

2007

## Utah v. White : Brief of Appellee

Utah Court of Appeals

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Case No. 20071008-CA

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IN THE  
UTAH COURT OF APPEALS

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State of Utah,  
Plaintiff/ Appellee,

vs.

Brenda Christine White,  
Defendant/ Appellant.

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Brief of Appellee

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Interlocutory appeal in a case charging attempted murder, a first degree felony, and criminal mischief, a second degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable William W. Barrett presiding.

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State of Utah,  
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STATEMENT OF JURISDICTION

This is an interlocutory appeal from a pretrial order denying Defendant's motion for a jury instruction on extreme emotional distress in her trial for attempted murder and criminal mischief. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West 2008).

STATEMENT OF THE ISSUE

Based on the evidence presented and proffered in this attempted murder case, must the trial court instruct the jury on the affirmative defense of extreme emotional distress?

*Standard of Review.* "Whether a trial court committed error in refusing to give a requested jury instruction is a question of law, which [the reviewing court will] review for correctness." *State v. Kruger*, 2000 UT 60, ¶ 11, 6 P.3d 1116, 1118 (2000).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

### Utah Code Ann. § 76-5-203(4) (West 2004):

(4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter.

### STATEMENT OF THE CASE

Defendant was charged by Domestic Violence Information dated 28 April 2006 with attempted murder, a first degree felony, in violation of Utah Code § 76-5-203 (2006), and criminal mischief, a second degree felony, in violation of Utah Code § 76-6-106 (2006). R. 1-2. The information was later amended. R. 241-43 (Addendum A). She was bound over after a preliminary hearing. R. 239-40.



Defendant filed a motion in limine seeking a “pre-trial order authorizing the defense of Extreme Emotional Distress to be presented as a question of fact to the jury.” R. 433. The court denied the motion, ruling that “[t]he information that Defendant White has proffered does not constitute evidence of extreme emotional distress, and there is irrelevant to that defense and may not be presented as evidence of extreme emotional distress.” R. 651, 653 (Addendum B).

Defendant filed a petition for interlocutory review. R. 664-694. The Utah Supreme Court granted the petition and transferred the case to this Court. R. 697.

### STATEMENT OF FACTS<sup>1</sup>

*“I’m going to wipe you off this earth”*

**Preliminary hearing facts.** Defendant was married to Jon White for eleven years. R. 711: 25-26. The marriage was “a rocky ride from the beginning.” R. 711: 66. Jon’s mindset was, “I [can] make this work.” *Id.* The birth of their first child did not, as he expected, solidify the marriage; instead, divorce became a frequent topic of discussion in their home. R. 711: 66-67.

Defendant had always told him that if they divorced, she would make their two daughters hate him. *Id.* At one point, Jon spent a night at his parents’ home,

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<sup>1</sup> Because this is an interlocutory appeal, this Statement of Facts is composed of facts adduced at the preliminary hearing and proffered by the parties. Defendant has not yet been proven guilty beyond a reasonable doubt and thus retains the legal presumption of innocence.

but that night, Defendant called his cell phone and had the girls scream into the phone, "Daddy, Daddy, why did you do this? Why are you hurting us? Why are you doing this to us?" R. 711: 94. Jon testified that "it broke me, and I couldn't do that to my girls at that time." *Id.* He moved back in. *Id.* But he moved out for good in November 2005, and the couple were divorced in July 2006. R. 711: 27-28.

After Jon moved out, Defendant would "constantly call [his] cell phone and abuse [him] . . . [and] do her rants on [him]." R. 711: 99-100. She would call him at all hours, wake him up, and call when she was drunk. R. 711: 100. He finally terminated his cell phone service, and refused to give Defendant his new cell phone number, even though "[s]he asked for it continuously." R. 711: 100.

On 26 April 2006 Jon was working at the Principal Financial Group in Woodland Towers in Salt Lake City. R. 711: 28. Defendant came to his work shortly after noon. R. 711: 31. Because she had harassed people at Jon's work in the past, she was not allowed in the office. R. 711: 31. Jon went out front and informed Defendant that she needed to leave, "because you've harassed employees here before." R. 711: 31, 101. She replied, "I don't have a protective order against me." R. 711: 101. He accompanied her to the elevator and out of the building. R. 711: 32, 101.

Outside, they discussed a term of the divorce settlement, which was that she would keep the home and all the equity in the home, but she had to get the home

put into her name by March 30. R. 711: 32. She wanted Jon to sign a quit claim deed; he refused to do that until his name was taken off the two mortgages encumbering the home. R. 711: 32-33. She said that she was not refinancing the first mortgage because the interest rates were good, and that he was going to have to pay for it while she lived there. R. 711: 102. He explained that he would not deliver a quit claim deed to her until both liens were put in her name alone: "my attorney told me, if you want, we can give you extra time; I'll sign a quit [claim] deed and we'll put it in to trust, and . . . hold on to it until the loan was put in your name." R. 711: 34. Jon said, "you know, you need to actually make an effort here, too. I'm reaching out; you need to reach out also." R. 711: 102-03.

Defendant handed Jon her phone and he explained his position to a bank officer on the phone. When he finished, he walked to her car and returned her phone. R. 711: 33-34, 102. Defendant got "very aggressive," raising her voice, swearing, and impugning Jon. R. 711: 34-35. She told him that his daughters did not love him or want to see him anymore. Then she repeatedly played a song on her car stereo called *Angry John[ny]*. R. 711: 36. The lyrics are something like, "'Johnny, Johnny, angry Johnny; Jezebel, I want to kill you; I want to blow you away.'" And whenever the singer sang the words, "I want to blow you away," Defendant would form her hands in the shape of a gun and point it at Jon's head. R. 711: 37. She did this well over 30 times. R. 711: 37. She said, "'say, isn't this a great

song? Isn't this great how songs can just motivate people? Wouldn't this be great if it was a true song?" R. 711: 37-38. She also lip-synced the lyrics. R. 711: 106.<sup>2</sup>

She stopped playing the song long enough to tell Jon that she needed money for daycare. R. 711: 38. He agreed to pay the daycare provider, as the mediation agreement required him to pay half of daycare expenses; however, she would not tell him where the children were. *Id.* Finally she told him she would pay the entire amount and said that their daughters "don't love you, don't want to talk to you, don't want to see you." R. 711: 39. She also said that they referred to the man she was dating as "Dad," and that she wanted to terminate Jon's parental rights so they could have a dad. R. 711: 38. Jon testified that he would never do that: "My daughters are my life." *Id.* "I will assure you," Defendant said, "you will never see your girls again." R. 711: 39.

In the course of this conversation, Defendant referred to Jon's great-uncle Darrell, who had recently died, saying, "I'm sorry to hear about Uncle Darrell." R. 711: 103. And she mentioned that she had put their dog, Dutch, to sleep. R. 711: 105. They also spoke about Defendant's father. She said, "He takes me out shooting

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<sup>2</sup> The song is "Angry Johnny," a 1995 release by Poe. Here are some of the lyrics: "Johnny, angry Johnny/This is Jezebel in Hell/I wanna kill you/I wanna blow you away/I wanna kill you/I wanna blow you away." <http://www.cmt.com/lyrics/poe/angry-johnny/728580/lyrics.jhtml>

guns a lot. Every time he teaches me how to shoot a gun, I think I'm shooting you."

