MAY CONTAIN INFORMATION PROTECTED BY ORDER OR STATUTE

REDACTED

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF STAMFORD/NORWALK
AT G.A. 20 (Norwalk)

A.C. 40384

STATE OF CONNECTICUT

V.

LORI A. THANER

BRIEF OF THE STATE OF CONNECTICUT- APPELLEE
WITH ATTACHED APPENDIX

To Be Argued By:

DENISE B. SMOKER
Senior Assistant State's Attorney
Office Of The Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Telephone: (860) 258-5807
Facsimile: (860) 258-5828
Juris Number: 410627
Denise.Smoker@ct.gov
Dcj.Ocsa.Appellate@ct.gov

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NATURE OF THE PROCEEDINGS

The defendant, Lori Thaner, was convicted by a jury of three counts of custodial interference in the second degree, in violation of General Statutes § 53a-98. Def's App. at A-24. She was sentenced by the trial court, *Hernandez, J.*, to a total effective term of three years in prison, execution suspended after 90 days, followed by three years probation and a $1,500 fine. Id. at A-25.

COUNTERSTATEMENT OF FACTS

The jury could reasonably have found the following facts: The defendant and Robert Thaner were married in 1999. T1 at 126. They had four children, a boy, twin girls, then another boy, before they divorced in 2007.[1] Id. at 126-27. The defendant also had an older son from a prior marriage. Id.

After the divorce, the defendant moved to Glastonbury, and Robert lived in Norwalk. Id. at 124. Initially, they had shared custody of their four children. Id. at 127. The defendant had residential custody, and Robert would see his children on Wednesday evenings and every other weekend, with holidays divided between the two parents. Id.

In 2008, however, the defendant's 13-year-old son from a prior marriage was charged with sexual assault, and the four younger children went to live with their father. Id. at 130-31, 146. That arrangement was finalized in 2010, when Robert was given sole legal

[1]The entire history of the Thaner's contentious divorce and subsequent custody proceedings is set forth in detail in Thaner v. Thaner, 2016 WL 4071878. This Court can take judicial notice of that decision, which is appended to this State's brief at A-4—A-20. See In re Selena O., 104 Conn. App. 635, 648, 934 A.2d 860 (2007) (reviewing court took judicial notice of superior court decision in In re Dante N., which revealed "that the respondent gave birth to a child (newborn) on August 8, 2006," and that "on September 7, 2006, Judge Graziani granted the petitioner's motion for an order of temporary custody of the newborn, who was in immediate physical danger from his surroundings").

and residential custody of his children. Id. The defendant was given access to the four children Tuesdays until 7:30 p.m., every other Thursday until 7:30 p.m., every other weekend, and shared holidays. Id. at 132.

In January of 2015, Robert and his oldest son, 13-year-old C1, got into an argument when Robert tried to discipline C1 by taking away his tablet. Id. at 153. C1 punched and kicked Robert, who "jacked him up" against the car. Id. at 154. Both the Norwalk police and the Department of Children and Families [hereinafter "DCF"] were called, and eventually it was decided that C1 would live temporarily with the defendant. Id. at 145, 154-55. As part of the new arrangement, the defendant agreed to drive C1 back and forth to school in Norwalk. Id. at 29, 43-44. After a time, however, she stopped bringing him regularly, saying that it was too strenuous for her and that getting C1 to school was Robert's problem since he was still C1's legal guardian even though she had temporary physical custody.[2] Id.

At some point in 2015, the custody orders were changed yet again, requiring the defendant to visit with the younger children in Norwalk on Tuesdays and Thursdays and not take them to her home in Glastonbury. Id. at 132-33. Nonetheless, the defendant continued to take C2 and C3, then 11, and C4, then 9, to Glastonbury during the week, often not returning them to Norwalk until 10:00 p.m. Id. at 135. The children were not doing their

[2] From August 25, 2015, to May 25, 2015, C1 missed 43 days of school and was in danger of being held back. T-1/17/17 at 46, 150. DCF investigated a complaint of educational neglect regarding C1, and the department initially substantiated a complaint of physical neglect against Robert. Id. at 174, 184. That substantiation was overturned on appeal, however, and DCF caseworker Jennifer Auger, who investigated the complaint, testified that she never had any concerns that Robert was unfit or abusive. Id. at 179, 183. She also testified that, although there were some initial reports made by the children about his drinking, she never saw him under the influence, there were no reports from the schools about his drinking, and he was sent for an alcohol evaluation but no services were recommended, indicating that it was not a concern. Id. at 179.

homework, and eventually the defendant started keeping them at her home overnight on Tuesdays and Thursdays, without Robert's consent and in violation of the custody order. Id. Robert communicated these developments to personnel at the children's schools, who were receptive to his concerns.[3] Id.

