

2010

Utah v. Cecil : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH)	
)	
Plaintiff/Appellee,)	BRIEF OF APPELLANT
)	
v.)	
)	Court of Appeals No. 20100003 -CA
JOHN VERNON CECIL,)	
)	
Defendant/Appellant.)	
)	

THE DEFENDANT IS CURRENTLY INCARCERATED

Attorneys for Defendant/Appellant

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in denying the defendant's motion to dismiss the charge of criminal mischief under Utah Code Ann. § 76-6-106(2)(c)?

Standard of Review: "The grant or denial 'of a motion to dismiss is a question of law [that] we review for correctness, giving no deference to the decision of the trial court.'" *Salt Lake City v. Peterson*, 2010 UT 64, ¶ 6, 245 P.2d 197 (citing *State v. Hamilton*, 2003 UT 22, ¶ 17, 70 P.3d 111).

This issue was preserved in the trial court by the defendant's motion to dismiss raised at the end of the plaintiff's case. See Record ("R.") at 112, p. 384, line 8 - p. 388, line 8.

2. Was there sufficient evidence presented in the trial court to support the jury's verdict finding the defendant guilty of the charge of criminal mischief under Utah Code Ann. § 76-6-106(2)(c)?

Standard of Review:

When reviewing a challenge for sufficiency of the evidence, we are 'highly deferential to a jury verdict, . . . and we will reverse only when 'reasonable minds could not have reached the verdict. Thus, we will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds

must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

State v. Cly, 2007 UT App 212, ¶ 15 (citations omitted).

This issue was preserved in the trial court by the motion of defense counsel to dismiss the charge made at the close of the plaintiff's case in chief. *See R.* at 112, p. 379, line 4 - line 10.

3. Did the trial court err in not declaring a mistrial after the defendant, at a recess in the proceedings, was seen by a juror while the defendant was in handcuffs and being escorted by a bailiff?

Standard of Review:

A trial court has discretion to grant or deny a motion for a mistrial and its decision will remain undisturbed absent an abuse of that discretion. A defendant has the burden of persuading this court that the conduct complained of prejudiced the outcome of the trial. In other words, unless a review of the record shows that the court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, we will not find that the court's decision was an abuse of discretion.

State v. Kohl, 2000 UT 35, ¶ 20, 392 Utah Adv. Rep. 3 (citations omitted).

This issue was preserved in the trial court by the defendant's motion for a mistrial. *See R.* at 112, p. 271, line 12 - line 21.

4. Did the trial court err in refusing to allow the defendant to use evidence of past criminal convictions, currently pending criminal charges, and an existing *ex parte* civil stalking injunction against one of the alleged victims in order to impeach the

testimony of such alleged victim or to establish the existence of threatening behavior by the alleged victim against the defendant and Ms. Quintero to prove that the alleged victim had a motive for threatening the defendant, thereby supplying a basis for the defendant's assertion of self defense?

Standard of Review: "Admission of evidence under Rule 404(b) is reviewed for abuse of discretion." *State v. Webster*, 2001 UT App 238, ¶ 11, 32 P.3d 976, 980.

"However, 'admission of prior crimes evidence itself must be scrupulously examined by trial judges in the proper exercise of that discretion.'" *Id.* (citations omitted).

This issue was preserved in the trial court at R. at 112, p. 191, line 13 - p. 213, line 5.

5. Did the trial court err in overruling the objection of the defendant to Jury Instruction Nos. 11 and 12, and in giving such jury instructions to the jury?

Standard of Review: "The standard of review for jury instructions to which counsel has objected is correctness." *State v. Bryant*, 965 P.2d 539, 544 (UT App 1998).

This issue was preserved in the trial court by defense counsel's objection to the instruction. *See* R. at 112, p. 355, line 8 - p. 363, line 19.

6. Was the defendant afforded effective assistance of counsel based upon his attorneys' failure to:

a. Interview or subpoena witnesses identified by the defendant; and

b. Acquire copies of certain tape recordings of conversations between the defendant and the alleged victim.

Standard of Review: "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

This issue was not raised in the trial court and is raised for the first time with this appeal.

7. Did the prosecution withhold certain tape recordings of conversations between the defendant and the alleged victim which would have been exculpatory of or beneficial to the defendant's defense, and thereby violate Rule 16, Utah Rules of Criminal Procedure, and defendant's due process rights?