R. 711: 39.

Jon said he had to return to work. R. 711: 39. Defendant's parting comment was, "you are a parasite on this earth and I'm going to wipe you off this earth." R. 711: 40.

*"I knew she was going to kill me"*

Jon went back to work, but he left at about 4:30 p.m. because he "was really shaken up by what she had said that afternoon." R. 711: 40, 107. He walked out of the building talking by phone to Tiffany Saltzman, his current wife. R. 711: 109. As he walked toward his car in a two-level parking area he heard tires squeal, then heard a car accelerating extremely fast— "faster than [a car] should be underneath covered parking"— and when he turned around he saw Defendant speeding toward him in her Ford Explorer: "I could see that cold, evil expressionless look in her face. I knew she was going to kill me." R. 711: 41-42. He jumped in between two cars "in the nick of time." R. 711: 42, 111.

Jon jumped over a three-foot cement wall and ran back toward the building, "yelling to people to call 911." R. 711: 43. A co-worker said, "we already have." *Id.* People were screaming. *Id.* Jon kept running toward what he thought would be the relative safety of Woodland Towers. *Id.* As he got to the building, he turned

around and saw Defendant speeding through the visitor parking area; people were yelling, “get in the building.” R. 711: 44.

He entered the first set of doors, then the second set of doors, and “actually, for a split second, had a sense of security,” but “it wasn’t even a full second.” *Id.* Defendant crashed her Ford Explorer through the building, hitting Jon and knocking him about ten feet, leaving him dazed. *Id.* He remembered, as he hit the ground, “thinking I was dead; ‘I’m not going to get out of this.’” *Id.* But he got up and ran. R. 711: 45. He headed down the middle corridor connecting the east entrance with the west lobby: “I just ran for my life.” *Id.* Defendant sped up and hit him again, spinning him around on the ground. *Id.* He tried to keep running, but he could not put any pressure on his left leg, so he hopped down a hallway, went into a service room, and put his back up against the door, “just scared that she was going to come in there.” *Id.* He was “shaking, bleeding, and just praying to God that [he could] live.” R. 711: 45-46. About twenty minutes later, paramedics arrived, stabilized him, and transported him to the hospital. R. 711: 51.

Jon suffered cuts and abrasions over his body, including cuts on both hands, his chest, and the backs of his legs. R. 711: 51-52. His ankle was shattered, requiring three surgeries. R. 711: 52. He was on crutches for over fifteen weeks. R. 711: 53. He still experiences a lot of pain; he can no longer run or play football, basketball or softball; walking is “very, very uncomfortable.” R. 711: 58.

Jon has since moved to Iowa; he has not returned to work due to post-traumatic stress syndrome, for which he is seeing a counselor. R. 711: 120.

Defendant's driving caused an estimated \$50,000 to \$100,000 worth of damage to the office building. R. 711: 19, 24.

On 26 April 2006, Jon had a life insurance policy; Defendant was the named beneficiary. R. 711: 59.

*"The final straw that broke the camel's back"*

**Defense proffers.** In her motion in limine seeking a jury instruction on extreme emotional distress manslaughter, Defendant proffered additional facts orally and in writing. These proffers included the following:

Approximately two years before the date of the offense, Jon viewed pornography on their home computer, prompting a visit to the home by law enforcement to investigate a possible child pornography violation. R. 443; R. 711: 76. Also, between two and three years before the date of the offense, Jon "forced" Defendant to engage in a "sexual threesome" with one of his co-workers. R. 443; R. 711: 74-76. After Jon moved out of the house, Defendant discovered that he had been having an affair. R. 443. He continued to see the woman throughout the divorce process. R. 443-44.

About a month and a half after "a wonderful anniversary weekend," Jon returned from a business trip where Tiffany Saltzman worked, and "over a very

short period of time," he told Defendant that was moving out and seeking a divorce. R. 711: 77. And he was "constantly text-messaging [Saltzman] on the cell phone." R. 711: 78. Also during this time, Jon was seeing less of their children and he began to withdraw from participating with them. R. 446. He was also uncooperative in coordinating visitation. R. 446.

When Defendant sought Jon's cell phone number "to try to have him have contact with his daughters, . . . have an emergency number for him in the event that something happened and they needed to get hold of him," he either denied that he had a cell phone or "refused to give her the cell-phone number." R. 711: 78. On the date of the incident, Jon "came walking out of the building . . . talking on a cell phone to the woman he was having . . . an extramarital affair with, with whom he is now married." R. 711: 75-76. This was for Defendant "the final straw that broke the camel's back." R. 711: 78.

There were also factors "outside of" Jon. R. 711: 79. Defendant was seeing a therapist, who had prescribed certain medication. R. 711: 79. Because she was no longer covered by Jon's health insurance, she was relying on samples from the therapist. R. 711: 79. Three weeks before the crime, Defendant's therapist died unexpectedly, which "cut off medication, cut off therapy, cut off everything. And three weeks later, we have this incident." R. 711: 79.



As a result of the divorce, Defendant was forced to work but still did not have enough money to pay her bills. R. 444-48. A mediation agreement was “forced down her throat” as a result of “[p]oor legal advice” and the fact that she was not receiving any financial support from Jon. R. 444-45. Her lawyer obtained no temporary orders. R. 445.

During this time, Jon was to provide health coverage for the family but on two occasions he cancelled the coverage, causing a lapse in her ability to acquire medication. R. 445.

*“Defendant White was not crying, upset, or emotional”*

**Prosecution proffers.** The prosecutor proffered facts in her memorandum opposing Defendant’s motion in limine. These proffers included the following:

After Defendant contacted the police in December 2005 to report her suspicion that Jon had viewed and stored child pornography on their home computer, the police reviewed the materials supplied by Defendant and found no evidence of child pornography. R. 462.

Shortly after the attack, while still seated in the Explorer, Defendant called Jon’s sister and told her that she thought she had just killed Jon. R. 460. Defendant’s “tone of voice was matter-of-fact and unemotional.” R. 460. Deputy Terry McQueen approached Defendant while she was still seated in the driver’s seat of the Explorer. Deputy McQueen observed that “Defendant White was not crying,

upset, or emotional.” R. 460. Deputy McQueen also observed one empty prescription medication bottle in the car and another in Defendant’s purse. R. 460.