On Monday, May 25, 2015, Memorial Day, Robert drove to Glastonbury to retrieve his three youngest children after their weekend visitation with the defendant.[4] Id. at 136. The defendant came out of the house and told him she wasn't sending the children out because they didn't want to go with him. Id. Robert drove to the Glastonbury police, reported the incident, and asked for a welfare check. Id. at 99-100, 136. The police checked on the children but refused to take further action, stating that it was a civil matter and advising Robert to take it up in family court. Id.

With no more assistance forthcoming from the Glastonbury police department, Robert decided to speak with Jermaine Nash, the Norwalk police officer assigned as the school resource officer at West Rocks Middle School.[5] Id. at 26, 137. Robert told Nash that he was having trouble getting his children back from the defendant. Id. at 26. Nash checked

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[3] C1, C2, and C3 attended West Rocks Middle School in Norwalk. T-1/17/17 at 166. C4 attended Cranbury Elementary School, also in Norwalk. Id. at 39. Robert testified that he spoke to the principals, vice principals, and social workers at both schools and to the school resource officer who worked at both schools. Id.

[4] Robert had some idea that he was going to have difficulty picking up the children that day because he had received an email, purportedly from one of his twin daughters, stating that she did not want to go back to Norwalk. T-1/17/17 at 137, 142. He suspected that the email might have been written by the defendant, however. Id. at 143. He responded that he was coming to pick his daughter and her siblings up, and they should be ready when he got there. Id.

[5] Like Auger, Nash testified that he had interacted with Robert numerous times in Robert's home, around town, and at the gym where Robert coached basketball, and Nash never saw anything that led him to believe Robert was an unfit parent. T-1/17/17 at 37.

the school attendance records and saw that C1 had been absent for a month, and the three youngest children had been absent for a week. Id.

Nash contacted the defendant, who said that the children didn't want to go with their father. Id. at 27. He asked if she was the adult, why didn't she just send them out. Id. The defendant said she wouldn't do that, and "just because they're going to miss the last couple of months of school that they will still pass and have the grades." Id. Nash told the defendant she could be in trouble criminally if she didn't return the children to their father and could be forced to pay a fine for them missing school. Id. at 32. His main concern was getting the children back into school. Id. The defendant agreed to let the children go back to school, and Nash said he would hold off on preparing a warrant for her arrest on the charge of custodial interference. Id.

A week went by, and the children were still not back at school.[6] Id. at 33. Nash contacted the defendant again. Id. This time, she said that she would not return the children, so Nash filed for a warrant seeking her arrest on the charge of custodial interference.[7] Id.

On June 2, 2015, Nash and Robert went to the defendant's residence. Id. at 34, 36, 110. They were met on the scene by Glastonbury police, including officer David Hoover. Id. at 34, 110. The defendant was at home, along with the four children she shared with Robert; their aunt, Carol Croody; and the defendant's older son from a prior marriage,

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[6] Robert testified that he went back to Glastonbury "a few times" during this time period and attempted to pick up the children, but he was unsuccessful. T-1/17/17 at 137.

[7] Nash testified that he did not charge the defendant with truancy because the fine for all the missed days of school would have been exorbitant. T-1/17/17 at 48.

Reed, now an adult.[8] Id. Nash placed the defendant under arrest, and he and Hoover tried to convince the children to go with their father, who was waiting on the side of the road, about 50 feet from the house. Id. at 34, 36, 110. Their efforts were hampered by Reed, who stood in the stairwell blocking Nash from going upstairs. Id. at 36. When Nash asked Reed to move, he refused, stating that he was the man of house and made all decisions. Id.

Ultimately, the officers' efforts to get the children to go with their father were unsuccessful, and the children were taken into DCF custody. Id. at 38, 111, 178. They were eventually released to the custody of their maternal grandmother, Janet Wilcox. Id. at 181. They stayed with Wilcox until September of 2015, when they were reunited with their father, who shortly thereafter moved the family to Trumbull.[9] Id. at 139-40, 187.

