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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTINA OZDEMIR,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 500, 2013
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
ID No. 0701018040

STATE'S ANSWERING BRIEF

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Dated: February 21, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

A New Castle County grand jury indicted Christina Ozdemir ("Ozdemir") on May 28, 2013 on two felony counts of Interference with Custody. (A1, D.I. 2; A3). A two-day jury trial began on September 6, 2013. (A2, D.I. 17). After the close of the State's case, Ozdemir moved for judgment of acquittal. (A77). Superior Court granted Ozdemir's motion as to the felony level Interference with Custody, and the case went to the jury on misdemeanor Interference with Custody. (A83-84). The jury found Ozdemir guilty of both counts of misdemeanor Interference with Custody. (A99). Superior Court sentenced Ozdemir to 2 years of Level V incarceration, suspended immediately for Level II probation. (Op. Brf. Ex. B; A101). Ozdemir timely appealed and filed an opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Denied. The Superior Court correctly found 5 Family Court letter decisions (the "Orders") issued in the civil custody case between Ozdemir and Douglas Riley to be relevant to the charges of Interference with Custody against Ozdemir. Any error in admitting the Orders in their entirety was harmless beyond a reasonable doubt.

STATEMENT OF FACTS

Ozdemir and Douglas Riley ("Riley") began a relationship in 2005 or 2006. (A52). About 4 or 5 months after the relationship began, Ozdemir moved from New York to Newark, Delaware to live with Riley. (*Id.*). Ozdemir and Riley had a son in 2007 and a daughter in 2009. (*Id.*). Both children were born in Delaware and, except for a short period of time in 2007 during which they resided in New York, resided with Ozdemir and Riley in Delaware. (A52-53).

On June 5, 2009, Ozdemir took the children to New York, telling Riley that she was attending her brother's graduation and would return in a week or two. (A5; A53). When she did not return and "just grew more and more distant," Riley filed a petition for custody with the Delaware Family Court. (A5; A53). A series of proceedings in Delaware and New York then ensued and is detailed below.

Ozdemir responded to Riley's initial custody petition, attaching a temporary Protection from Abuse Order issued by a New York Court, listing Ozdemir and the couple's two children as protected persons. (A5). On November 9, 2009, the New York Court and the Delaware Family Court held a joint hearing pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). (A6; A21; A54; A73-74). Ozdemir was present and represented by counsel at the November 9th joint hearing. (A6; A21; A54; A73-74). The parties stipulated, and the courts determined, that the Delaware Family Court had jurisdiction. (A6; A21;

A54; A74). The New York Court judge stated that the New York temporary PFA would be vacated. (A6).

Following the hearing, the Delaware Family Court entered a November 16, 2009 interim order awarding Ozdemir sole legal custody and primary residency and awarding Riley supervised visitation, and a December 18, 2009 Order scheduling further visitation dates. (A6-7). Riley filed Petitions/Rules to Show Cause on November 20, 2009, December 29, 2009 and January 22, 2010, alleging that Ozdemir failed to comply with the court's visitation orders. (A7). On March 12, 2010, the Delaware Family Court held a hearing on the Rules to Show Cause, finding Ozdemir was not in contempt based on the allegations in one Petition/Rule to Show Cause, but was in contempt based on the allegations in the other two Petitions/Rules to Show Cause. (A7).

On October 19, 2010, the Delaware Family Court entered a temporary custody order awarding the parties joint legal custody and shared residency on an alternating monthly basis for 6 months, and scheduling a review hearing for April 6, 2011. (A8). Following the April 6, 2011 review hearing at which Riley testified that Ozdemir had not complied with the October 2011 Order, the Delaware Family Court entered an April 12, 2011 Order awarding Riley sole legal custody and primary residency and precluding Ozdemir from any visitation until she should appear in Court. (A8-9). Ozdemir filed a "Motion for New Hearing Reversal of

Decision" on April 25, 2011, and a "Request for Stay of Order" on June 28, 2011. (A9). The Delaware Family Court denied both motions through a Letter Decision and Order, dated July 15, 2011, and admitted at trial as State's Exhibit 1. (A5-12).

Riley unsuccessfully sought assistance of New York authorities and the Federal Bureau of Investigation to enforce the Delaware Family Court's April 2011 Order and to obtain the return of his children. (A55). On November 21, 2011, Riley filed a Petition/Rule to Show Cause, with the Delaware Family Court alleging that Ozdemir was violating the April 2011 Order. (A20).