Defendant was taken to Cottonwood Hospital, released, and interviewed at the Salt Lake County Sheriff’s Office by Detective Brent Adamson. R. 460. Defendant told Detective Adamson that she “got into a car accident” and drove through a building because she “took too much medication.” R. 460. She later told the detective she was on Xanax, took Lexapro every other day, and had taken nine Valium capsules before returning to Jon’s work that afternoon. R. 460-61.<sup>3</sup>

When told she was under arrest for running over her spouse, Defendant expressed confusion about how Jon could have been injured and said that he was not even in front of her. R. 461. She recounted that she had gone to Jon’s work at about noon that day to ask for his help in obtaining a second mortgage and described their conversation as “very decent.” R. 461. Jon had asked how she was doing and arranged to pick up the children that weekend. *Id.* Jon told her that he was not going to sign anything, but to get the papers from the bank and he would look them over. She told him that was “fine.” *Id.* When she returned later that afternoon and saw Jon in the parking lot, she called to him through her car window,

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<sup>3</sup> Potential side effects of Valium include unusual risk-taking, decreased inhibitions, no fear of danger, depressed mood, suicidal thoughts, hyperactivity, agitation, and hostility. <http://www.drugs.com/valium.html>.

asking him to sign the papers, and explained that she “was just trying to chase him to get the papers.” *Id.* When Jon went inside the building, her “foot went on the pedal and [she] went through a building, and the other side of the building stopped [her] car.” *Id.* She denied hitting Jon with the car. *Id.*

### SUMMARY OF ARGUMENT

The trial court correctly ruled that the evidence did not warrant instructing the jury on Defendant’s claimed defense of extreme emotional distress.

It is an affirmative defense to a charge of attempted murder that the defendant attempted to cause the death of another under the influence of extreme emotional distress for which there is an explanation or excuse that is reasonable from the viewpoint of a reasonable person under the circumstances.

Here, however, the evidence of extreme emotional distress is so slight that all reasonable people would reject it. Defendant points to evidence that her husband was unfaithful, that he forced her to engage in a sexual threesome, that he viewed pornography in the home, that he left her after a pleasant anniversary getaway, that he was uncooperative in the course of their divorce proceedings, that he shirked his parental responsibilities and hampered hers, and that she was financially strapped and had trouble obtaining needed medications. When she saw him talking on a cell phone he had earlier denied owning, according to the proffer, she snapped and attempted to run him over.

These circumstances do not justify an instruction on extreme emotional distress. They describe common frustrations that would not drive a reasonable person into a homicidal frenzy. They are remote in time, occurring weeks or even years earlier. They ignore the fact that Defendant explicitly threatened to kill Jon four hours before the alleged attempt. Her claimed provocation—seeing him talking on a cell phone—is negligible compared to the provocations described in Utah manslaughter cases. Finally, according to Jon’s account, the attack was cold and calculated; according to Defendant’s statement to police, it was an accident.

The instant case presents no facts similar to Utah manslaughter cases, such as knife play or pistol-whipping. On the contrary, our courts have held that no instruction is required where a heated argument is followed by a cooling-off period, where jealousy over an ex-girlfriend complicated by child custody issues causes hurt feelings, or where a family friend was ill-treated by her husband. The instant case is similar to these.

To mitigate a charge of murder or attempted murder, a defendant’s emotional distress must be *extreme*. While the average reasonable person might under the circumstances of this case have been so enraged as to write the victim an angry letter, stalk him, slander him, or even strike him, she would not have been so enraged as to attempt to kill him. Defendant’s claim thus fails.

## ARGUMENT

### THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A JURY INSTRUCTION ON EXTREME EMOTIONAL DISTRESS

Defendant claims that “[t]he trial court erred in denying [her] motion in limine to introduce the affirmative defense of extreme emotional distress to the jury.” Br. Aplt. at 12 (capitalization, boldface, and underlining omitted).

In support of this claim, Defendant contends that the trial court made four errors of law: (1) ruling that Defendant did not present sufficient evidence to justify instructing the jury on extreme emotional distress; (2) failing to view the evidence from the viewpoint of a reasonable person under the then-existing circumstances; (3) ruling that Defendant’s stressors were “too remote in time and lacking a highly provocative triggering event”; and (4) ruling that Defendant “did not lose self-control, had a plan and was aware of what she was doing” at the time she allegedly committed the crime. Br. Aplt. at 12-13.

Defendant’s claim is based on the facts summarized in her brief, which, she argues, are “more than sufficient evidence to meet the corrected standard of presenting the case to the jury on the defense of extreme emotional distress.” Br. Aplt. at 11. She “insists there is ample basis in the evidence developed thus far, and perhaps even additional evidence to be developed, to support her theory.” Br. Aplt. at 14.

**Trial courts' ruling.** The trial court ruled that "[t]he circumstances proffered by Defendant White do not constitute extreme emotional distress, therefore there is no rational basis in the evidence for the defendant's theory that she committed Attempted Manslaughter rather than Attempted [Murder]." R. 651. The court ruled that Defendant did not present "a sufficient quantum of evidence to warrant jury instructions on the defense of extreme emotional distress." *Id.*

The court acknowledged that Defendant had cited "marital difficulties, financial stress, difficulties with the divorce, and the death of Ms. Talbot [her therapist who was providing medication samples] as stressors that accumulated over time to create a situation wherein she lost self-control on the day of the incident." *Id.* Nevertheless, the court ruled that it was "required to evaluate how these stressors would impact the average reasonable person, and whether these stressors would cause a reasonable person to experience a loss of self-control." *Id.*

**Controlling law: manslaughter.** Traditionally, manslaughter was viewed as a lesser included offense of murder. Thus, in 1973, a homicide was deemed to be manslaughter if the actor "[c]auses the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." Utah Code Ann. § 76-5-205(b) (Allen Smith Co. 1973). At that time, the statutory definition of "reasonableness" incorporated a subjective component:

The reasonableness of an explanation or excuse of the actor . . . shall be determined from the viewpoint of a person in the actor's situation *under the circumstances as he believes them to be*.

Utah Code Ann. § 76-5-205(c)(2) (Allen Smith Co. 1973) (emphasis added).

In 1985, the Legislature made three significant changes to the definition of manslaughter. First, it excised the term *mental* from the phrase “extreme mental or emotional disturbance,” thereby rendering the phrase “extreme emotional disturbance.” Utah Code Ann. § 76-5-205 (1985). Second, it excluded “mental illness” from the definition of “emotional disturbance.” *Id.* Thirdly, and most relevant here, it replaced the subjective test with an objective one: it specified that the reasonableness of an actor's explanation for his extreme emotional disturbance should be judged not from the viewpoint of a person in “the circumstances as he believes them to be,” but from the viewpoint of a *reasonable* person in the actual circumstances:

The reasonableness of an explanation or excuse . . . shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

*Id.*

In 1999, the Legislature recast manslaughter as an “affirmative defense” reducing a charge from murder to manslaughter or attempted murder to attempted manslaughter. It also changed *disturbance* to *distress*:

It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; . . .

