, so the preliminary hearing was continued.⁶ The order was accompanied by an Attachment Pro Corpus, commanding the Dekalb County Sheriff to attach the body of B.B. and her brother immediately to a representative of DCS for protective custody. Ms. Miller was able to find Defendant's son and place him in foster care.

³ Defendant was at the police department to file a missing person's report on her son.

⁴ Again, because the indictment only names B.B., we have omitted any discussion of Defendant's son.

⁵ There was testimony during trial indicating that the juvenile judge in Dekalb County was a part-time judge who maintained a law practice. The judge represented Defendant's ex-husband during their divorce action and recused himself from "any kind of dependency and neglect cases" involving the parties. The Smith County judge who signed the order was permitted to serve in the Dekalb County judge's place when he is unable to serve by a Supreme Court order.

⁶ The hearing was eventually held in December of 2018. At the hearing, B.B.'s removal was upheld.

Ms. Reguli filed a hand-written notice of appearance on August 15, 2018, indicating that she would be representing Defendant in the matter. After filing the notice, Ms. Reguli made it clear that she was not accepting service of any documents for Defendant. Ms. Reguli asked to look at and copy the DCS file.

Based on a conversation with Defendant's son, Ms. Miller directed law enforcement to look for B.B. and Defendant at a hotel in Lebanon. Ms. Miller "filled out a missing persons report" for B.B. She was contacted by the Tennessee Bureau of Investigation ("TBI") and provided them with a copy of the petition and order. The TBI issued an endangered child alert for Defendant and B.B. DCS learned that Defendant and B.B. were at the Comfort Suites in Lebanon from August 11, 2018, to August 15, 2018. Surveillance video footage showed Defendant, B.B., and Ms. Reguli in the lobby of the Comfort Suites. In the surveillance video, B.B. looks at something on her phone and shows it to Defendant and Ms. Reguli. Shortly thereafter, the group left the hotel for Ms. Reguli's Williamson County home. Defendant left her car at the hotel and traveled with Ms. Reguli. Cell phone records led authorities to Ms. Reguli's home in Brentwood where Defendant and B.B. were staying. DCS eventually took custody of B.B. at the Brentwood Police Department. Defendant admitted that she knew about the order placing B.B. in DCS custody. Defendant informed police that she saw the endangered child alert and did not contact DCS after she saw it based on advice from her attorney.

Based on the evidence presented at trial and the instructions given by the trial court, the jury found Defendant guilty of custodial interference. Defendant was sentenced to two years on supervised probation. Defendant filed a motion for new trial. The trial court denied the motion and Defendant appealed.

Challenges to the Indictment

Defendant makes several challenges to the indictment on appeal, arguing the trial court improperly denied the motion to dismiss the indictment filed prior to trial. We will discuss each one in turn.

Failure to Charge Elements of the Offense

Defendant first argues that the trial court erred by denying the motion to dismiss the indictment because the indictment failed to allege all of the elements of the offense under Tennessee Code Annotated section 39-13-306(a)(2). Specifically, Defendant argues that the indictment failed to include the element that Defendant detained the child "after the expiration of the noncustodial parent's lawful period of visitation." Moreover, Defendant argues that the State could never prove this element because Defendant was never the

noncustodial parent.⁷ The State disagrees, arguing that the language referring to the “expiration of the noncustodial parent’s lawful period of visitation” is not an essential element of the offense and that the trial judge properly denied the motion to dismiss.

Any challenge to the validity of an indictment presents a question of law that this Court reviews de novo. *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997). An indictment is constitutionally required to provide the accused with “the nature and cause of the accusation” being made against him/her. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. Pursuant to Tennessee Code Annotated section 40-13-202, an indictment must present the facts in such a way that “enable[s] a person of common understanding to know what is intended.” This Court has deemed “an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy.” *Hill*, 954 S.W.2d at 727 (citing *State v. Byrd*, 820 S.W.2d 739, 741 (Tenn. 1991); *VanArsdall v. State*, 919 S.W.2d 626, 630 (Tenn. Crim. App. 1995); *State v. Smith*, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980)).

