State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 2, 2026 CR-23-0663

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER

CHELSEA FOUR-ROSENBAUM,
Appellant.

Calendar Date: February 18, 2026

Before: Reynolds Fitzgerald, J.P., Ceresia, Fisher, Powers and Mackey, JJ.

Mitchell S. Kessler, Cohoes, for appellant, and appellant pro se.

Brian P. Conaty, District Attorney, Monticello (*Michael J. Puma* of counsel), for respondent.

Ceresia, J.

Appeal from a judgment of the County Court of Sullivan County (James Farrell, J.), rendered September 30, 2022, upon a verdict convicting defendant of the crimes of kidnapping in the second degree and endangering the welfare of a child.

Following a joint trial, defendant and her mother, the codefendant, were convicted of kidnapping in the second degree and endangering the welfare of a child. These charges resulted from a months-long search for defendant's toddler child, which ultimately led to the discovery of defendant and the codefendant with the child in the State of Washington, where they had brought the child without the consent of her father. Defendant was sentenced to a prison term of seven years, to be followed by five years of postrelease

supervision, on the kidnapping conviction and to a lesser concurrent jail term on the endangering the welfare of a child conviction. Defendant appeals.[1]

Initially, defendant contends that the evidence is legally insufficient to support her convictions for kidnapping in the second degree and endangering the welfare of a child and that the verdicts as to these convictions are also against the weight of the evidence. "In determining whether [a] defendant's convictions are supported by legally sufficient evidence, we view the facts in the light most favorable to the People and examine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Reinfurt*, 241 AD3d 1015, 1017 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 44 NY3d 1067 [2026]; *see People v Williams*, 43 NY3d 1030, 1032 [2025]). "In turn, when conducting a weight of the evidence review, this Court must view the evidence in a neutral light and determine first whether a different verdict would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" (*People v Gerhard*, 244 AD3d 1313, 1314 [3d Dept 2025] [internal quotation marks, brackets and citations omitted], *lv denied* 45 NY3d 936 [2026]; *see People v Scott*, 219 AD3d 1572, 1573 [3d Dept 2023]).

"A person is guilty of kidnapping in the second degree when he [or she] abducts another person" (Penal Law § 135.20). Relevant thereto, abduct is defined as "to restrain a person with intent to prevent his [or her] liberation by . . . secreting or holding him [or her] in a place where he [or she] is not likely to be found" (Penal Law § 135.00 [2] [a]) and, flowing from that definition, " '[r]estrain' means to restrict a person's movements intentionally and unlawfully in such [a] manner as to interfere substantially with his [or her] liberty by moving him [or her] from one place to another . . . without consent and with knowledge that the restriction is unlawful" (Penal Law § 135.00 [1]). When a child is under the age of 16, such child is restrained without consent if "the parent, guardian or other person or institution having lawful control or custody of him [or her] has not acquiesced in the movement or confinement" (Penal Law § 135.00 [1] [b]). The kidnapping by a custodial parent of his or her own child is a legal possibility where the parent's "conduct is so obviously and unjustifiably dangerous or harmful to the child as to be inconsistent with the idea of lawful custody" (*People v Leonard*, 19 NY3d 323, 329

[1] The codefendant similarly appeals from her judgment of conviction (*People v Hollman*, ___ AD3d ___ [3d Dept 2026] [decided herewith]).

[2012]). Still, "[i]n any prosecution for kidnapping, it is an affirmative defense that (a) the defendant was a relative of the person abducted, and (b) his [or her] sole purpose was to assume control of such person" (Penal Law § 135.30).

Here, the child's father testified that the codefendant came to visit the family from her home in Connecticut on June 11, 2021. On that day, the father and the codefendant picked up the child from her babysitter and, as they were leaving, the babysitter said, "[s]ee you Monday," to which the codefendant replied, "[n]o. I'm going to be here . . . for a while. I'm going to take [the child]." According to the father, the codefendant has "[e]xtreme" religious beliefs and, during her stay, expressed that the child was "under a spell of witchcraft" and that she was not sleeping well and was having nightmares because they needed to "get [the] . . . demons out of her." The codefendant made multiple statements regarding demons being inside the child and told the child during mealtimes that "food drives demons from you." The codefendant also spoke of the child as "[t]he seed of [her] seed" and insisted that "[t]he seed of [her] seed will not have demons" and "will be saved." When the father asked the codefendant to "tone . . . down" this rhetoric, the codefendant assured him that she would keep her prayers to a "softer roar."