Standard of Review: "But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976).

It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable

validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 112 - 113.

The question as to what duty a prosecutor has to disclose allegedly exculpatory evidence in a criminal case depends on the nature of the evidence, whether the defense made a specific request for the evidence, whether the evidence is perjured, whether the defense knew, or, using reasonable diligence, should have known, about the evidence, and, to a certain extent, the conduct of the prosecution.

State v. Jarrell, 608 P. 2d 218, 223 - 224 (Utah 1980).

This issue was not raised in the trial court and is raised for the first time with this appeal.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Annotated § 76-5-103: Aggravated assault.

- (1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:
 - (a) intentionally causes serious bodily injury to another; or
 - (b) under circumstances not amounting to a violation of Subsection (1)(a), uses
 - (A) a dangerous weapon as defined in Section 76-1-601 or
 - (B) other means or force likely to produce death or serious bodily injury.

Utah Code Annotated § 76-2-105: Transferred intent.

Where intentionally causing a result is an element of an offense, that element is established even if a different person than the intended was killed, injured, or harmed, or different property than the actor intended was damaged or otherwise affected.

Utah Code Annotated § 76-6-106(2)(ct): Criminal mischief.

- (2) A person commits criminal mischief if the person:
 - (a) under the circumstances not amounting to arson, damages or destroys property with the intention or defrauding an insurer;
 - (b) intentionally and unlawfully tampers with the property of another and as a result:
 - (i) recklessly endangers:
 - (A) human life; or
 - (B) human health or safety; or
 - (ii) recklessly causes or threatens a substantial interruption or impairment of any critical infrastructures;
 - (c) intentionally damages, defaces, or destroys the property of another; or
 - (d) recklessly or wilfully shoots or propels a missile or another object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

Rule 16(a)(1-4) & (b) of the Utah Rules of Criminal Procedure:

- (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
 - (1) relevant written or recorded statements of the defendant or codefendants;
 - (2) the criminal record of the defendant;
 - (3) physical evidence seized from the defendant or codefendant;
 - (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and....
- (b) The prosecutor shall make disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

Rule 402 of the Utah Rules of Evidence: Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the state of Utah, statute, or by other rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403 of the Utah Rules of Evidence: Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 of the Utah Rules of Evidence: Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

....

(a)(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(a)(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

Rule 607 of the Utah Rules of Evidence: Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608 of the Utah Rules of Evidence: Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character.

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness for the purposes of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified....

Rule 609 of the Utah Rules of Evidence: Impeachment by evidence of commitment of crime.

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent

to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

STATEMENT OF THE CASE

I. Nature of the Case.

This case involves the appeal of certain rulings of the Fifth District Court, the Honorable G. Rand Beacham, and a jury verdict finding the defendant guilty of aggravated assault, criminal mischief and reckless driving, and questioning whether defendant was provided with effective assistance of counsel.

II. Course of Proceedings.

By the filing of an Information on March 31, 2009, the defendant was initially charged with one count of aggravated assault, a 3rd degree felony, under Utah Code Ann. §§ 76-5-102 and 76-5-103; one count of criminal mischief, a 3rd degree felony, under Utah Code Ann. § 76-6-106(2)(c); one count of reckless driving, a class B misdemeanor, under Utah Code Ann. § 41-6a-528; and one count of leaving the scene of an accident, a class B misdemeanor, under Utah Code Ann. § 41-6a-401. A preliminary hearing was scheduled for June 29, 2009. On that date an Amended Information was filed which retained the original charges and charged the defendant with an additional count of aggravated assault, a third degree felony. After the preliminary hearing, the defendant was bound over and an arraignment was scheduled for July 2, 2009. At arraignment, the defendant pled not guilty to all charges. A three day jury trial was scheduled to begin on November 16, 2009. The jury trial was held as scheduled. The notice of appeal was filed on December 22, 2009.

III. Disposition at the Trial Court.

During trial, the defendant moved for a mistrial based upon the fact that the defendant was seen in the hallway at the courthouse by a juror while the defendant was in handcuffs. The trial court denied that motion. At the end of the plaintiff's case in chief, the defendant moved to dismiss all charges as the plaintiff failed to present a prima facie case. The trial court dismissed the charge of leaving the scene of an accident but allowed

the remaining charges to go to the jury. The defendant objected to Jury Instruction Nos. 11 and 12 based upon such instructions containing the wrong mental state required for finding the defendant guilty. However, the trial court overruled the defendant's objection. The jury returned a verdict of guilty on one count of aggravated assault, the count of criminal mischief, and the count of reckless driving. The defendant was found not guilty of the remaining charge of aggravated assault.