Utah Code Ann. § 76-5-205 (1999). In addition, while retaining the objective definition of reasonableness and the exclusion for mental illness, the Legislature added a second exclusion, declaring that “emotional distress does not include: . . . distress that is substantially caused by the defendant’s own conduct.” *Id.* This is the form of manslaughter that was in effect at the time of the instant charged offense and in effect today.<sup>4</sup>

Thus, under Utah’s statutory scheme, extreme emotional distress manslaughter is no longer a lesser included offense to the crime of murder; it is an “affirmative defense” reducing a charge of aggravated murder to murder, or a charge of murder to manslaughter. Utah Code Ann. § 76-5-203(4)(a)(i), -(d) (West 2000); *State v. Low*, 2008 UT 58, ¶ 24. Its parameters are clear in the statute:

- (1) the defendant acted “under the influence of extreme emotional distress for which there is a reasonable explanation or excuse”;
- (2) defendant’s distress is not the result of “mental illness as defined in section 76-2-305”;
- (3) defendant’s distress is not “substantially caused by the defendant’s own conduct”; and

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<sup>4</sup> The section was renumbered in 2000. See Utah Code Ann. § 76-5-203 (2000).



(4) the explanation or excuse for defendant's distress must be reasonable "from the viewpoint of a reasonable person under the then existing circumstances."

Utah Code Ann. § 76-5-203(4) (West 2004).

**Controlling law: affirmative defenses.** Unless otherwise provided by statute, when a defendant presents evidence of an affirmative defense, the prosecution must negate it by proof beyond a reasonable doubt. Utah Code Ann. § 76-1-502 (West 2004); *Low*, 2008 UT 58, ¶ 46. Cf. Utah Code Ann. § 76-5-205.5 (West 2004) (tacitly placing the burden of establishing "special mitigation" by a preponderance of the evidence on the proponent of special mitigation). This is a statutory requirement, not a constitutional one. *See, e.g., Patterson v. New York*, 432 U.S. 197 (1977) (approving a statute placing upon the accused the burden to establish by a preponderance of evidence that he acted under an extreme emotional disturbance).

"When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented . . . that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant." *Low*, 2008 UT 58, ¶ 25. However, a defendant is not entitled to an instruction if the evidence of extreme emotional distress is "so slight that all reasonable people would have to conclude

against the defendant on that point.” *State v. Piansiaksone*, 954 P.2d 861, 871 (Utah 1998) (citing *State v. Harding*, 635 P.2d 33, 34 (Utah 1988); *State v. Castillo*, 23 Utah 2d 70, 72-73, 457 P.2d 618, 620 (1969)). The court may even refuse to instruct on a defense theory supported by a defendant’s own testimony, if the “great weight of the evidence . . . runs contrary to defendant’s claim.” *State v. Kell*, 2002 UT 106, ¶ 24, n. 5, ¶ 25, 61 P.3d 1019.

In determining whether the trial court correctly refused to instruct on a claimed defense, the appellate court will view the evidence in the light most favorable to the defense. *State v. Talarico*, 57 Utah 229, 193 P. 860, 861 (Utah 1920). *Cf. State v. Spillers*, 2007 UT 13, ¶ 10, 152 P.3d 315 (“When considering whether a defendant is entitled to a lesser included offense jury instruction, we view the evidence and the inferences that can be drawn from it in the light most favorable to the defense”) (citation and internal quotation marks omitted).

**A. The court correctly viewed the evidence from the viewpoint of a reasonable person.**

Defendant claims that the trial court “omitted an important subjective statutory perspective” and failed to view the evidence from the viewpoint of the reasonable person under the then-existing circumstances when it ruled as a matter of law that the proffered evidence “would not cause the average reasonable person to suffer from extreme emotional distress.” Br. Aplt. at 12.

The court ruled that the “extreme emotional distress defense is available only to defendants who have been subjected to stress that would cause the average reasonable person to have an extreme emotional reaction and experience a loss of self-control.” R. 651. The court was therefore required to evaluate how Defendant’s marital difficulties and divorce, her financial stress, and the death of her therapist “would impact the average reasonable person, and whether these stressors would cause a reasonable person to experience a loss of self-control.” *Id.* The court ruled that these stressors “do not rise to this level; they are common occurrences that are endured by many people, and in this case do not justify the attempted homicide of Jon White.” R. 652. The court’s ruling was correct.

Defendant, relying on an opinion from the New York Court of Appeals, argues that the reasonableness assessment “should be made by viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been.” Br. Aplt. at 16-17 (quoting *People v. Casassa*, 404 N.E.2d 1310, 1316 (N.Y. 1980)).

Defendant’s reliance on *People v. Casassa* is misplaced. That opinion from the New York Court of Appeals construes a New York statute declaring that the reasonableness of an excuse “is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to

be.” *Id.* at 1315-16. This language is materially identical to the Utah manslaughter statute prior to the 1985 amendment, which in fact *Casassa* cites. *Id.* at 1316. As explained above, however, the 1985 amendment replaced this subjective aspect of the statute with a purely objective standard.

Now the defense is available only to those who kill under the influence of extreme emotional distress for which there is a *reasonable* explanation or excuse:

(4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; . . .

Utah Code Ann. § 76-5-203(4)(a)(i). The statute reiterates that “[t]he reasonableness of an explanation or excuse . . . shall be determined from the viewpoint of a reasonable person under the then existing circumstances.” § 76-5-203(4)(c). In fact, the term *reasonable* or its variant appears five times in subsection 76-5-203(4).

This reasonably explained distress, then, must be of sufficient intensity that it would overwhelm the self-control of “the average reasonable person”:

[A] person suffers from an extreme emotional disturbance “when he is *exposed* to extremely unusual and overwhelming stress” such that

the average reasonable person under that stress would have an extreme emotional reaction to it, as a result of which he would experience a loss of self-control and that person’s reason would be overborne by intense feelings such as passion, anger, distress, grief, excessive agitation, or other similar emotions.

*State v. Shumway*, 2002 UT 124, ¶ 9, 63 P.3d 94 (construing same standard in lesser included offense context) (quoting *State v. Bishop*, 753 P.2d 439, 471 (Utah 1988) (opinion of Hall, C.J., with one justice concurring on this point), *overruled on other grounds by State v. Menzies*, 889 P.2d 393 (Utah 1994)).<sup>5</sup>

The trial court thus correctly applied an objective, reasonable-person standard in assessing whether there was a reasonable explanation or excuse for the extreme emotional distress Defendant claims to have been suffering at the time of the alleged offense.

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<sup>5</sup> The question of which provocations are “reasonable” presupposes value judgments about which types of homicides deserve a measure of lenity under law and which do not. See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331 (1997). Nourse argues that mitigation should be reserved for only those killers who kill “with a rage shared by the law”:

In every provoked murder case the laws risks the embrace of revenge. To maintain its monopoly on violence, the State must condemn, at least partially, those who take the law in their own hands. At the same time, however, some provoked murder cases temper our feelings of revenge with the recognition of tragedy. Some defendants who take the law in their own hands respond with a rage shared by the law. In such cases, we “understand” the defendant’s emotions because these are the very emotions to which the law itself appeals for the legitimacy of its own use of violence. At the same time, we continue to condemn the act because the defendant has claimed a right to use violence that is not his own.

*Id.* at 1393. Defendant here did not “respond with a rage shared by the law.”