The father explained that these comments by the codefendant continued on June 17, 2021. At this time, he attempted to discuss the matter with defendant, but these efforts were thwarted by the codefendant, who interrupted their conversation, resulting in the father leaving them to speak. It had been planned that, later that day, the codefendant would take the child to meet defendant for lunch before the codefendant would then return to Connecticut, bringing her visit to an end. Instead, the father received a text message from defendant that afternoon asking to talk to him and, when the father called, defendant told him that "[t]he Lord revealed" that he was having an affair with the babysitter. Defendant then notified the father that she and the child were going to the codefendant's home for the weekend. In response, the father asked defendant to inform him when they arrived and, subsequently, requested to speak with defendant regarding the allegation she had made against him and the broader situation. At trial, both the father and the babysitter steadfastly denied this claim of infidelity.

The father sent defendant numerous text messages over the next several days which expressed that he missed defendant and the child and anticipated their return. On June 21, 2021, defendant told the father that she was not going to be home for a couple more days. Defendant's brother testified that he saw defendant and the codefendant on this date and described them as behaving unusually, making statements regarding the father sexually abusing the child and having an affair with the babysitter, who they

claimed to be a witch.[2] The following day, after defendant failed to answer numerous calls and text messages, the father told her that he was coming to the codefendant's home. Defendant responded that she was "taking time to process and heal," confirmed that the child was well, and indicated that they were "enjoying [their] mini vacation" and she would notify him when she was ready to return to the family home. The day after that, defendant informed the father that she did not think she would return the upcoming weekend but stated that she would contact him daily. That same day, defendant also sent an email to the law firm with which she had been employed as an attorney, notifying them that she would be taking a leave of absence.[3]

The father testified that this behavior was uncharacteristic for defendant and, in combination with the fact that he had received no photographs of the child in multiple days and his requests to video chat had been denied, he was concerned that defendant may have gone on the run with the child. A week after defendant's initial departure, she denied the father's request for the child to call the paternal grandmother and, a few days later, sent the father a text message notifying him that he must pay the mortgage and credit card bill. All communication with the father then ceased despite efforts on his part to contact defendant and the codefendant, and, in the interim, on July 8, 2021, defendant resigned from her law firm.[4] As a result, the father involved, among others, the State Police and the Sullivan County Sheriff's Department. He also filed a petition in Family Court pursuant to Family Ct Act article 6, prompting an order to show cause to be issued awarding him temporary physical custody of the child and ordering that the child remain

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[2] Defendant later made similar comments by email to investigators, which also expressed that the father was a pedophile who viewed child pornography and was "involved in sat[a]nic activities." Copies of these emails were admitted at trial. The father consented to a search of his home, which revealed no indication that he had engaged in any illegal activities.

[3] Email communications confirming as much were admitted at trial through the testimony of a partner with this law firm.

[4] Defendant's brother testified that, because of their earlier behavior, he attempted to keep track of the whereabouts of defendant and the codefendant during this time. However, all contact between them ceased on June 27, 2021. Also in late June 2021, defendant communicated with a friend, notifying her that she and the child would be unable to attend the friend's October 2021 wedding, in which defendant was to serve as a bridesmaid and the child as the flower girl.

in New York. However, because efforts to serve defendant at the codefendant's address were unsuccessful and her whereabouts were unknown, the father was unable to personally serve defendant before the deadline set by the court. The father was eventually notified that, upon investigation, it was determined that defendant and the codefendant were either in Seattle, Washington or Bellevue, Washington. On August 26, 2021, nearly two months after they had left, defendant, the codefendant and the child were located in a hotel in Bellevue, Washington, and defendant was served with the order to show cause.