On March 30, 2012, the Delaware Family Court and the New York Court held a joint UCCJEA proceeding. (A13). Ozdemir was present before the New York Court and represented by counsel. (*Id.*). The judge of the New York Court explained that:

> [Ozdemir] had previously filed in New York a petition for protection against [Riley] and a petition to modify the current custody Order issued by [the Delaware Family Court] on April 12, 2011. Because [the New York judge] found that [the Delaware Family Court] retained jurisdiction, she dismissed [Ozdemir's] petitions. [Ozdemir] subsequently appealed [the New York judge's] decision. The New York Appellate Division stayed the prior dismissals and indicated that a temporary order of protection for the family offense was to remain in effect and that [the New York judge] should issue an order granting [Riley] supervised visitation. [The New York judge] agreed that [Delaware Family Court] retains jurisdiction over the custody matter but stated that she could modify the temporary order of protection to award [Riley] supervised visitation. (A13).

The Delaware Family Court allowed the New York Court first to proceed with its scheduled April 9, 2012 hearing on modification of the New York PFA, and scheduled the hearing on Riley's pending Petition/Rule to Show Cause for May 3, 2012. (A14). Before the May 3, 2012 Delaware hearing could take place, the New York Court advised that its April 9, 2012 hearing did not take place because, upon the instruction of the New York Appellate Division, the New York Court granted a protective order lasting until October 15, 2012 to Ozdemir, providing Riley supervised visitation. (A17).

In May and October 2012, the Delaware Family Court issued orders directing Ozdemir to cooperate with the appointed attorney guardian ad litem and with a doctor tasked with assisting with therapeutic reunification of the children and Riley. (A25-26). Ozdemir still did not allow Riley to see the children. (A56). Although unsuccessful in his efforts, Riley continued to seek assistance from the police, the FBI and local senators to be able to see his children. (A56).

On December 12, 2012, the New York Supreme Court, Appellate Division, affirmed the New York Court's December 12, 2011 decision dismissing Ozdemir's petition. (A21; A59). Thus, the New York Court's finding that it lacked jurisdiction because the Delaware Family Court possessed jurisdiction under the UCCJEA was affirmed.

The Delaware Family Court scheduled a January 14, 2013 hearing on Riley's November 11, 2011 Petition – Rule to Show Cause. (A20). Ozdemir failed to appear either telephonically or in person. (*Id.*). On January 28, 2013, the Delaware Family Court entered an order holding Ozdemir in civil contempt for violating its April 12, 2011 order, awarding Riley sole legal custody and primary residency, and ordering Ozdemir to appear on February 18, 2013 to turn the children over to Riley. (A19; A30). Ozdemir failed to appear on February 18, 2013 and failed to turn the children over to Riley. (A30). As a result, on February 19, 2013, the Delaware Family Court issued a capias for Ozdemir. (A31).

On February 27, 2013, Riley took the January 28, 2013 and February 19, 2013 Delaware Family Court orders to the New Castle County Police for assistance in securing the return of his children. (A64-67). Initial efforts of the New Castle County Police to obtain cooperation of the police in New York were unsuccessful. (A65-66; A68). After investigation and discussion with the Attorney General's Office, the investigating officer brought two charges of felony Interference of Custody against Ozdemir, and noted in the national warrant database that the State would extradite her from up to 1,500 miles away. (A65-66).

On April 3, 2013, the Federal Marshal's Fugitive Task Force took Ozdemir into custody in Miami, Florida. (A66; A69). The children were not with her. Ozdemir was returned to Delaware. (A69). At a May 2013 Delaware Family

Court hearing, Ozdemir did not assist in turning over the children and did not disclose the location of the children. (A57). Riley filed a missing persons report for the children with police in two counties in New York. (A57). The Suffolk County missing persons squad found the children and returned them to Riley on May 17, 2013. (*Id.*).

I. The Superior Court did not commit reversible error in admitting State's Exhibits 1-5.

Question Presented

Whether any error in admitting State's Exhibits 1-5 was harmless beyond a reasonable doubt.