**B. The trial court correctly ruled that Defendant's stressors were too remote in time and lacked a triggering event.**

Defendant claims that the trial court erred by ruling that Defendant's stressors were "too remote in time and lacking a highly provocative triggering event." Br. Aplt. at 12.

The court ruled that "[t]he reasonableness of these stressors as an adequate excuse or explanation for a loss of self-control is further diminished by the length of time between the stressors and the incident." R. 652. Here, several of Defendant's stressors—the threesome, the pornography investigation, and the death of her therapist—preceded the incident by "several weeks to years." R. 652. This delay contrasts sharply, the court noted, with the supreme court's two most recent extreme emotional distress cases, *Shumway*, 2002 UT 124, and *Spillers*, 2007 UT 13. Again, the court's ruling was correct.

Shumway, a 15-year-old boy, killed his friend Chris with a butcher knife during a sleepover at the friend's house. 2002 UT 124, ¶ 2. An argument over a videogame spiraled out of control when Chris, who had a reputation for being a "hothead" and losing his temper, retrieved a knife and lunged at the Shumway. *Id.* Evidence suggested that Shumway had endured years of bullying by his peers, and that "all of this 'came out on Chris' when the boys fought over the knife." *Id.* The

supreme court ruled that Shumway was entitled to an extreme emotional distress instruction. 2002 UT 124, ¶ 13.

Spillers and his friend Bo argued, Bo accusing Spillers of having “snitch[ed]” on him to drug enforcement agents. *Spillers*, 2007 UT 13, ¶ 3. According to Spillers, Bo, who had a reputation for violence, retrieved a firearm and struck Spillers on the back of the head, a blow that left him “cloudy, dazed, uncomfortable, and scared.” *Id.* Bo then approached him “with his arm cocked to strike again.” *Id.* Spillers then shot him dead. *Id.* The supreme court ruled that Spillers was entitled to an extreme emotional distress instruction. 2007 UT 13, ¶ 20.

The case at bar presents nothing remotely comparable to what Shumway and Spillers faced. Shumway alleged that Christopher lunged at him with a kitchen knife; Spillers alleged that Bo clubbed him over the head with a gun; Defendant alleges that Jon talked on a cell phone. Common experience teaches that, while the rational faculties of an “average reasonable person” might be overborne by intense feelings such as passion or anger by aggressive knife play or pistol-whipping, the same is not true of seeing someone talking on a cell phone. *Shumway*, 2002 UT 124, ¶ 9. Lumping the three into the single category of “initiating incident[s],” as Defendant does, blurs crucial differences in magnitude. Br. Aplt. at 22.

Again relying on New York precedent, Defendant argues that the inquiry is not whether a killing (or in this case, an attempted killing) was reasonable, but

whether the defendant's explanation for her extreme emotional reaction is reasonable. Br. Appt. at 17 (quoting *People v. Liebman*, 583 N.Y.S.2d 234, 241 (N.Y. App. Div. 1992)). The law in Utah is similar. A prosecutor's statement that "the jury had to find a reasonable justification for the killing rather than a reasonable justification for appellant's extreme emotional disturbance" was deemed by this Court to be "clearly a misstatement of the law." *State v. Lopez*, 789 P.2d 39, 45 (Utah App. 1990).

Nevertheless, Defendant's argument fails. The reasonableness inquiry cannot be plucked from its context. Defendant asserts extreme emotional distress as a defense to a charge of attempted murder. "[T]he plain intent of our statutory scheme is to mitigate the crime of murder where a defendant's conduct was clearly wrong but where the circumstances were so provocative that even a reasonable person might have reacted similarly." *Shumway*, 2002 UT 124, ¶ 12 (stating, without criticism, the State's argument). The question is not whether the average reasonable person might, under the then-existing circumstances, have been so enraged as to write the victim an angry letter, stalk him, slander him, or even strike him. It is whether the average reasonable person might, under the then-existing circumstances, have been so enraged as to kill him. Any lesser showing is logically insufficient to mitigate a charge of murder.



Attempted murder is an extreme act. Extreme actions are partially excused under the law only by extreme emotional distress, which must in turn be explained or excused by extreme provocations. The flaw in Defendant's claim is that her alleged extreme emotional distress rests on common provocations. As the prosecutor argued below, most people have endured stressful times with their spouses or parents, as well as financial stress. R. 711: 82. Adultery, divorce, deceit, mental health issues, and financial stress are, unfortunately, common, not extreme.

Finally, implicit in the trial court's ruling here is an acknowledgement that an emotional disturbance may be defused by a cooling-off period. *State v. Clayton*, 658 P.2d 624 (Utah 1983), demonstrates this. After a Provo bar fight, Clayton went home, retrieved a gun, and, about twenty minutes after leaving the bar, returned to it, argued with the victim, then shot and killed him. *Id.* at 625. The supreme court had little trouble affirming the trial court's refusal to instruct on extreme emotional disturbance. "The passage of time between the fight and defendant's return to the bar tends to negate the 'heat of passion' explanation," it wrote. *Id.* at 626.<sup>6</sup> "Further, defendant testified that in returning to the bar he acted purposefully with

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<sup>6</sup> The "extreme emotional disturbance" standard "reformulates and enlarges" the earlier "heat-of-passion standard to include any extreme emotional disturbance based on a reasonable excuse or explanation that mitigates the blameworthiness of the homicide." *State v. Standiford*, 769 P.2d 254, 259 (Utah 1988).

the stated intent of collecting from the victim the title to his car and some money owed him.” *Id.*

The supreme court held that Clayton’s 20-minute cooling off period tended to negate a heat-of-passion defense; Defendant here had a cooling off period of about four hours. R. 711: 31, 40. Like Clayton, Defendant returned to the scene of an argument (according to Jon’s testimony) or a discussion (according to Defendant’s statement to police) with a purpose related to a property dispute. *Clayton* also demonstrates that the trial court was correct in discounting Defendant’s principal stressors on the ground that they preceded the incident by “several weeks to years.” R. 652.

The point of these cases is not that a defendant’s personal history can never contribute to a finding of extreme emotional distress—after all, the court cited Shumway’s history of being bullied in ruling that he was entitled to a manslaughter instruction. But the cases demonstrate that personal history must be coupled with, and play a supporting role to, some proximate, highly provocative event. In Shumway’s case, that was a physical struggle coupled with his victim’s knife play. No Utah case holds that anything so slight as seeing an ex-spouse talking on a cell phone, coupled with various common frustrations experienced over the previous two to three years, reasonably explains or excuses emotional distress sufficiently extreme to mitigate an attempted murder.

**C. The trial court correctly ruled that Defendant did not in fact lose self-control.**

Defendant claims that the trial court erred in ruling that Defendant “did not lose self-control, had a plan and was aware of what she was doing” at the time she allegedly committed the crime. Br. Aplt. at 13.