A detective with the local police department in Washington testified as to the investigation and how it revealed defendant and the codefendant's whereabouts. The detective described the clientele of the hotel where they were staying in a negative manner but confirmed that the room itself was equipped with the child's necessities. Located therein were notebooks containing handwritten notes related to their apparent travels, which seemingly indicated that, in addition to travelling to Washington, they had also travelled to Avalon, California; Las Vegas, Nevada; and Boise, Idaho.[5] The search of the hotel room also revealed unused gift cards; over $27,000 in cash; a receipt for a cash withdrawal of $10,000 dated June 28, 2021; numerous ATM transaction receipts from Massachusetts dated July 3, 2021 and Ohio dated July 5, 2021; three one-way train tickets from Chicago, Illinois to Pasco, Washington with a departure date of July 6, 2021; a receipt from a hotel in Spokane, Washington indicating a stay from July 7, 2021 until July 9, 2021, with payment being made in cash; three one-way train tickets from Spokane, Washington to Boise, Idaho with a departure date of July 9, 2021; a receipt for the hotel in which they were located with a check-in date of August 23, 2021 and a check-out date of September 6, 2021, with payment also having been made in cash; and three phones, two of which appeared to be burner phones. Numerous photographs of the room and the items found therein were admitted at trial. The detective additionally described that when the child was located, she was told that the father would be getting her the following day, in response to which she smiled and noticeably changed her demeanor. An investigator with the Sullivan County District Attorney's office opined that it was significant that defendant and the codefendant were found with large amounts of cash and gift cards, as the use thereof is a common way to remain undetected.

The father's testimony continued that when he was ultimately reunited with the child, she was emotional and expressed a desire to go home. Upon returning home, the

[5] We take notice of the fact that Avalon, California is located on Catalina Island and, markedly, the child was wearing a shirt ascribed with "Catalina Island" when located.

child was seen by her pediatrician who, according to the father, confirmed that she was healthy and recommended that he monitor her for behavioral changes as she adjusted. The babysitter attested that the child returned to her care in August 2021, whereupon she appeared to be quieter than she had been previously and needed time to adjust to being back with other children. Upon cross-examination, the father affirmed that he believed defendant to be a good mother and that the child being in her care did not trouble him. The father was, however, concerned for the child's physical and emotional safety as a result of the codefendant's belief that the child had demons inside her.

Viewing the evidence in the light most favorable to the People, we find defendant's conviction of kidnapping in the second degree to be supported by legally sufficient evidence (*see People v White*, 231 AD3d 1429, 1432 [3d Dept 2024], *lv denied* 42 NY3d 1082 [2025]; *People v Petit*, 230 AD3d 1337, 1339 [2d Dept 2024], *lv denied* 42 NY3d 1054 [2024]; *People v Barnette*, 150 AD3d 1136, 1136-1137 [2d Dept 2017], *lv denied* 29 NY3d 1123 [2017]). Initially, defendant's motion for a trial order of dismissal addressed the elements of kidnapping in the second degree, but did not touch on the applicability of the affirmative defense. Consequently, her legal sufficiency challenge as to this conviction is preserved only to the limited extent of whether the elements of the crime were established (*see People v McMillan*, 220 AD3d 1119, 1120 [3d Dept 2023], *lv denied* 40 NY3d 1081 [2023]; *People v Vickers*, 168 AD3d 1268, 1269 [3d Dept 2019], *lv denied* 33 NY3d 1036 [2019]). With that said, the proof at trial demonstrated that the child was of such an age that she could not control her own movements and that defendant, aside from other sojourns, intentionally moved the child to Washington, without the knowledge or consent of the father, establishing that defendant had hindered the child's movements and held her in a place where she was not likely to be found (*see People v Leonard*, 19 NY3d at 327; *cf. People v Denson*, 26 NY3d 179, 188-189 [2015]). These acts, taken in conjunction with the efforts to remain undetected – which included, among other things, purchasing burner phones, withdrawing large amounts of cash and paying for hotel stays in cash to avoid the use of credit cards – evidenced that defendant, despite being a custodial parent and thus having a right to control the child's movements, had reached "a point where [her] . . . control over [the] child's movements [had become] unlawful, and indeed obviously so" (*People v Leonard*, 19 NY3d at 328). Thus, the evidence is legally sufficient to support the kidnapping conviction.