Additional facts will be set forth as necessary in the Argument section of this brief.

ARGUMENT

I. GENERAL STATUTES § 53a-98 IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED.

The defendant first claims that the custodial interference statute, General Statutes § 53a-98(a)(3), is unconstitutionally vague as applied to the facts of this case because "[w]hat

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[8] June 2, 2015, was a weekday, and the couple's four children should have been in school. T-1/17/17 at 35-36.

[9] Even after the children were returned to their father's custody, the defendant and Reed continued to attempt to interfere with the custody arrangements, telling the children to run away and encouraging them to get violent with their father. T-1/17/17 at 139. Within weeks of returning to Robert's house, C1 left in the middle of the night and was picked up by Reed. Id. On January 24, 2016, Reed picked up one of the twin girls in the middle of the night during a snow storm. Id. Another time, around January 31, 2016, Robert saw one of his twin daughters outside his house in the driveway holding her teddy bear. Id. He told her to get back inside and then saw C1 at the end of the driveway. Id. Robert chased C1 up the street and saw him get into a van owned by Reed. Robert had his girlfriend call 911. Id. The Trumbull police responded and pulled Reed and C1 over on the Merritt Parkway. Id. Reed was arrested for custodial interference and risk of injury to a minor. Id. at 140.

it means to hold, keep[,] or otherwise refuse to return a child is not defined in the statute, case law[,] or model jury instructions, and some police departments, such as the Glastonbury [p]olice [d]epartment, do not enforce it precisely because they do not know what it means." Def's Br. at 10. The defendant concedes that she failed to preserve this claim below and seeks review under State v. Golding, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), as modified by In re Yasiel R., 317 Conn. 773, 781, 120 A.3d 1188, reconsideration denied, 319 Conn. 921, 126 A.3d 1086 (2015).[10]

The defendant's claim is reviewable under the first two prongs of Golding because it "the record is adequate for review and the defendant has raised a claim of constitutional magnitude." State v. Josephs, 328 Conn. 21, 176 A.3d 542 (2018). It fails Golding's third prong, however, because the defendant has not shown the existence of a constitutional violation that deprived her of a fair trial.

A. Applicable Law And Standard Of Review

"The determination of whether a statutory provision is unconstitutionally vague is a question of law over which [this Court] exercise[s] de novo review." State v. Winot, 294 Conn. 753, 758-59, 988 A.2d 188 (2010) (citing State v. Knybel, 281 Conn. 707, 713, 916 A.2d 816 (2007)). The purpose of the vagueness doctrine is twofold: It ensures that statutes (1) provide fair notice of the conduct that they proscribe, and (2) establish

[10] In Golding, our Supreme Court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) State v. Golding, 213 Conn. at 239–40; see also In re Yasiel R., 317 Conn. at 781 (modifying third prong of Golding).

minimum guidelines to govern law enforcement. State v. Indrisano, 228 Conn. 795, 802, 640 A.2d 986 (1994).

The following principles govern this Court's analysis of a void for vagueness claim:

> "A statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. . . . A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [her], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [she] had inadequate notice of what was prohibited or that [she was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement.

State v. Josephs, 328 Conn. at 31 (quoting State ex rel. Gregan v. Koczur, 287 Conn. 145, 156, 947 A.2d 282 (2008) (internal quotation marks omitted)).

As a general rule, the constitutionality of the statute is to be determined by its applicability to the particular facts at issue.[11] State v. Pickering, 180 Conn. 54, 57, 428 A.2d 322 (1980); see also State v. Indrisano, 228 Conn. at 811 (defendant may not challenge facial validity of statute where his conduct unmistakably falls within statute's core meaning of prohibited conduct). "[T]hat a statutory provision may be of questionable applicability in speculative situations is . . . immaterial if the challenged provision applies to the conduct of the defendant in the case at issue." State v. Pickering, 180 Conn. at 58. Second, as a matter of due process, the statute must give fair warning to enable the average person to

[11] There is an exception to this rule where the defendant raises a first amendment challenge to the statute. State v. Springmann, 69 Conn. App. 400, 411, 794 A.2d 1071, cert. denied, 260 Conn. 934, 802 A.2d 89 (2002). However, the defendant in this case does not raise such a claim and cannot do so in her reply brief. State v. Garvin, 242 Conn. 296, 312, 699 A.2d 921 (1997).

know what conduct to avoid. Id. at 59-60. "[A] penal statute may survive a vagueness attack solely upon a consideration of whether it provides fair warning." State v. Shriver, 207 Conn. 456, 459-61, 542 A.2d 686 (1988); see also State v. Perruccio, 192 Conn. 154, 158-59, 471 A.2d 632, appeal dismissed, 469 U.S. 801, 105 S.Ct. 55, 83 L.Ed.2d 6 (1984); State v. Ezren, 29 Conn. App. 591, 593-94, 617 A.2d 177 (1992).