The court observed in the motion hearing, that from “a reasonable person’s point of view, this almost looks to me like she planned it.” R. 714: 15. The court later concluded that “[t]he circumstances of the crime itself indicate that Defendant White had not lost self-control at the time of the incident, but appeared to be acting in accordance with a plan.” R. 652. The court cited the fact that the disagreement over the quit-claim deed preceded the incident by more than four hours, and that Defendant negotiated a “complicated driving pattern” in her pursuit of Jon White. *Id.* These factors indicate that Defendant “was aware of what she was doing and was in control of her faculties during the time in question.” *Id.*

The extreme emotional distress defense has a subjective prong and an objective prong. The subjective prong is that the actor must have acted “under the influence of extreme emotional distress.” Utah Code Ann. § 76-5-203 (3)(a)(i); *Piansiakson*, 954 P.2d at 871 (error in instructions mandating order of deliberation harmless where record did not show that the defendant’s alleged dislike of victim “suddenly overwhelmed [his] self-control and caused him to kill the victim”); 2

Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 7.10(a), (c) (1986) (voluntary manslaughter as result of “reasonably induced emotional disturbance” requires that “[t]he defendant must have been in fact provoked”).

The objective prong is that there must be “a reasonable explanation or excuse” for defendant’s extreme emotional distress “from the viewpoint of a reasonable person under the then existing circumstances.” Utah Code Ann. § 76-5-203(4).

To qualify for the defense, a defendant must adduce credible evidence of both prongs. It is not sufficient that Defendant experienced an extreme emotional disturbance if an average reasonable person would not have. But neither is it sufficient that an average reasonable person would have experienced an extreme emotional disturbance if Defendant in fact did not.

Here, the uncontroverted evidence presented and proffered in the district court supports the court’s observation that Defendant did not lose self-control. She confronted Jon at noon and they discussed the quit claim deed. But then she repeatedly played *Angry Johnny* on her car stereo, lip-syncing the lyrics and making shooting gestures. R. 711: 36-37, 106. She said, “Wouldn’t this be great if it was a true song?” R. 711: 37-38. She referred to Jon’s great-uncle Darrell, who had recently died. R. 711: 103. She mentioned that she had put their dog to sleep. R. 711: 105. She remarked that whenever she goes shooting, “I think I’m shooting you.” R. 711: 39. And she ended their conversation with an explicit threat: “you are

a parasite on this earth and I'm going to wipe you off this earth." R. 711: 40. This is powerful evidence of a planned attack; rarely does such explicit evidence of intent to kill come from the killer's own mouth. And these statements were made four hours before Defendant's claimed provocation.

As to their next encounter, Jon's version of events and Defendant's version of events diverge. According to Defendant's statement to police, the incident was an accident. She left Jon's place of work, went home, and took nine Valium capsules. R. 460-61. When she returned that afternoon and saw Jon in the parking lot, she called to him through her car window, asking him to sign the papers, and explained that she "was just trying to chase him to get the papers." R. 461. When Jon went inside the building, her "foot went on the pedal and [she] went through a building, and the other side of the building stopped [her] car." *Id.*

Jon's testimony, on the other hand, described a premeditated attack. He heard Defendant's tires squeal, saw her Ford Explorer speeding toward him, and saw a "cold, evil expressionless look in her face." R. 711: 42. He jumped between two cars "in the nick of time." R. 711: 42, 111. He hopped a three-foot cement wall and kept running toward what he thought would be the relative safety of Woodland Towers. R. 711: 43. Right after he entered the building, Defendant crashed her vehicle through the building, hitting Jon and knocking him about ten feet, leaving him dazed. R. 711: 44. As he got up and "ran for [his] life," Defendant chased him

down the middle corridor connecting the east entrance with the west lobby and hit him again. R. 711: 45.

Neither version of the facts describes Defendant as in fact suffering extreme emotional distress. Accordingly, the court was justified in concluding that, from “a reasonable person’s point of view, this almost looks . . . like she planned it.” R. 714: 15. But, again, even if Defendant in fact suffered extreme emotional distress, she is nevertheless not entitled to a jury instruction on that defense unless an average reasonable person under the existing circumstances would also have that reaction.

**D. The court properly ruled that the evidence did not justify a jury instruction on extreme emotional distress.**

Finally, Defendant claims that the trial court erred in ruling that she did not present sufficient evidence to justify instructing the jury on extreme emotional distress. Br. Aplt. at 12. This claim in effect summarizes Defendant’s entire position: the testimony presented and proffered below was sufficient to warrant a jury instruction on extreme emotional distress.

A review of the relevant precedents here demonstrates convincingly that the facts of this case are insufficient to warrant an extreme emotional distress instruction.

**Instruction required.** The salient cases in which Utah courts have required a jury instruction on extreme emotional distress (or disturbance) are *Shumway* and

*Spillers*, discussed above. Briefly, Shumway, a 15-year-old boy with a history of being bullied at school, killed his friend Chris after Chris lunged at him with a knife. *Shumway*, 2002 UT 124, ¶ 10. Spillers killed his friend Bo during an argument in which Bo retrieved a firearm and struck Spillers on the back of the head, a blow that left him “cloudy, dazed, uncomfortable, and scared.” *Spillers*, 2007 UT 13, ¶ 20.

The case at bar presents no provocation remotely comparable to what Shumway and Spillers experienced.

**Instruction not required.** The instant case more closely resembles *Clayton*. Twenty minutes after a bar fight, Clayton returned with a gun for the purpose of obtaining a car title and a loan repayment. He shot and killed the victim. The supreme court ruled that the “passage of time between the fight and defendant’s return to the bar tends to negate the ‘heat of passion’ explanation.” *Clayton*, 658 P.2d 626.

Like Clayton, Defendant returned to the scene of an earlier confrontation about a property title, but she did so after a four-hour cooling off period rather than a 20-minute one. Also, her weapon of choice was a Ford Explorer rather than a gun. But in both cases, the cooling-off period undermines the claim that Defendant acted under extreme emotional distress.

In *Piansiaksone*, the supreme court saw “no basis in the evidence to support the view that Piansiaksone killed the victim as the result of an extreme emotional

disturbance.” 954 P.2d at 871. Piansiaksone was told by Nuk, someone he respected as an older brother, that the victim was beating Nuk’s sister and ‘disrespecting his family.” The court found “conspicuously absent” any evidence that “Nuk worked Piansiaksone into a frenzy.” *Id.* It found no basis for concluding that anything “suddenly overwhelmed Piansiaksone’s self-control and caused him to kill the victim.” *Id.*

The very factors the supreme court found “conspicuously absent” in Piansiaksone’s defense are also absent here. The instant record contains no evidence that Jon or anyone else “worked [Defendant] into a frenzy,” or even that she was in a frenzy. *Id.* In addition, Defendant can point to no provocation reasonably able to suddenly overwhelm her self-control and cause her to attempt to kill the victim.