Although a different verdict would not have been unreasonable given the circumstantial nature of the proof presented, for the same reasons outlined above, we are satisfied that, viewing the evidence in a neutral light, the elements of kidnapping in the second degree are supported by the weight of the evidence (*see People v Cole*, 140 AD3d

1183, 1183 [2d Dept 2016], *lv denied* 28 NY3d 970 [2016]; *People v Leonard*, 83 AD3d 1113, 1115 [3d Dept 2011], *affd* 19 NY3d 323 [2012]). As for defendant's affirmative defense provided by Penal Law § 135.30, her weight of the evidence challenge with respect thereto bears no preservation requirement (*see People v Noble*, 244 AD3d 1499, 1500 [3d Dept 2025]), but is likewise without merit. "When a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence" (Penal Law § 25.00 [2]; *accord People v Smith*, 45 NY3d 286, 289 [2025]). Thus, as it is uncontested that defendant is a relative of the child, she was required to demonstrate by a preponderance of the evidence that she took the child for the sole purpose of assuming control over her (*see* Penal Law § 135.30). A relative who takes a child with the purpose of something more than custodial control – such as "ransom, extortion or terrorization" of the other custodian – will still be guilty of kidnapping (William C. Donnino, Prac Commentaries, McKinney's Cons Laws of NY, Penal Law § 135.00 [internal quotation marks and citation omitted]; *see People v Leonard*, 19 NY3d at 327).

The trial evidence established that it had been communicated to the father that the codefendant and the child were going to meet defendant for lunch, after which the codefendant intended on returning to her home in Connecticut. Defendant, however, subsequently informed the father that she had learned that he was having an affair with the babysitter, prompting her to change her plans and travel with the child to the codefendant's home. While there, defendant and the codefendant engaged in discussions concerning the father's supposed infidelity, among other claimed transgressions. Upon the father eventually contacting defendant and telling her that he was going to come to the codefendant's home, defendant advised him that she needed time to process and heal. Defendant thereafter notified her employer that she was taking a leave of absence and, cutting off all communications with the father, fled across country with the child and the codefendant, taking actions each step of the way to attempt to remain undetected. Considering this evidence in a neutral light and deferring to the jury's factual findings and credibility determinations, the jury's rejection of defendant's affirmative defense was not against the weight of the evidence. Rather, there was ample evidence from which the jury could, and indeed did, reasonably conclude that defendant's actions were at least partially, if not totally, motivated by her belief that the father had been unfaithful and her desire to obtain retribution. In rebuffing defendant's affirmative defense, the jury was also free to take into account the notion that defendant's claim that her *sole* purpose in taking the child was to assume control over her (*see* Penal Law § 135.30 [b]) was undermined by the fact that such control would have already been obtained once defendant had the child

in Connecticut, thereby obviating any need to then secretly move across the country from one location to the next.

Turning to defendant's remaining conviction, a person is guilty of endangering the welfare of a child when, as pertinent here, "[h]e or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old" (Penal Law § 260.10 [1]). The proof adduced at trial demonstrated that defendant knowingly took the child away from the father, while claiming that he had sexually abused her and that she was possessed by demonic spirits. These acts were injurious to the child's mental welfare as demonstrated by the testimony that her personality was altered upon return to the father's care. Accordingly, this conviction is supported by legally sufficient evidence and, although a contrary result may not have been unreasonable had the jury discredited the father's and the babysitter's descriptions of the child's demeanor, the verdict is not against the weight of the evidence (*see People v Stanley*, 246 AD3d 1218, 1221-1222 [3d Dept 2026]; *People v Engelsen*, 92 AD3d 1289, 1290 [4th Dept 2012]).

Next, defendant argues that territorial jurisdiction was lacking with respect to the kidnapping charge. "The general rule in New York is that, for the State to have criminal jurisdiction, either the alleged conduct or some consequence of it must have occurred within the State" (*People v McLaughlin*, 80 NY2d 466, 471 [1992] [citations omitted]; *accord People v Callahan*, 186 AD3d 943, 945 [3d Dept 2020]). Territorial jurisdiction based on a defendant's conduct within the state exists where that conduct is sufficient to establish an element of the offense, an attempt to commit the consummated offense or a "conspiracy or criminal solicitation to commit such offense . . . or otherwise to establish the complicity of at least one of the persons liable therefor" (CPL 20.20 [1] [c]; *see* CPL 20.20 [1] [a], [b]). Here, an element of the kidnapping offense – namely, intent to prevent the child's liberation by secretly holding her in a place where she was not likely to be found (*see* Penal Law § 135.00 [2] [a]) – was made manifest in New York based on the evidence adduced at trial, together with reasonable inferences drawn therefrom, reflecting that defendant took the child out of the state under the guise of taking her to lunch and as a result of her anger at the father, thereby establishing territorial jurisdiction pursuant to CPL 20.20 (1) (a) (*see People v Kassebaum*, 95 NY2d 611, 620-621 [2001], *cert denied* 532 US 1069 [2021]; *People v Callahan*, 186 AD3d at 945). Alternatively, the same evidence was sufficient to show that defendant conspired to commit the crime of kidnapping in the second degree in this state, such that territorial jurisdiction under CPL 20.20 (1) (c) was demonstrated.