"If the meaning of a statute can be fairly ascertained, a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties." State v. Josephs, 328 Conn. at 31 (internal quotation marks omitted); see also State v. Pickering, 180 Conn. at 62; State v. Jason B., 248 Conn. 543, 556, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S.Ct. 406, 145 L.Ed.2d 316 (1999); State v. Aziegbemi, 111 Conn. App. 259, 270, 959 A.2d 1, cert. denied, 290 Conn. 901, 962 A.2d 128 (2008). "'References to judicial opinions involving the statute, the common law of our state and other jurisdictions, legal dictionaries or treatises may assist in ascertaining a statute's meaning to determine if it gives fair warning.'" State v. Josephs, 328 Conn. at 31-32 (quoting State v. Winot, 294 Conn. at 759 (internal quotation marks omitted)); see also State v. Scruggs, 279 Conn. 698, 719, 724 n.12, 905 A.2d 24 (2006); State v. Miranda, 260 Conn. 93, 106, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S.Ct. 224, 154 L.Ed.2d 175 (2002).

Likewise, whether a statute provides fair warning may be ascertained by reference to other provisions of the penal code "because General Statutes § 53a-2 provides that 'the provisions of this title shall apply to any offense defined in this title or the general statutes, unless otherwise expressly provided or unless the context otherwise requires. . . .'" State v. Erzen, 29 Conn. App. at 594 (quoting Conn. Gen. Stat. § 53a-2); see also State v. James

G., 268 Conn. 382, 830-31, 844 A.2d 810 (2004). Finally, whether a statute provides fair warning may be ascertained by using common sense and ordinary understanding because the standard is whether a person of ordinary intelligence would reasonably know what acts are prohibited. State v. Erzen, 29 Conn. App. at 594; see also State v. Branham, 56 Conn. App. 395, 400, 743 A.2d 635, cert. denied, 252 Conn. 937, 747 A.2d 3 (2000).

B. The Defendant Has Not And Cannot Prove Beyond A Reasonable Doubt That She Did Not Have Fair Notice That Her Conduct Was Prohibited By General Statutes § 53a-98.

General Statutes § 53a-98(a) provides, in pertinent part, that a person is guilty of custodial interference in the second degree when, "knowing that he has no legal right to do so, he holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child." Conn. Gen. Stat. § 53a-98(a)(3). The defendant focuses on the words "holds, keeps or otherwise refuses to return," arguing that none of those terms gave her adequate notice that she could be convicted for "her inaction in physically forcing her children to return to their father." Def's Br. at 16.

There are several problems with this argument. First, the defendant was not, as she posits, convicted for "her inaction in physically forcing her children to return to their father." Def's Br. at 18. Rather, her conviction was based on her affirmative, repeated statements that she would not send her children out to their father, their lawful, custodial parent. First, she told Robert that she wasn't sending the children out because they didn't want to go with him. T-1/17/17 at 136. She then told Nash on two different occasions that she would not send the children out to go with their father, even after Nash warned her that she could face criminal charges. Id. at 27-33.

This affirmative behavior clearly falls within the core meaning of the "otherwise refuse to return" language in General Statutes § 53a-98. As the term "refuse to return" is not defined in General Statutes § 53a-98 or elsewhere in the Connecticut General Statutes, this Court must look to the ordinary meaning in construing the statute. Conn. Gen. Stat. § 1-2z (meaning of statute in first instance ascertained from text of statute and relationship to other statutes). "'When a statutory term is not defined, or cannot be ascertained by means of related statutory provisions, courts must apply its plain and ordinary meaning.'" State v. Gilligan, 164 Conn. App. 406, 414, 138 A.3d 328 (2016) (quoting In re Pedro J.C., 154 Conn. App. 517, 535, 105 A.3d 943 (2014)) "'[I]t is a cardinal rule of statutory construction that statutory words and phrases are to be given their ordinary meaning in accordance with the commonly approved usage of the language.'" Id. (quoting In re Pedro J.C., 154 Conn. App. at 535). "'To ascertain the commonly approved usage of a word, [this Court] look[s] to the dictionary definition of the term.'" Id. (quoting In re Pedro J.C., 154 Conn. App. at 535);