Indictments are reviewed from an “enlightened standpoint of common sense and right reason rather than from the narrow standpoint of petty preciosity, pettifogging, technicality or hair splitting fault finding.” *Hill*, 954 S.W.2d at 728 (quoting *United States v. Purvis*, 580 F.2d 853, 857 (5th Cir. 1978)). Since *Hill*, this Court has held on numerous occasions that an indictment meets statutory and constitutional requirements if it “achieve[s] the overriding purpose of [providing] notice to the accused,” noting the “relaxation of common law pleading requirements and its reluctance to elevate form over substance.” *State v. Hammonds*, 30 S.W.3d 294, 300 (Tenn. 2000); *Crittenden v. State*, 978 S.W.2d 929, 931 (Tenn. 1998); *Ruff v. State*, 978 S.W.2d 95, 99 (Tenn. 1998) (determining indictment for aggravated sexual battery sufficient without specifically specifying mental state). In fact, “specific reference to a statute within the indictment may be sufficient to place the accused on notice of the charged offense.” *State v. Sledge*, 15 S.W.3d 93, 95 (Tenn. 2000) (citing *State v. Carter*, 988 S.W.2d 145, 149 (Tenn. 1999); *Ruff*, 978 S.W.2d at 97).

The indictment at issue here, again, read:

[Defendant], being the natural parent of B.B. date of birth of 1-26-2006, a child younger than eighteen (18) years of age heretofore, to-wit, between August 15, 2018 and August 16, 2018, inclusive, before the finding of this presentment, in said County and State, unlawfully, feloniously, and

⁷ Defendant addresses the application of the statute to the custodial versus noncustodial parent as part of this issue, and Defendant also addresses it during her challenge to the sufficiency of the indictment.

knowingly, did detain said child within this state with the intent to violate a temporary or permanent judgment or court order regarding the custody or care of the child, in violation of Tennessee Code Annotated 39-13-306, a class E felony, and against the peace and dignity of the State of Tennessee.

As Defendant correctly points out, the indictment omits the language from the statute “after the expiration of the noncustodial natural or adoptive parent or guardian’s lawful period of visitation.” Further, the indictment does not specify which provision of Tennessee Code Annotated section 39-13-306 Defendant was alleged to have violated.

The question we must answer is whether the indictment in this case was fatally flawed. Despite these obvious omissions, we determine that it was not. In *State v. Marshall*, 870 S.W.2d 532, 538 (Tenn. Crim. App. 1993), overruled on other grounds by *State v. Carter*, 988 S.W.2d 145, 148-49 (Tenn. 1999), this Court held that the failure to specifically allege an element of the offense is not fatal “if the elements are necessarily implied from the allegations made.” (citing *Hagner v. United States*, 285 U.S. 427 (1932)). Said differently, an omission in an indictment “is not a defect so long as the indictment performs its essential constitutional and statutory purposes.” *Dykes v. Compton*, 978 S.W.2d 528, 529 (citing *Hill*, 954 S.W.2d at 729). Here, the indictment references the statute, Tennessee Code Annotated section 39-13-306, and puts Defendant on notice that she was charged with the Class E felony of “unlawfully, feloniously, and knowingly, detain[ing] said child within this state with the intent to violate a temporary or permanent judgment or court order regarding the custody or care of the child.” Only one subsection of the referenced statute contains the language recited in the indictment, pointing Defendant directly to the subsection of the statute for which she could reasonably infer notice of the offense charged. While the indictment left out the language referring to the expiration of the noncustodial parent’s period of visitation, something we will conclude later in this opinion is an essential element of the offense, Defendant was surely provided with sufficient notice to surmise which section of the statute she was accused of violating.

As noted by Defendant, the State takes a contrary position on appeal from the position taken in the trial court regarding the validity of the indictment. At trial, the State argued that the pattern jury instruction, including the phrase “after the expiration of the . . . lawful period of visitation” was appropriate, thus implying that portion of the statute was an element of the offense. On appeal, rather than merely addressing the sufficiency of the indictment and whether it gave appropriate notice to Defendant, the State argues that applying the rules of statutory construction to Tennessee Code Annotated section 39-13-306(a)(2) results in the conclusion that the phrase “after the expiration of the noncustodial natural or adoptive parent or guardian’s lawful period of visitation” is not an essential element of the subsection, but rather modifies only one part of subsection (a)(2) “that is not implicated by the facts of [Defendant’s] case.” On appeal, the State urges this Court

to apply the “last antecedent rule” to the limiting phrase such that the phrase “should be read to modify only the immediately preceding phrase ‘remove the child from this state.’” Though the State is now taking a substantially similar position to that relied on by the trial court below in denying the motion to dismiss, it is the opposite position that the State took at trial. While shifting gears typically results in a waiver of the issue, we do not have to determine whether the State waived this issue in our discussion of the validity of the indictment because we conclude that the indictment was sufficient to put Defendant on notice of the crime with which she was charged albeit for different reasons than those advanced by the State. Defendant is not entitled to relief on this issue.