Standard and Scope of Review

Where a contemporaneous objection is raised below, this Court reviews the Superior Court's evidentiary rulings for abuse of discretion unless a constitutional issue is raised, in which case, this Court's review is *de novo*.[1] However, failure to raise a contemporaneous objection at trial constitutes a waiver of that issue on appeal, unless the error is plain.[2] To be plain, the error must have affected the outcome of the trial.[3]

Merits of the Argument

At trial, the Superior Court admitted State's Exhibits 1-5, which are letter decisions and orders ("Orders") entered by the Delaware Family Court in the civil custody proceeding between Riley and Ozdemir. Ozdemir argues that the Superior Court committed reversible error in admitting State's Exhibits 1-5 without redactions.[4] Ozdemir claims that the Superior Court abused its discretion and

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[1] *Johnson v. State*, 878 A.2d 422, 425 (Del. 2005).
[2] Del. Supr. Ct. R. 8; *Wainright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[3] *Keyser v. State*, 893 A.2d 956, 958 (Del. 2006) (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *Wainwright*, 504 A.2d at 1100).
[4] State's Exhibit 1 contained certain redactions unrelated to the issue raised by Ozdemir on appeal. (A6-7; A40). In this brief, the State uses the term "unredacted" or "without redactions"

violated Ozdemir's Due Process and Confrontation rights in admitting the Orders that Ozdemir claims contained inadmissible hearsay as well as irrelevant and inflammatory statements by the Family Court judge. Ozdemir's claims on appeal related to the hearsay and Confrontation Clause objections she made at trial are focused on the Orders dated January 28, 2013 (State's Exhibit 4) and February 19, 2013 (State's Exhibit 5), specifically, the statements of the children's attorney guardian ad litem that the Delaware Family Court relied on in reaching its decisions. *See* Op. Brf. at 12-13 (identifying only portions of State's Exhibits 4 & 5). Although she did not object based on relevancy or D.R.E. 403 grounds below, Ozdemir now claims the Superior Court erred because "only the bottom line orders regarding custody resulting from the judge's findings in the 5 Family Court decisions were relevant." Op. Brf. at 17. Specifically, Ozdemir argues: only 1 line of the July 15, 2011 Order (State's Exhibit 1) was relevant; only 6 lines of the April 4, 2012 Order (State's Exhibit 2) and 6 lines of the April 19, 2012 Order (State's Exhibit 3) were relevant; only 1 line of the January 28, 2013 Order (State's Exhibit 4) was relevant; and no portion of the February 19, 2013 Order (State's Exhibit 5) was relevant. *See* Op. Brf. at 17-18. Ozdemir's arguments are unavailing. Any error in admitting State's Exhibits 1-5 was harmless beyond a reasonable doubt.

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to refer only to the redactions Ozdemir claims should have been made and ignoring the unrelated redactions that were present.

Factual background

The morning trial began, the Superior Court held a pre-trial conference. (A34-43). One of the issues discussed was the admissibility of the 5 Family Court Orders. Ozdemir objected to introduction of the Orders based on the timing of production by the State, hearsay and the Confrontation Clause. (A35-36). Ozdemir was most concerned with the January 28, 2013 Family Court letter decision and order, which was later admitted as State's Exhibit 1. (A41). Ozdemir did not object based on D.R.E. 401, 402, 403 or 404(b). (A35-42; *See* Op. Brf. at 9 (stating objections based on hearsay and Confrontation Clause)). Instead, Ozdemir argued that "even though they may be self-authenticating or not hearsay, I – I would allege that some portions of those documents contain hearsay and findings of fact that I'm not able to attack or question…. [which] I think it's a confrontation type of a question." (A36). Ozdemir explained further that "there's certain findings in there that are alleging that she's done certain things that I can't, obviously, confront." (A37).

The State argued that the Family Court's letter decisions and orders were admissible. The State first pointed out that the Orders were self-authenticating under D.R.E. 902. (A35-36). The State further argued: "It's a finding of the [Family] Court and the finding itself is the fact. The basis for the finding would be in the discussion in these letters, decisions and orders which can be attacked in

argument, I believe." (A36). The State argued that the Orders were admissible to prove the issue of custody and Ozdemir's intent. (A35-36).

In considering the admissibility of the Orders, the Superior Court found the Orders relevant to the issue of custody. (A37, 46). With respect to Ozdemir's objections, the Superior Court stated: "A litigated fact by a Court is not done for the purposes of prosecution and I don't think that's a Crawford situation. Crawford is a testimonial situation. This is not – this is just the proof of the custody itself…." (A36). The Superior Court further explained: "You don't get to relitigate another judge's decision that hadn't been appealed and it contains facts and your client is involved, she had an opportunity to the confrontation." (A37). The Superior Court continued: "I'm not going to allow anybody to collaterally attack a Judge's decisions and finding of fact." (A39). When the State indicated it would redact from the Orders anything that the Superior Court found to be extraneous, the Superior Court stated that there is nothing extraneous or superfluous in a court's order. (A40). After reviewing the Orders, the Superior Court ruled that the Orders were admissible. (A46). When the Orders were admitted, the Superior Court instructed the jury that they "will consider the document[s] solely for the purposes of the custody issue." (A55. *See also* A57).