Finally, we do not agree with defendant's claim that the sentence imposed was unduly harsh or severe. Defendant stands convicted of kidnapping in the second degree, a class B violent felony (*see* Penal Law § 70.02 [1] [a]), for which a term of imprisonment between 5 and 25 years, followed by a period of postrelease supervision of between 2½ and 5 years, is authorized (*see* Penal Law §§ 70.02 [3] [a]; 70.45 [2] [f]). It is true that defendant has no criminal history and the presentence report indicated that she poses a low risk of violent recidivism. Weighing against that, however, is the seriousness of defendant's conduct, which indeed appeared to have a negative effect on the child's mental and emotional well-being, as well as the fact that defendant refused to accept responsibility or show remorse for her behavior. Under these circumstances, we discern no basis on which to disturb defendant's sentence, which we note fell near the low end of the allowable sentencing range. We similarly find unavailing defendant's unpreserved assertion that the significant disparity between the pretrial offer of an adjournment in contemplation of dismissal in exchange for a guilty plea to the endangering charge and the sentence that she ultimately received for the kidnapping charge demonstrates that she was penalized for exercising her constitutional right to trial. Once defendant rejected the plea offer and elected to proceed to trial, as was her right to do, she subjected herself to a criminal conviction of a much more serious crime, carrying with it a more serious sentencing exposure, and the record is devoid of any indication that the sentence imposed was retaliatory as opposed to being based on pertinent sentencing factors (*see People v Henehan*, 238 AD3d 1336, 1340-1341 [3d Dept 2025], *lv denied* 43 NY3d 1055 [2025]). As for defendant's speculative claim that she was denied the effective assistance of counsel when her attorney failed to argue mitigating factors relative to sentencing, defendant has not articulated any specific factors that were not already known to County Court, nor has she demonstrated that she suffered any prejudice from such an omission (*see People v Ayala*, 194 AD3d 1255, 1257-1258 [3d Dept 2021], *lv denied* 37 NY3d 970 [2021]).

Defendant's remaining contention that the integrity of the grand jury was impaired has been considered and rejected, as has her unpreserved challenge to the jury instructions.

Reynolds Fitzgerald, J.P., and Fisher, J., concur.

Powers, J. (dissenting).

As we believe that defendant – and her mother, the codefendant – have both established the affirmative defense to kidnapping in the second degree by a preponderance of the evidence, we respectfully dissent in both this matter and *People v Hollman* (___ AD3d ___ [3d Dept 2026] [decided herewith]).

Initially, we take no issue with the majority's recitation of the facts elicited at trial and, as a result, do not see a need to reiterate what has already been articulately stated. Similarly, we are in agreement that, due to the failure to preserve the legal sufficiency challenge as to the affirmative defense, whether it had been established by a preponderance of the evidence must be analyzed in the context of the weight of the evidence (*see generally People v Noble*, 244 AD3d 1499, 1500 [3d Dept 2025]; *People v Gomez*, 244 AD3d 1382, 1382 [3d Dept 2025], *lv denied* 45 NY3d 936 [2026]).[1] We are also satisfied that, although a different verdict may not have been unreasonable, the elements of kidnapping in the second degree are supported by the weight of the evidence (*see People v Cole*, 140 AD3d 1183, 1184 [2d Dept 2016], *lv denied* 28 NY3d 970 [2016]; *People v Leonard*, 83 AD3d 1113, 1115 [3d Dept 2011], *affd* 19 NY3d 323 [2012]; *cf. People v Hall*, 247 AD3d 1254, 1257 [3d Dept 2026]).