Jury Instructions

Defendant challenges several instructions given by the trial court to the jury. A defendant in a criminal case “has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions.” *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000); *see State v. Leath*, 461 S.W.3d 73, 105 (Tenn. Crim. App. 2013). Trial courts are required, as part of their instructions in criminal cases, to describe and define each element of the offense or offenses charged. *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005). When reviewing jury instructions on appeal to determine whether they are erroneous, this Court must “review the charge in its entirety and read it as a whole.” *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997). A jury instruction is considered “prejudicially erroneous” only “if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law.” *Id.* An erroneous jury instruction may deprive the defendant of his constitutional right to a jury trial. *Garrison*, 40 S.W.3d at 433-34. Because the propriety of jury instructions is a mixed question of law and fact, the standard of review is de novo with no presumption of correctness. *Carpenter v. State*, 126 S.W.3d 879, 892 (Tenn. 2004); *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001).

Custodial Interference

Defendant takes issue with the instruction given to the jury on the elements of custodial interference. Specifically, Defendant argues that the trial court redefined the elements of the offense, ignoring “the plain language of the statute, the pattern jury instruction defining the offense, and this Court’s prior ruling regarding the elements of the offense.” Defendant complains that the trial court erred in removing one of the elements of custodial interference in its instructions to the jury. Defendant argues that the trial court did not instruct the jury with the pattern instruction, instead fashioning its own instruction to remove “expiration of a period of visitation” as an element of the statute, despite the fact that the parties agreed on the pattern instruction. Defendant argues that the trial court’s

failure to properly instruct the jury is a constitutional error requiring reversal. The State argues that the trial court properly instructed the jury.

Before trial, both Defendant and the State filed proposed jury instructions. Both parties filed substantially identical instructions that mirrored the pattern jury instructions:

Any person who commits the offense of custodial interference is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

- (1) That the defendant detained within the State of Tennessee a child younger than eighteen (18) years of age *after the expiration of the non-custodial natural parent's lawful period of visitation*; and
- (2) That the defendant intended to violate a temporary or permanent judgment or court order regarding the child's custody or care; and
- (3) That the defendant was related to the child as the natural parent.

See Tenn. Pattern Jury Instr. Crim. 8.04 (emphasis added). The trial court disagreed, ruling in its order denying the motion to dismiss that the “expiration of a period of visitation is not an essential element” of the statute. The trial court continued by saying that the pattern jury instruction was “ungrammatical” and would “render the statute patently ambiguous.” The trial court also ruled that the pattern jury instruction would “lead to [an] absurd result,” “potentially violate equal protection,” and “would be contrary to legislative intent.”⁸ Ultimately, the trial court instructed the jury as follows:

For the defendant to be found guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

- (1) That at the time of the offense, the defendant was a natural parent of a child younger than 18 years of age; and
- (2) That the defendant detained the child within this state with the intent to violate a court order regarding the custody or care of the child; and
- (3) That the defendant acted intentionally.

⁸ Defendant applied to the trial court for permission to appeal this order pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The request was denied on July 6, 2021. A panel of this Court denied Defendant's Tennessee Rule of Appellate Procedure 10 application on July 12, 2021.

In this particular case, a person acts intentionally when that person acts with a conscious objective or desire to violate a specific court order regarding the custody or care of a child under the age of 18.

The elements given to the jury in the jury instruction above clearly differ from those proposed by Defendant, the State at trial, and the pattern jury instruction. There was an elimination of the requirement that the detention occurs “after the expiration of the non-custodial natural parent’s lawful period of visitation,” which is an essential element defining the circumstances surrounding a defendant’s conduct. While we recognize that pattern jury instructions are suggestions for a trial court because they are not “officially approved” by either this Court or the legislature, *Hodges*, 944 S.W.2d at 354, a defendant is entitled to a correct statement of the law. *Id.* at 352.

On appeal, the State argues that this conduct element defining the circumstances surrounding the defendant’s conduct does not apply when the defendant “[d]etain[s] the child within this state.” It asserts instead that the conduct element only applies when the defendant “remove[s] the child from the state,” relying upon the rule of the last antecedent for its statutory construction argument. We respectfully disagree.