Discussion

The Superior Court correctly found that the Orders were relevant to the issue of custody. While each parent is a "joint natural custodian,"[5] and a court order may not always be necessary to prove Interference with Custody,[6] here, in light of the complex and protracted jurisdictional issues and various orders impacting custody, the Orders were relevant to show that Riley was a lawful custodian on February 27, 2013, the date of the alleged offense, and that Ozdemir had no right to take or entice the children from him. The Superior Court's determination that the Orders were relevant is also correct because the Orders were relevant to prove Ozdemir's intent, i.e., that she intentionally took or enticed the children from their lawful custodian and that she intended to hold the child permanently or for a prolonged period of time.[7] To the extent that portions of the Orders should have been redacted, any error in admitting State's Exhibits 1-5 without such redactions was harmless beyond a reasonable doubt.[8]

[5] 13 *Del. C.* § 701(a).
[6] *See In re: Barrett-Spence*, 1998 WL 1034937, at *5-6 (Del. Fam. Ct. Nov. 13, 1998).
[7] This Court may affirm the Superior Court's judgment on an alternative ground. *Torrence v. State*, 2010 WL 3036742, at *2 (Del. Aug. 4, 2010) (citing *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).
[8] Of course, because the error was harmless beyond a reasonable doubt (the standard applicable to Confrontation Clause errors), it necessarily also meets the lower standard of harmless error (the standard applicable to hearsay errors) and was not plain error (the standard applicable to errors waived by lack of a contemporaneous objection at trial, such as Ozdemir's D.R.E. 401/402 and 403 claims).

Not all errors, including constitutional errors, require reversal.[9] "[C]ertain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial."[10] Because the Constitution entitles a defendant to a fair trial, but not to a perfect one,[11] constitutional errors do not require reversal where the error is "harmless beyond a reasonable doubt," meaning that the verdict was unattributable to the error.[12] Here, because the evidence of Ozdemir's guilt was over overwhelming, the jury's verdict of guilt was not attributable to the admission of State's Exhibits 1-5 without redaction.

To find Ozdemir guilty of misdemeanor Interference with Custody, the jury had to find the State had proven beyond a reasonable doubt the following elements as to each of the two children: 1) the defendant is a relative of the child, who is less than 16 years old; 2) the defendant intentionally took or enticed the child from his lawful custodian; 3) the defendant intended to hold the child permanently or for a prolonged period of time; and 4) the defendant had no right to take or entice the child from the child's lawful custodian.[13] Ozdemir conceded the first element. (A91) ("We concede the first [element]. The defendant was a relative and the kids

[9] *Sullivan v. Louisiana*, 508 U.S. 275, 278-279 (1993) (citing *Chapman v. California*, 386 U.S. 18 (1967)).
[10] *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).
[11] *See, e.g., Wilkerson v. State*, 953 A.2d 152, 158 (Del. 2008) (citing *Chapman*, 386 U.S. at 24); *Van Arsdall*, 475 U.S. at 680-81 (1986).
[12] *Sullivan*, 508 U.S. at 278-79 (citing *Chapman*, 386 U.S. 18).
[13] 11 *Del. C.* § 785(1). *See also* A93.

were under 16."). As discussed below, the State presented overwhelming evidence of the remaining elements. The State presented evidence that:

- Riley was the children's father, thus establishing his status, at least initially, as lawful custodian.[14] (A52).

- Riley filed a custody petition in Delaware Family Court after Ozdemir took the children to New York and did not return. (A53).

- Ozdemir filed proceedings in New York. (A5-6, A13, A16-17, A20-21, A58) .

- The UCCJEA was adopted in Delaware and in New York to have "the same ground rules, the same procedure to determine what state is going to hear a custody case, what state can modify it and – and how the states are going to enforce it if the parties or the children move from one state to another." (A71-72).

- At the November 9, 2009 joint hearing between the Delaware Family Court and the New York Court, Ozdemir was represented by counsel and stipulated that the Delaware Family Court had jurisdiction. (A54, 73-74).