Webster's Dictionary defines "refuse" as "to express oneself as unwilling to accept," to "show or express unwillingness to do or comply with," or to "not allow someone to have or to do." Merriam-Webster.com, 2019. https://www.merriam-webster.com (Feb. 11, 2019). "Return" is defined, in pertinent part, as "to pass back to an earlier possessor." Id. Applying these dictionary definitions to the defendant's conduct, she clearly showed and expressed unwillingness to pass the children back to their father, their lawful custodian, when she three times stated that she would not turn the children over to Robert. The record contains ample evidence that a reasonable person in the defendant's position, engaged in a contentious divorce and a protracted custody battle, would know that her continued refusal to give the children back to their father fell within the statute's prohibited conduct. See, e.g.,

State v. Hearl, 182 Conn. App. 237, 268-69, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018) (terms "charge" and "custody" in General Statutes § 53-247(a) gave defendant sufficient notice that he bore responsibility for caring for goats and that he could face criminal liability for failing to do so). "Because the prohibition of the statute readily can be defined and determined . . . the statute is not void for vagueness." State v. Smith, 139 Conn. App. 107, 112, 54 A.3d 638 (2012) (using dictionary definitions of "roam," "at large," and "control," reasonable person in defendant's position would have fair notice that General Statutes § 22-364(a) prohibited dog owner from allowing dog freely to move around another's property, unrestrained and unhindered, and not under direct influence of dog's owner).

The defendant glosses over the obvious, commonsense applicability of the phrase "refuse to return" to her behavior and instead attempts to shift responsibility to her children, arguing that it was their will to stay, and not any action on her part, that ultimately led to the children not being turned over to their father. Def's Br. at 18-19. What she fails to understand is that her children's reluctance to go with their father did not absolve her of her duty to return them to their lawful, custodial parent.[12] No reasonable person would believe that the statute allowed her to let the decision as to whether to comply with a lawful custody order rest on the shoulders of her minor children. Because the plain wording and core

[12] The defendant seems to suggest that the statute cannot be read to require her to do what "intervention by Glastonbury police offices, DCF workers, [ ] Nash, [Robert], and the children's grandmother [ ] failed to accomplish," i.e. convince the children to go with their father. Def's Br. at 19. Unlike those individuals, however, the defendant had a duty to comply with both the custody order and General Statutes § 53a-98. Moreover, as the children's mother, she had a special relationship with them. It is not out of the realm of possibility that, had she been willing to do so, she might have been able to accomplish what the others listed could not.

meaning of the statute clearly encompassed the defendant's conduct in three times refusing to turn the children over to their father, the defendant has failed to meet her high burden of showing that she lacked fair notice that her actions were illegal, and her void for vagueness claim must fail.

C. The Defendant Has Not And Cannot Prove Beyond A Reasonable Doubt That General Statutes § 53a-98 Allows For Arbitrary And Discriminatory Enforcement.

The defendant also argues that "the vague wording of [General Statutes § 53a-98] led to the arbitrary and discriminatory enforcement of the statute as applied to the defendant." Def's Br. at 19. "To prevent arbitrary and discriminatory enforcement, 'laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.'" State v. Chance, 147 Conn. App. 598, 714, 83 A.3d 703, cert. denied, 311 Conn. 932, 87 A.3d 580, U.S. cert. denied, ___ U.S. ___, 135 S.Ct. 169, 190 L.Ed.2d 120 (2014) (quoting Grayned v. Rockford, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (internal quotation marks omitted)). "'[A] legislature [must] establish minimal guidelines to govern law enforcement.'" Id. at 712 fn. 12 (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (internal quotation marks omitted)). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender v. Lawson, 461 U.S. at 358 (internal quotation marks omitted).