Our divergence stems from the issue of whether the jury's rejection of the affirmative defense set forth in Penal Law § 135.30 was against the weight of the evidence. As described in more detail by our colleagues, "[a] person is guilty of kidnapping in the second degree when he [or she] abducts another person" (Penal Law § 135.20). While kidnapping by a custodial parent of his or her own child is a legal possibility where the parent's "conduct is so obviously and unjustifiably dangerous or harmful to the child as to be inconsistent with the idea of lawful custody" (*People v Leonard*, 19 NY3d 323, 329 [2012]), it remains an affirmative defense "that (a) the defendant was a relative of the person abducted, and (b) his [or her] sole purpose was to assume control of such person" (Penal Law § 135.30). Thus, based upon the uncontested relation to the child, defendant and the codefendant were required to demonstrate by a preponderance of the evidence that they took the child for the sole purpose of assuming control over her (*see* Penal Law § 135.30; *see also* Penal Law § 25.00 [2]; *People v*

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[1] This is unfortunate, as further review is limited because the Court of Appeals "cannot review a weight of the evidence challenge unless the intermediate appellate court manifestly failed to consider the issue or did so using an incorrect legal principle" (*People v Anderson*, ___ NY3d ___, ___, 2026 NY Slip Op 00967, *1 [2026] [internal quotation marks and citation omitted]). It is, therefore, unlikely that we will have further clarification as to this issue.

Smith, 45 NY3d 286, 289 [2025]). Still, as the majority notes, a relative who takes a child with the purpose of something other than custodial control – such as, "ransom, extortion or terrorization" of the other custodian – will still be guilty of kidnapping (William C. Donnino, Prac Commentaries, McKinney's Cons Laws of NY, Penal Law § 135.00 [internal quotation marks and citation omitted]; *see People v Leonard*, 19 NY3d at 327).

Contrary to the determination made by the majority, we would find that the preponderance of the evidence demonstrates that defendant, together with the codefendant, took the child and secreted her away from the father – ultimately to another state – for the manifest purpose of getting the child away from the father. Stated another way, defendant was acting with the purpose of assuming control over the child (*see* Penal Law § 135.30). The evidence at trial demonstrates that this purpose was driven by a litany of supposed facts that defendant and the codefendant believed to be true and considered to be negatively influencing the child. Specifically, they believed that the father had sexually abused the child, was engaged in the viewing of child pornography and was involved in satanic activities. In addition, defendant asserted that she also believed the father to be unfaithful. Nevertheless, the proof does not reveal that defendant took the child as retribution against the father or as a mechanism to terrorize him. In fact, defendant assured the father multiple times that the child was healthy and safe. Instead, the evidence establishes that defendant took the child for the sole purpose of protecting the child from the father, who defendant believed to be causing the child harm. Regardless of whether these motives were in fact grounded in reality, the proof presented at trial – which included statements defendant made at the time of the taking – established that defendant took the child for the purpose of assuming control of her, thereby meeting the requirements of the affirmative defense (*see* Penal Law § 135.30; *compare People v Leonard*, 19 NY3d at 327; *see generally Vachon v Pugliese*, 931 P2d 371, 378 n 7 [Alaska 1996]).

However, this is not to say that the taking of the child may not have constituted a crime. To the contrary, the underlying facts presented in these appeals are largely consistent with those in cases where the defendants were charged and convicted of the crime of custodial interference (*see* Penal Law §§ 135.45, 135.50; *People v Sharp*, 104 AD3d 1325, 1326 [4th Dept 2013], *lv denied* 21 NY3d 1009 [2013]; *People v Wyne*, 200 AD2d 779, 780 [2d Dept 1994], *lv denied* 83 NY2d 973 [1994]; *People v Morel*, 164 AD2d 677, 682 [2d Dept 1991], *lv denied* 78 NY2d 971 [1991]; *People v S.W.*, 81 Misc 3d 299, 300-301 [Genesee County Ct 2022]; *cf. Matter of Schrotenboer v Soloff*, 74 NY2d 597, 600 [1989]). "A person is guilty of custodial interference in the second degree when . . . [b]eing a relative of a child less than [16] years old, intending to hold such child

permanently or for a protracted period, and knowing that he [or she] has no legal right to do so, he [or she] takes or entices such child from his [or her] lawful custodian" (Penal Law § 135.45 [1]). Relevant to the facts presented, "[a] person is guilty of custodial interference in the first degree when he [or she] commits the crime of custodial interference in the second degree . . . [and, w]ith intent to permanently remove the victim from this state, he [or she] removes such person from the state" (Penal Law § 135.50 [1]).