The rule of the last antecedent provides that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *In re Estate of Tanner*, 295 S.W.3d 610, 624 (Tenn. 2009) (quoting *United States v. Hayes*, 555 U.S. 415, 425 (2009)). However, “[t]he last antecedent rule is not a hard and fast rule of statutory interpretation,” *State ex rel. McQueen v. Metro. Nashville Bd. of Pub. Educ.*, 587 S.W.3d 397, 405 (Tenn. Ct. App. 2019), and it “can assuredly be overcome by other indicia of meaning,” *In re Est. of Tanner*, 295 S.W.3d at 624 (citation and internal quotation marks omitted).

In this case, if the rule of the last antecedent applies at all, it is displaced by the context of this offense within the structure of the whole statute. In interpreting statutes, an important principle is that “individual subsections of a single statute should not be read in isolation but rather should be considered in the context of the statute as a whole.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 530 n.37 (Tenn. 2010) (citing 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46.5, 189-205 (7th ed. 2007)). From its plain language, the statute as a whole seeks to prohibit various types of custodial interference with reference to different types of custody situations. For example, the statute seeks to prohibit interference with a mother’s rightful custody of a child or with a child custody determination. T.C.A. § 39-13-306(a)(1), (a)(3). Separately, the statute also seeks to prohibit interference with a visitation order, whether that interference occurs during the visitation period or after that period has expired. *Id.* § 39-13-306(a)(5), (a)(2).

In each of these cases, the statute’s structure carefully defines each of the separate crimes through a combination of three elements describing the nature of the conduct, the circumstances surrounding the conduct, and the culpable mental state. Contrary to the structure of the other offenses created by section 39-13-306, the State seeks to uncouple the single detention offense in subsection (a)(2) from the circumstances-of-conduct element, *i.e.*, after the lawful period of visitation. And in so doing, the State seeks to create a broad, general offense that involves detaining a child in Tennessee in violation of a custody or care order under *any* circumstance.

The context and structure of section 39-13-306 are at odds with this interpretation. Indeed, the breadth of the State’s detention offense can be seen from the fact that it likely subsumes—and thereby renders unnecessary or superfluous—all other in-state offenses created by section 39-13-306. Plainly, then, untethering the detention offense created by subsection (a)(2) from its circumstances would do irreparable damage to the statute’s carefully drawn structure. We will not interpret the detention offense created by subsection (a)(2) in a way that renders other provisions of section 39-13-306 superfluous or that damages the overall statutory structure. *See, e.g., State v. Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022) (“We consider the whole text of a statute and interpret each word ‘so that no part will be inoperative, superfluous, void or insignificant.’” (quoting *Bailey v. Blount Cnty. Bd. of Educ.*, 303 S.W.3d 216, 228 (Tenn. 2010))).

Apart from the State’s arguments, though, we are not writing on a clean slate. In previous cases, we have made clear that the essential elements of the detention offense in subsection (a)(2) include the circumstances surrounding the prohibited conduct, *i.e.*, “after the expiration of the noncustodial natural or adoptive parent or guardian’s lawful period of visitation.” For example, in a case involving the constitutionality of dual convictions for contempt and custodial interference under subsection (a)(1) of section 39-13-306, this Court has previously determined that the elements of custodial interference under subsection (a)(2) include “(1) the parent of a child younger than 18; (2) “[detained] the child [within] this state”; (3) after a period of lawful visitation; (4) “with the intent to violate . . . a temporary or permanent judgment or a court order regarding the custody or care of the child.” *State v. Lisa Renea Smith*, No. E2010-00202-CCA-R3-CD, 2010 WL 5276902, at *4 n.5 (Tenn. Crim. App. Dec. 17, 2010), *perm. app. denied* (Tenn. May 27, 2011); *see also State v. Tanywana Sallie*, No. W2015-00427-CCA-R3-CD, 2016 WL 4360879, at *4 (Tenn. Crim. App. Aug. 15, 2016), *perm. app. denied* (Tenn. Oct. 21, 2016) (finding evidence sufficient to support a conviction for custodial interference where Defendant “intentionally violated the custody order by not returning the child at the end of her scheduled weekend visitation”). The instruction given herein omits a material element of the offense, namely the expiration of a period of lawful visitation.