In *State v. Price*, 909 P.2d 256, 263 (Utah App. 1995), this court concluded that the record was “devoid” of any evidence of extreme emotional distress. Price shot his ex-girlfriend. Earlier in the evening she went out with another man, leaving their child in the care of a friend. When Price asked to pick the child up, the friend refused. Later that evening Price confronted the ex-girlfriend and became frustrated when she “just ran off at the mouth” and “hurt his feelings.” *Id.* at 258, 263. When apprehended, Price was “crying and visibly shaken.” *Id.* at 258. This court held that frustration and hurt feelings do not rise to the level of extreme emotional disturbance. *Id.* at 263. Like Price, Defendant here points to domestic frustrations to



justify her claim of extreme emotional distress. She claims more of a history of frustration than Price apparently did, but no greater immediate provocation.

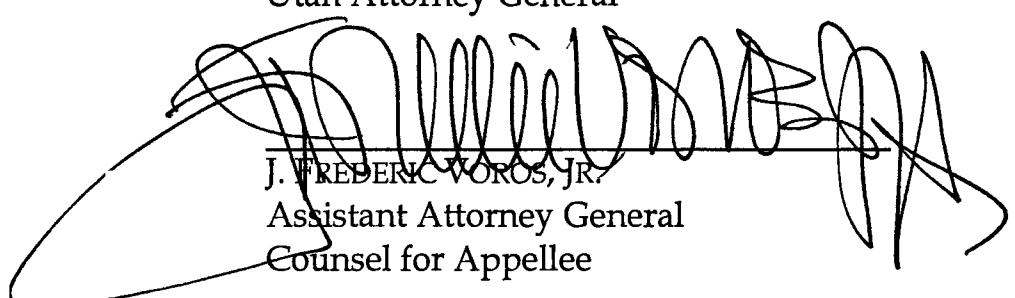
The trial court correctly ruled that, as a matter of law, even viewing the presented and proffered evidence in the light most favorable to defendant, that evidence is "so slight that all reasonable people would have to conclude against the defendant on that point." *Piansiaksone*, 954 P.2d at 871.

### CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the district court.

Respectfully submitted September 2, 2008.

MARK L. SHURTLEFF  
Utah Attorney General



J. FREDERIC VOROS, JR.  
Assistant Attorney General  
Counsel for Appellee

## CERTIFICATE OF SERVICE

I certify that on September 2, 2008, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Jason A. Schatz  
Schatz, Anderson & Uday LLC  
57 West 200 South, #200  
Salt Lake City, Utah 84101

*Lee Nakamura*

A digital copy of the brief was also included: ☐ Yes ☒ No

# Addendum A

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**FILED DISTRICT COURT**  
Third Judicial District

JAN 22 2007

SALT LAKE COUNTY

By WAO Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

**BRENDA CHRISTINE WHITE**  
DOB 11/19/75,  
AKA **BRENDA CROSSLEY**  
6134 So. Karos Cir.  
Taylorsville, UT  
529-17-0241  
OTN 16816258  
SO# 296951

Defendant.

Screened by: A. Cook  
Assigned to: A. Cook (Thursday)  
DAO # 06007842

BAIL: \$500,000  
Warrant/Release: IN JAIL

**AMENDED  
DOMESTIC VIOLENCE  
INFORMATION**

Case No. 061902834FS  
Judge Robin W. Reese

The undersigned under oath states on information and belief that the defendant committed the crimes of:

**COUNT I**

**ATTEMPTED CRIMINAL HOMICIDE, MURDER (DOMESTIC VIOLENCE)**, a First Degree Felony, at 4021 South 700 East, in Salt Lake County, State of Utah, on or about April 26, 2006, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended, in that the defendant, **BRENDA CHRISTINE WHITE**, a party to the offense, attempted to intentionally cause the death of Jon White, and Jon White or another suffered serious bodily injury in the course of the defendant's commission of the offense.

AMENDED INFORMATION

DAO No. 06007842

Page 2

COUNT II

**CRIMINAL MISCHIEF**, a Second Degree Felony, at 4021 South 700 East, in Salt Lake County, State of Utah, on or about April 26, 2006, in violation of Title 76, Chapter 6, Section 106, Utah Code Annotated 1953, as amended, in that the defendant, **BRENDA CHRISTINE WHITE**, a party to the offense, intentionally damaged, defaced, or destroyed the property of Woodland III Holdings, LLC, causing a pecuniary loss to Woodland III Holdings, LLC equal to or in excess of \$5,000 in value.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

B. Adamson, J. White, T. White, C. Low, N. White, L. Haun, M. Henry, B. Zimmerman, A. Low, J. Hansen, H. Scott, A. Sommer, M. Kime, J. Walker, L. Davies, M. Jones, E. Nance, S. Luker, S. Bray

PROBABLE CAUSE STATEMENT:

Your affiant bases probable cause on the following:

The statement of Jon White that he and the defendant, Brenda C. White, are married but are obtaining a divorce. On April 26, 2006, the defendant came to Mr. White's place of work, located in the Woodland Towers at 4021 South 700 East in Salt Lake County, Utah, in a green Ford Explorer. The defendant spoke to Mr. White while she was seated in her vehicle in the parking lot and requested that Mr. White sign various papers. Mr. White refused to sign the papers, and the defendant played a song on her car stereo that included the lyrics, "Johnny, I'm gonna blow you away." The defendant also stated that her father had been teaching her how to shoot a gun. Mr. White left the parking lot and returned to work.

Mr. White finished work later that afternoon and walked toward his vehicle. Mr. White heard the sound of squealing tires and saw the defendant driving toward him. The defendant drove over the raised curb of the parking structure and chased Mr. White through the parking lot as he ran toward the Woodland Towers. Mr. White entered the east side of the building through a double set of glass doors. Mr. White continued to run through the building to a lobby on the west side. The defendant drove her vehicle through the glass doors and down a hallway to the lobby. The defendant struck Mr. White with the Explorer, causing Mr. White to flip over the vehicle and fall to the ground. The defendant drove through the lobby windows and stopped her vehicle. The defendant put her vehicle in reverse and backed into the lobby. Mr. White stood up

AMENDED INFORMATION  
DAO No. 06007842  
Page 3


and fled down a side hallway. The defendant turned her car around in the lobby and stopped the vehicle.

Mr. White received several cuts and abrasion to his hands, legs, arms, and face. Mr. White's ankle was dislocated.

The statement of Rick Johnson, employed by Wasatch Property Management, that the defendant caused approximately \$40,000 worth of damage to the Woodland Towers building.

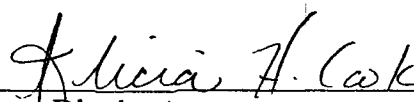
  
\_\_\_\_\_  
DETECTIVE B. ADAMSON  
Affiant

Subscribed and sworn to before me this 22  
day of January, 2007.