Although "legal right to do so" is not defined by statute, analogous language can be found in Penal Law § 135.00 (1). Therein it is specified that a person has been restrained when, without consent of "the parent, guardian or other person or institution having lawful control or custody of him [or her] has not acquiesced in the movement or confinement" (Penal Law § 135.00 [1]). Flowing from that definition, the Court of Appeals indicated in *People v Leonard* that "there comes a point where even a custodial parent's control over a child's movements is unlawful, and indeed obviously so" (19 NY3d at 328). As such, there also comes a point where even a custodial parent would become aware they no longer have the legal right to remove the child from the other custodial parent, which could be evidenced by taking the child out of state without notifying the other parent. Consistent with this view, relying upon *People v Morel* (164 AD2d 677), it has been noted that, "[i]n a prosecution for custodial interference, there is no requirement that a court order determining custody be in effect at the time of the taking of the child" (10PT1 West's McKinney's Forms Matrimonial and Family Law § 20A:31 [Feb. 2026 update]). Instead, although "the existence of a custody order at the time of the taking of a child is certainly useful in determining such issues as the respective legal rights of parties to the physical custody of the child, the identity of the child's lawful custodian, and whether the individual who took the child acted with knowledge that he or she lacked the legal right to do so, it is not an essential element to a prosecution for custodial interference" (10PT1 West's McKinney's Forms Matrimonial and Family Law § 20A:31 [Feb. 2026 update]).

Based upon the foregoing, it appears that defendant and the codefendant could have been charged with custodial interference in the first degree notwithstanding the mother's supposed unawareness of the requisite custody order entered after her departure with the child.[2] Yet, the People did not do so, highlighting the truth to the observation

[2] Similar determinations have been made in other states with underlying statutes that mirror the applicable New York statute (*Strother v State*, 891 P2d 214, 221-223 [Alaska Ct App 1995] [collecting cases]). In a comparable case, Alaska's intermediate appellate court was presented with the question of "whether, between two parents who

that came after the Court of Appeals decision in *People v Leonard* that "it is likely that prosecutors will attempt to expand further the use of the kidnapping statute as applied to parents and guardians of children because the penalty for kidnapping will likely be more substantial than the penalty authorized for other applicable crimes" (William C. Donnino, Prac Commentaries, McKinney's Cons Laws of NY, Penal Law § 135.00). Thus, despite the admonition that the decision in *People v Leonard* be read narrowly, the differing penalties to the two crimes likely factored into the People's decision to charge defendant and the codefendant with kidnapping, rather than custodial interference.

All told, because we would find that the jury's rejection of the affirmative defense was against the weight of the evidence (*compare People v Lyons*, 200 AD3d 1222, 1226 [3d Dept 2021], *lv denied* 37 NY3d 1162 [2022]; *People v Gilley*, 163 AD3d 1156, 1157 [3d Dept 2018], *lv denied* 33 NY3d 948 [2019]) and, as a result, defendant's conviction of kidnapping in the second degree should be reversed, we respectfully dissent.

Mackey, J., concurs.

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retain equal right to physical custody of a child, one parent may commit the crime of custodial interference by keeping and concealing a child from the other parent" (*id.* at 220). After an in-depth review of case law, it was determined that "Alaska's custodial interference statutes[, which mirror the New York statute almost verbatim,] embody the rule that, when a child is entrusted to joint custodians, neither custodian may take exclusive physical custody of the child in a manner that defeats the rights of the other joint custodian" (*id.* at 223). As such, "[a] parent's act of peaceably taking sole physical possession of a child does not exceed the parent's legal authority . . . unless the parent also performs other acts that alter the act of taking, converting it into conduct that defeats the custody rights of the other custodian" (*id.* at 224). Therefore, in that case, the father's "act of 'taking' the child was within his legal authority" yet, by removing the child out of state, he had "engaged in acts that undeniably defeated [the mother's] co-extensive right of custody" (*id.*). As a result, "this [additional] conduct was sufficient to constitute the actus reus of the offense of custodial interference: the keeping of [the child] with 'no legal right to do so' " (*id.*, quoting AS § 11.41.330 [a] [1]).

ORDERED that the judgment is affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court