Of course, not every erroneous jury instruction “rises to the level of constitutional error,” but “[t]he failure to instruct the jury on a material element of an offense,” constitutes constitutional error subject to harmless error analysis. *State v. Faulkner*, 154 S.W.3d 48, 60 (Tenn. 2005). A jury instruction that misstates or omits an element of an offense effectively lessening the State’s burden of proof amounts to constitutional error. *State v. Page*, 81 S.W.3d 781, 789 (Tenn. Crim. App. 2002). Our constitutional guarantee of due process requires the conviction to rest upon a jury determination that the defendant is beyond a reasonable doubt guilty of every element of the crime. *State v. Ducker*, 27 S.W.3d 889, 899 (Tenn. 2000). By removing one of the elements of the offense because including it would somehow be “absurd” and “contrary to legislative intent,” the trial court overlooked a “cardinal rule of construction . . . that every word in a statute be given some meaning, if possible.” *Cohen v. Cohen*, 937 S.W.2d 823, 827-28 (Tenn. 1996). While sometimes tempting, the judiciary is not tasked with defining “what shall constitute a criminal offense.” *State v. Farmer*, 66 S.W.3d 188, 200 (Tenn. 2001) (quoting *State v. Burdin*, 924 S.W.2d 82, 87 (Tenn. 1996)). Here, by removing an essential element from the offense, the trial court effectively lowered the State’s burden of proof at trial. In our view, the trial court improperly instructed the jury. This error is not harmless. Accordingly, Defendant’s conviction is reversed and vacated.

Respectfully and simply put, Defendant’s troubling conduct here does not fit within the criminal offense of “custodial interference” as defined by our General Assembly in Tennessee Code Annotated section 39-13-306(a)(2).

Mistake of Fact

Though we have already determined Defendant’s conviction must be reversed and vacated, we will resolve the remaining issues in the event of further appeal. Defendant next argues that the trial court erred in sua sponte modifying the mistake of fact defense jury instruction to add that the ex parte order was valid and enforceable as a matter of law and the error was not harmless. Specifically, Defendant insists that the custody order did not impose any obligations on Defendant and was therefore not “enforceable” against her until she was served or given notice of the terms of the order. The State argues that the trial court properly determined that the order was “valid and enforceable,” but cites no law to support its argument.

The jury instruction gave the following modified instruction to the jury on mistake of fact:

Ignorance or mistake of a matter of law is never a defense to prosecution. Legal advice or statements of opinion by a lawyer regarding a matter of law are not statements of fact and do not create a defense of mistake

or ignorance of fact. Whether the statements made by Ms. Reguli to [Defendant] are statements of fact or statements of legal opinion is for you to determine from all of the evidence in this case. *Nevertheless, you are hereby instructed that the Protective Custody Order introduced into evidence as Exhibit 2 in this case is, as a matter of law, valid and enforceable.*

(Emphasis added). The last sentence of the instruction was added by the trial court over the objection of Defendant.

Defendant argues that the trial court's modification of the instruction and determination that the order was valid and enforceable was a question of fact for the jury to decide, not a question of law. Defendant cites rule 108(c)(6) of the Tennessee Rules of Juvenile Procedure which explains that an ex parte restraining order is binding on the party at the time of service or when the party is informed of the order, whichever is earlier. We fail to see how this rule is applicable. Initially, Defendant's case does not involve a restraining order. Second, the jury was tasked with determining the factual question of whether Defendant intentionally violated a court order regarding the custody or care of the child, not whether that order was valid and enforceable. Third, though Defendant was not formally served with the order, she and her attorney both admitted that she was aware of the order. Defendant argues that she was never served with the order and that one of the "central factual questions . . . [is] whether and when [Defendant] received notice of the ex parte custody order." The mistake of fact instruction in which the trial court instructed the jury that the ex parte order was valid and enforceable did not "fail[] to fairly submit the legal issues or . . . mislead[] the jury as to the applicable law." *Hodges*, 944 S.W.2d at 352. Defendant is not entitled to relief on this issue.

Advice of Counsel Defense

Defendant argues that Tennessee should adopt an advice of counsel defense to specific intent crimes. While conceding that there is no such defense in Tennessee, Defendant urges this Court to adopt one. The Tennessee Supreme Court has ruled that "advice of counsel" is not a defense in Tennessee. *Hunter v. State*, 12 S.W.2d 36, 362 (Tenn. 1928). This Court is not in a position to adopt one. *See Cauthern v. State*, 145 S.W.3d 571, 600 (Tenn. Crim. App. 2004). Defendant is not entitled to relief on this issue.

Sufficiency

The last issue presented by Defendant is a challenge to the sufficiency of the evidence. Even though we have already determined that Defendant's conviction should be reversed on the basis that the trial court improperly instructed the jury on the elements of the offense, we will address the sufficiency of the evidence in the event of a further appeal.