  
\_\_\_\_\_  
MAGISTRATE

Authorized for presentment and filing:

LOHRA L. MILLER, District Attorney

  
\_\_\_\_\_  
Deputy District Attorney  
April 28, 2006  
prs/06007842  
Amended/prs/January 22, 2007

## Addendum B

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FILED DISTRICT COURT  
Third Judicial District

DEC 10 2007

SALT LAKE COUNTY  
By                      Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,  Plaintiff,  -vs-  BRENDA CHRISTINE WHITE  Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER Regarding Defendant's Motion in Limine re Extreme Emotional Distress  Case No. 061902834  Hon. WILLIAM W. BARRETT
--	---

This matter came before the Court on October 19<sup>th</sup>, 2007, for a hearing regarding the Defendant's Motion in Limine concerning the defense of Extreme Emotional Distress. The Defendant was present and represented by counsel, Jason Schatz. The State was represented by Alicia H. Cook and Stephen L. Nelson. The Court has received and reviewed Defendant's Motion in Limine re Extreme Emotional Distress and supporting memorandum, and the State's Reply. The Court heard oral argument from both parties concerning the motion on October 19<sup>th</sup>, 2007.

Having fully considered the memoranda and arguments of counsel, and for good cause shown, the Court now makes and enters the following:



## FINDINGS OF FACT

1. The victim in this case, Jon White, was married to Defendant White for eleven years before he left the marital home in November of 2005 and initiated divorce proceedings.
2. Mr. White worked for the Principal Financial Group in the Woodland Towers building, located at 4021 South 700 East, which is where he was employed on the day of the incident, April 26<sup>th</sup>, 2006. On that date, Defendant White went to Mr. White's place of work during the lunch hour and asked Mr. White to sign a quit-claim deed to the marital home. Mr. White refused to sign and returned to work.
3. At approximately 4:30 p.m., Mr. White left the Woodland Towers building and was walking toward his car in a covered parking area when he heard the sound of squealing tires. Mr. White saw Defendant White speeding toward him in her Ford Explorer, and jumped between two parked cars. Mr. White jumped over a three-foot cement wall at the end of the covered parking structure, and ran through a visitor parking lot back toward the Woodland Towers building. As Mr. White approached the east entrance of the building, he turned and saw Defendant White speeding through the visitor parking lot after him. Defendant White drove up onto the sidewalk leading from the parking lot to the building, and turned the Explorer toward the building. Mr. White ran through the first set of doors at the east entrance, and Defendant White drove the Explorer through the glass doors. Defendant White struck Mr. White with the Explorer and threw him back approximately ten feet. Mr. White picked himself up off the ground and ran down a corridor to the west lobby on the opposite side of the building. Defendant White

chased Mr. White down the hallway and hit him with her vehicle a second time in the west lobby. Mr. White flew over the hood of the Explorer and landed on the ground. Mr. White stood to run away, but was unable to put any pressure on his left leg. Mr. White hobbled down a smaller hallway until he found a service closet, and hid there until he was discovered by a maintenance worker. Defendant White, meanwhile, drove her vehicle entirely through the glass windows of the west lobby, then reversed her vehicle back into the building and across the lobby. Defendant White pulled forward again and stopped her vehicle in the middle of the lobby. The incident was first reported to the Salt Lake County Sheriff's Office at 4:39 p.m..

4. In the defendant's motion in limine, Defendant White proffered the evidence that she argued constituted a basis for extreme emotional distress. In summary, the defendant proffered that Jon White forced Defendant White to engage in a "threesome" with a co-worker, that Jon White viewed pornography and was investigated for possession of child pornography, and that Defendant White discovered that Mr. White was engaged in an extra-marital affair prior to their separation. Defendant White also proffered that she was financially stressed after the separation, that Jon White only spent the minimum visitation time with their children, that Mr. White made the visitation schedule difficult, that Mr. White denied owning a cell phone, and that Mr. White promised to assist her with refinancing the marital home, but refused to cooperate in the refinance process. Defendant White was also being supplied with medications by a nurse practitioner named Valerie Talbot who died on March 20<sup>th</sup>, 2006, due to the fact that Mr. White had cancelled the defendant from his insurance policy. The Court does not make

any findings of fact concerning the proffered evidence because the Court does not weigh the credibility of the evidence for purposes of this motion. (State v. Kruger, 6 P.3d 1116, 1119 (Ut. S.Ct. 2000)).

### CONCLUSIONS OF LAW

1. The defense of extreme emotional distress is not applicable to Defendant White's case. The circumstances proffered by Defendant White do not constitute extreme emotional distress, therefore there is no rational basis in the evidence for the defendant's theory that she committed Attempted Manslaughter rather than Attempted Homicide. Accordingly, the defendant has not presented a sufficient quantum of evidence to warrant jury instructions on the defense of extreme emotional distress and the lesser included offense of Attempted Manslaughter.
2. The factors proffered by Defendant White do not meet the definition of "extremely unusual and overwhelming stress" given in State v. Bishop, 753 P.2d 439, 471 (Ut. S.Ct. 1988). The extreme emotional distress defense is available only to defendants who have been subjected to stress that would cause the average reasonable person to have an extreme emotional reaction and experience a loss of self-control. Bishop, 753 P.2d at 471. Defendant White cites marital difficulties, financial stress, difficulties with the divorce, and the death of Ms. Talbot as stressors that accumulated over time to create a situation wherein she lost self-control on the day of the incident. The Court, however, is required to evaluate how these stressors would impact the average reasonable person, and whether these stressors would cause a reasonable person to experience a loss of self-control. The stressors cited

by Defendant White do not rise to this level; they are common occurrences that are endured by many people, and in this case do not justify the attempted homicide of Jon White.


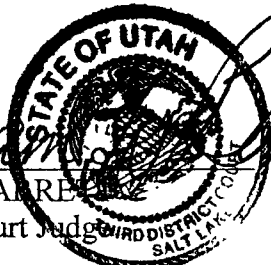
3. The reasonableness of these stressors as an adequate excuse or explanation for a loss of self-control is further diminished by the length of time between the stressors and the incident. Several of the stressors that Defendant White proffers (the threesome, the pornography investigation, and the death of Ms. Talbot) occurred several weeks to years before April 26<sup>th</sup>, 2006. Furthermore, the Court has reviewed the two most recent decisions of the Utah appellate courts dealing with extreme emotional distress, and has noted that in both cases a highly provocative event occurred immediately before the crime. (State v. Shumway, 3 P.3d 94; State v. Spillers, 152 P.2d 315 (Ut. S.Ct. 2007)). In the case at bar, there is a complete absence of a similarly provocative event on or near the day in question.
4. The circumstances of the crime itself indicate that Defendant White had not lost self-control at the time of the incident, but appeared to be acting in accordance with a plan. The disagreement about the quit-claim deed occurred during the noon hour, and the crime occurred more than four hours later at approximately 4:30, when Mr. White was walking across the parking lot toward his vehicle. The complicated driving pattern that Defendant White negotiated to pursue Mr. White also indicates that Defendant White was aware of what she was doing and was in control of her faculties during the time in question.

## ORDER

Defendant White's Motion in Limine regarding Extreme Emotional Distress is denied. The information that Defendant White has proffered does not constitute evidence of extreme emotional distress, and therefore is irrelevant to that defense and may not be presented as evidence of extreme emotional distress.

Dated this 10 day of Dec., 2007.

By the Court:

  
WILLIAM W. BARRETT  
Third District Court Judge  


Approved as to form:

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Jason Schatz  
Counsel for Defendant