- Ozdemir knew that the two courts jointly determined that the Delaware Family Court had jurisdiction (A54, 74).

- Ozdemir knew that, following the November 9, 2009 hearing, the Delaware Family Court entered a temporary order of custody and visitation, awarding Ozdemir sole legal custody in New York and requiring Ozdemir or her parents to bring the children to Delaware for visitation. (A74).

- Ozdemir complied with only four or five of 15 visits that were specifically ordered by the Delaware Family Court. (A58).

[14] *See* 13 *Del. C.* § 701(a).

- Ozdemir knew that the Delaware Family Court awarded Riley sole legal custody of the children in April 2011. (A54). Indeed, Ozdemir unsuccessfully sought review of that decision by the Delaware Family Court. (A54; State's Exhibit 1).

- Ozdemir also sought review of the April 2011 Delaware Family Court Order by filing in New York a petition to modify the Delaware Family Court's April 2011 Order awarding Riley sole legal custody and a petition for an order from protection. (A13, A58-60).

- Riley filed a Rule to Show Cause when Ozdemir ignored the Delaware Family Court's order and did not return the children. (A55).

- In December 2011, the New York Court dismissed Ozdemir's petition for lack of jurisdiction, and Ozdemir appealed. (A13, A 59-60).

- On April 9, 2012, the New York Court, upon instruction of the appellate court, entered an extended order of protection for Ozdemir and granting Riley visitation. (A17)

- In April 2012, the Delaware Family Court appointed a guardian ad litem to represent the best interests of the children and to assist with the therapeutic reunification process. (A55-56).

- The therapeutic reunification process "didn't work out" because Ozdemir was "not at all" helping with the reunification process. (A56).

- On December 12, 2012, the New York Supreme Court, Appellate Division affirmed the New York Court's dismissal of Ozdemir's petitions for lack of jurisdiction. (A59).

- In January 2013, the Delaware Family Court held a hearing at which Riley explained his efforts to get his children back and the court found Ozdemir in contempt and ordered Ozdemir to turn the children over to Riley. (A56-57).

- In February 2013, the Delaware Family Court issued a capias for Ozdemir and ordered her to return the children immediately. (A56).

- Riley took the January 28, 2013 and February 19, 2013 Orders to the New Castle County Police Department for assistance in obtaining the return of his children. (A57, 65, 67).

- The New Castle County Police obtained a criminal warrant against Ozdemir for two counts of felony Interference with Custody, which was entered in the national database with a 1,500 mile extradition limit. (A57, 66).

- The Federal Marshal's Fugitive Task Force in Florida took Ozdemir into custody in Florida. (A66).

- Following her return to Delaware, the Delaware Family Court held a hearing in May 2013. Ozdemir would not disclose the location of the children.[15]

- The children were returned to Riley by the missing persons squad in Suffolk County, New York, after Riley had filed missing persons reports in two counties in New York. (A58).

As a whole, the evidence against Ozdemir was overwhelming. The State presented overwhelming evidence that Riley was a lawful custodian on February 27, 2013, and that Ozdemir had no right to take the children from him. The State proved beyond a reasonable doubt that from 2009 through February 27, 2013, Riley possessed at least visitation rights, and Ozdemir did not have a right to

[15] Q. Okay. Now at this hearing in May, did Christine do anything to help you retrieve your children?
A. No.
Q. Did she disclose the location of the children?
A. No.
Q. At any time did she do anything to assist you in getting these children back?
A. Not at all. (A57).

withhold the children from him except for a limited period of time not pertinent to whether Ozdemir committed Interference with Custody on February 27, 2013.[16] Similarly, the evidence was overwhelming that Ozdemir acted intentionally and with the intent to hold the children from him permanently or for a prolonged period of time. Indeed, even after her arrest and return to Delaware, Ozdemir would not disclose the location of the children, and the children were returned only through the efforts of the missing person's squad in New York. Under these circumstances, any error in admitting State's Exhibits 1-5 is harmless beyond a reasonable doubt.

[16] When Ozdemir appealed the New York Court's dismissal of her petition because of lack of jurisdiction, the appellate court stayed the dismissal and ordered that the temporary order of protection was to remain in effect. (A13). That order did not provide Riley visitation rights. (*Id.*). The appellate court then instructed the New York Court to enter an extended order providing Riley visitation rights. (A17). The New York Court entered such an order on April 9, 2012. (*Id.*).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esquire, do hereby certify that on February 21, 2014, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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