Defendant argues that the evidence is insufficient in this case because the State “failed to establish that [Defendant] violated the ex parte custody order” because the order did not direct Defendant to take any action. The State, on the other hand, argues that the evidence was sufficient to establish that Defendant “detained B.B. in the state with the intent to violate the Order that placed B.B. in DCS custody and called for law enforcement to attach B.B. to a representative of DCS.” In a reply brief, Defendant insists the State’s argument should be “rejected” because it “imposes obligations on [Defendant] that are not found” in the order.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. The relevant question is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury’s verdict replaces the presumption of innocence with one of guilt; therefore, the burden is shifted onto the defendant to show that the evidence introduced at trial was insufficient to support such a verdict. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The prosecution is entitled to the “strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.” *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Questions concerning the “credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact.” *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008)). “A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution’s theory.” *Reid*, 91 S.W.3d at 277 (quoting *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). It is not the role of this Court to reweigh or reevaluate the evidence, nor to substitute our own inferences for those drawn from the evidence by the trier of fact. *Id.* The standard of review is the same whether the conviction is based upon direct evidence, circumstantial evidence, or a combination of the two. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009).

Here, the trial court instructed the jury that to find Defendant guilty of custodial interference, the State had to prove that Defendant was B.B.’s natural parent, that B.B. was under 18 years of age, that Defendant detained B.B. within the state with the intent to violate a court order regarding the custody or care of the child; and that Defendant acted intentionally. Though these instructions omitted what we deem an essential element of the offense, these were the instructions given at trial. The proof at trial, in a light most favorable to the State, showed that Defendant knew of the DCS investigation and referral at least on August 8 when Ms. Miller went to her home. Defendant left her home with B.B. on August 11 to stay in a hotel in Lebanon. On August 15, Defendant learned that DCS

filed for and received an ex parte order. Defendant was presented with the DCS paperwork, including the ex parte order, by Ms. Reguli at the hotel in Lebanon. Defendant was also aware that police issued a “BOLO” for her and B.B. Instead of contacting DCS or the police, Defendant immediately left the hotel with Ms. Reguli, traveling to Ms. Reguli’s house in Williamson County. When police eventually located Defendant and B.B., the child exclaimed, “they found us.” In our review, examining the facts through the lens of the erroneous instruction given to the jury, the evidence was sufficient to sustain the conviction.

Defendant takes particular issue with the trial court statements at the denial of the motion for judgment of acquittal wherein the trial court commented that Defendant was required to “surrender the child” to DCS despite no instructions in the ex parte order requiring Defendant to do anything. Citing a civil case, Defendant argues that a person “may not be punished for violating a court order” that does not specify “what actions are required or forbidden. *Konvalinka v. Chattanooga Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 355 (Tenn. 2008). However, the question is not whether Defendant violated the order, the question was whether Defendant had the intent to violate the ex parte order. Surely, Defendant’s actions of taking the child several counties away to her lawyer’s house despite her knowledge of an endangered child alert having been issued by the TBI evinced an intent to violate the ex parte order placing the child in the custody of DCS.

Although not applicable here because of the trial court’s improper jury instructions and our decision to reverse and vacate Defendant’s conviction, we note that if the trial court had charged the jury with all of the statutory elements of the offense, which should have included language regarding the expiration of a lawful period of visitation, the evidence would never have been sufficient to support a conviction for custodial interference. This is because there is no proof in the record before us that Defendant was the noncustodial parent whose lawful visitation period expired.⁹

Conclusion

⁹ At the time this opinion was being written, proposed legislation had been introduced in the Tennessee House and Senate to amend the statute, making it an offense for a parent or other family member to “harbor[] or hide[] a child within or outside this state, knowing that the child has been placed in the custody of the department of children’s services pursuant to a protective custody order or an emergency custody order entered by a court.” The proposed legislation also states that “[i]t is not a defense that the person harboring or hiding the child has not been served with an actual copy of a protective custody order or emergency custody order.” *See* 2023 Tenn. H.B. 1109 (113th Gen. Assembly); 2023 Tenn. S.B. 1319 (113th Gen. Assembly). The bill was signed by Governor Bill Lee on April 28, 2023. *See* 2023 Tenn. Pub. Acts, ch. 286, § 1 (eff. July 1, 2023).

For the foregoing reasons, the judgment of the trial court is reversed and Defendant's conviction is vacated. We remand the case for any further proceedings that may be necessary.

TIMOTHY L. EASTER, JUDGE