As a practical matter,

> "a court analyzing an as-applied vagueness challenge may determine that the statute generally provides sufficient guidance to eliminate the threat of arbitrary enforcement without analyzing more specifically whether the particular enforcement was guided by adequate standards. In fact, it is the better (and perhaps more logical) practice to determine first whether the statute provides such general guidance, given that the [United States] Supreme Court has indicated that the more important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. . . . If a court determines that a statute provides sufficient guidelines to eliminate generally the risk of arbitrary enforcement, that finding concludes the inquiry.
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> [When] a statute provides insufficient general guidance, an as-applied vagueness challenge may nonetheless fail if the statute's meaning has a clear core. . . . In that case, the inquiry will involve determining whether the conduct at issue falls so squarely in the core of what is prohibited by the law that there is no substantial concern about arbitrary enforcement because no reasonable enforcing officer could doubt the law's application in the circumstances."

State v. Daniel G., 147 Conn. App. 523, 543-44, 84 A.3d 9, cert. denied, 311 Conn. 931, 87 A.3d 579 (2014) (quoting State v. Stephens, 301 Conn. 791, 805-06, 22 A.3d 1262 (2011) (internal quotations omitted)). "While it is true that the application of the statute to any particular case is irreducibly fact-specific, the same can be said of every statute, and does not suggest a constitutional infirmity." Sweetman v. State Elections Enforcement Com'n., 249 Conn. 296, 325, 732 A.2d 144 (1999).

The defendant in this case argues that she was the victim of arbitrary and discriminatory enforcement because: (1) although the Norwalk police charged her under the statute, the Glastonbury police declined to do so, stating that they referred such cases to family court; (2) Nash initially declined to charge her with custodial interference, instead giving her the chance to get the children back to school; (3) despite the fact that all four Thaner children were present on the date of the incident in question, the state amended its information to charge her with only three counts of custodial interference; and (4) "at trial, even the court and [the] state's attorney were confused as to what conduct constitute[d]

'holding, keeping or otherwise refusing to return' the children to their legal guardian." Def's Br. at 21-22. None of these arguments is persuasive.

First, as discussed at length in section I.B., supra, there is no risk of arbitrary or discriminatory enforcement because the plain terms of General Statutes § 53a-98, illuminated by their dictionary definitions, "provide sufficient guidance as to what is prohibited" and because "the statute has a core meaning within which the defendant's conduct fell." State v. Daniel G., 147 Conn. App. at 543-43. That finding "concludes the inquiry," and more specific analysis of whether "the particular enforcement was guided by adequate standards" is unnecessary. Id. at 544.

Second, even if this Court were to examine the conduct of the police and prosecutors in this case, none of the actions cited by the defendant show that she was the victim of arbitrary or discriminatory enforcement. The defendant confuses discretion with discrimination. The Glastonbury police exercised their discretion in declining to press charges against the defendant, instead suggesting that the parties first try to resolve their custody dispute in family court. T1 at 99-100, 135. Nash, too, exercised discretion when he offered the petitioner a chance to avoid prosecution by bringing her children back to school. Id. at 32. Similarly, the state did not, as the defendant posits, "arbitrarily" nolle the charge involving C1. Def's Br. at 22. Rather, the evidence suggests that the state exercised its discretion to nolle that charge because C1 was, at the time, living with the defendant under an informal agreement that came about after he and his father had a dispute over a tablet.[13] Id. at 29, 43-44, 154-55.

[13] The defendant's claim that even the state and trial court were confused about the meaning of the terms "holding, keeping or otherwise refusing to return" in General Statutes (continued...)

If anything, the fact that Nash told the defendant she would be arrested if she did not return her children to school cuts against her vagueness claim. "A 'defendant's special knowledge may undermine h[er] . . . vagueness challenge,'" such as if, for example, the defendant had "notice that h[er] conduct violated the law." State v. Hearl, 182 Conn. App. at 269 (quoting State v. Jason B., 248 Conn. at 567). Here, Nash specifically told the defendant that she could be arrested if she did not return the children to their father and fined if they did not return to school. T-1/17/17 at 32. Despite this warning, the defendant failed to return the children either to their father or to school. Id. at 33. In fact, when Nash called her a second time after a week had gone by and the children were still not in school, she affirmatively stated that she would not return the children, prompting him to seek a

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(...continued)
§ 53a-98 is also unavailing. She bases this claim on a colloquy that occurred during jury selection. T-1/10/17 at 215-17. Although the state acknowledged a dearth of case law concerning the statute, neither the state nor the trial court expressed any confusion as to its terms. Id. Rather, the court recited the elements of the statute to the defendant in an attempt to alleviate her confusion in believing that, because her minor children refused to go with their father, she could not be guilty of custodial interference. Id. at 215. Moreover, in closing argument, the state clearly articulated its theory of the case as follows:

> So what evidence has been presented so that you can find that the defendant kept her children from their lawful custodian, with – which is the first element of custodial interference in the second degree[?] Mr. Thaner testified that he tried to pick up his children on May 25[ ], 2015. He drove to Glastonbury to go get – to have his turn visiting with the children. But the kids were not sent out to him. And [it] doesn't appear that there's too much dispute here, but the [s]tate must prove each element beyond a reasonable doubt. Officer Nash testified that the defendant made statements to him regarding this, that she said, yeah, you know, he – he came to get them, but they refused to go. And she wasn't going to make them.

T-1/19/17 at 22. On rebuttal, the state further clarified its position that the defendant could not "hide behind [her] children" and that it was the defendant's duty to comply with the court's custody order, which she admitted she had violated. Id. at 36-37.

warrant for her arrest. Id. Having been put on notice by Nash that her conduct was criminal, the defendant cannot prevail on her vagueness claim.

II. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT THE DEFENDANT REFUSED TO RETURN HER CHILDREN TO THEIR LAWFUL CUSTODIAN, AS REQUIRED BY GENERAL STATUTES § 53a-98.

The defendant's second and final claim is that the state failed to meet its burden of proving her guilt beyond a reasonable doubt because "it presented no evidence that [she] took affirmative action to prevent her children from returning to their father." Def's Br. at 25. For the reasons set forth below, this claim, too, is meritless.

This Court's standard for reviewing a sufficiency of the evidence claim is well settled. A reviewing court

> "appl[ies] a two[-]part test. First, [the reviewing court] construe[s] the evidence in the light most favorable to sustaining the verdict. Second, [the reviewing court] determine[s] whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical."

State v. Sadowski, 146 Conn. App. 693, 79 A.3d 136 (2013), cert. denied, 311 Conn. 903, 83 A.3d 604 (2014) (quoting State v. Howell, 98 Conn. App. 369, 373–74, 908 A.2d 1145 (2006) (citations and internal quotation marks omitted)).

This Court's review "'is a fact[-]based inquiry limited to determining whether the inferences drawn by the jury are so unreasonable as to be unjustifiable.'" Id. at (quoting State v. Howell, 98 Conn. App. at 374 (internal quotation marks omitted)). "'This [C]ourt cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict.'" Id. (quoting State v. Howell, 98 Conn. App. at 374 (internal quotation marks omitted). "On appeal, [this Court] do[es] not ask whether there is a

reasonable view of the evidence that would support a reasonable hypothesis of innocence. [It] ask[s], instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." Id.

Rather than citing and applying any of these rules of appellate review, the defendant essentially rehashes her void for vagueness claim, arguing that "there is not a scintilla of evidence to suggest that [she] in any way restricted her children's access to their father, prevented their return to him, or actively refused to allow [Robert] to assert his custody over their children." Def's Br. at 27. What the defendant fails to understand is that her repeated refusal to send the children out to their father was "specific action on [her] part;" id.; that satisfied the "otherwise refuse to return" element of General Statutes § 53a-98. The evidence introduced at trial, in particular the testimony of Robert and Nash, showed that the defendant three times refused to return her minor children to their father. First, she told Robert that she wasn't sending children out because they didn't want to go with him. T-1/17/17 at 136. She then told Nash on two different occasions that she would not ask the children to go with their father, even after Nash advised her that she could face criminal charges. Id. at 27, 33. On the basis of these affirmative actions, the jury could have found beyond a reasonable doubt that the defendant refused to return her children to their lawful, custodial parent. Her sufficiency of the evidence claim must therefore fail.

CONCLUSION

For all of the foregoing reasons, the State of Connecticut-Appellee asks this Court to affirm the trial court's judgment of conviction.

Respectfully submitted,

STATE OF CONNECTICUT

By: Denise B. Smoker

DENISE B. SMOKER
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax (860) 258-5828
Juris No. 410627
Denise.Smoker@ct.gov
DCJ.OCSA.Appellate@ct.gov

RICHARD J. COLANGELO, JR.
State's Attorney
Judicial District of Stamford/Norwalk

JUSTINA MOORE
Assistant State's Attorney
Judicial District of Stamford/Norwalk at G.A. 20

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

Denise B. Smoker

DENISE B. SMOKER
Senior Assistant State's Attorney