On December 21, 2009, the defendant was sentenced to an indeterminate term of not to exceed five years in the Utah State Prison for the conviction of aggravated assault; an indeterminate term of not to exceed five years in the Utah State Prison for the conviction of criminal mischief; and a term of six months in the Washington County jail. The defendant was given credit for time served. The prison term for aggravated assault was ordered to run consecutive to the other terms of incarceration. The defendant was also ordered to pay restitution.

IV. Statement of Relevant Facts.

On March 30, 2009, the Washington City police department received a call regarding a citizen dispute at a gas station in Washington City. (R. 112, p. 290, line 20 - p. 291, line 5). Shortly thereafter another call was received by the police department regarding a traffic offense at the same location. (R. 112, p. 291, lines 8 - 11.) Officer Christopher Ray, while responding to the first call, was advised to meet Anjelica Quintero at her home. (R. 112, p. 292, line 24 - p. 293, line 2). Ms. Quintero was the defendant's

girlfriend at the time. (R. 112, p. 339, lines 17 - 20). When Officer Ray met with the defendant and Ms. Quintero, he was advised that the defendant and Ms. Quintero were driving home and saw Michael Stevens' vehicle at the gas station. They became concerned for their safety because Mr. Stevens had been recently threatening them. The defendant and Ms. Quintero did not want Mr. Stevens to know where they lived. (R. 112, p. 294, lines 2-18).

As the defendant and Ms. Quintero returned to their apartment complex, they noticed Mr. Stevens parked on the corner by the complex. (R. 112, p. 295, lines 3-12). Since the defendant and Ms. Quintero did not wish to have Mr. Stevens know where they lived, they did not pull into their apartment complex. (R. 112, p. 295, lines 15-22). According to the defendant's and Ms. Quintero's initial statements, they drove past Mr. Stevens and continued back towards the gas station. After they passed Mr. Stevens, he began to chase them in his vehicle. They entered the gas station and Mr. Stevens continued to chase them around the pumps and to the backside of the building. (R. 112, p. 295, line 19 - p. 296, line 14). Mr. Stevens then pulled his vehicle in front of the defendant's and Ms. Quintero's vehicle, got out of the vehicle and approached the defendant and Ms. Quintero in a very aggressive manner. The defendant and Ms. Quintero could clearly see a black semi-automatic handgun in the front waistband of Mr. Stevens' pants. (R. 112, p. 297, lines 1-14). After receiving this information from the defendant and Ms. Quintero, Officer Ray went to the gas station to talk to Mr. Stevens,

who had been found there by another Washington City officer. (R. 112, p. 298, lines 17-23).

After arriving at the gas station, Officer Ray was able to view certain video recordings from security cameras on the premises. The video showed that Mr. Stevens' vehicle was actually being pursued by the vehicle driven by the defendant when it entered the gas station. (R. 112, p. 301, lines 8-19). Both the defendant's and Mr. Stevens' vehicles entered the gas station property and drove behind the building. The portion of the gas station property behind the building could not be seen on the video recordings. (R. 112, p. 306, lines 8-18). After approximately one and one-half minutes, the vehicle operated by the defendant drove from the back of the gas station building and exited onto the street. (R. 112, p. 308, lines 7-13).

Mr. Stevens' story as told to Officer Ray differed from that of the defendant and Ms. Quintero. Mr. Stevens stated that he was sitting in his vehicle at the corner by the defendant's and Ms. Quintero's apartment, that he had dropped his cell phone and when he looked up, he saw Ms. Quintero and the defendant driving towards him. When Mr. Stevens began to drive away, he noticed that the defendant and Ms. Quintero began to follow him. He noticed that the defendant tried to pass his vehicle so Mr. Stevens sped up. However, the defendant was still able to pass Mr. Stevens' vehicle and once the defendant was in front of Mr. Stevens' vehicle, the defendant slammed on his brakes and forced Mr. Stevens to stop. Once the vehicles were stopped, the defendant put his vehicle

in reverse and tried to back up and hit Mr. Stevens' vehicle. Mr. Stevens was able to avoid being hit and drove to the gas station, with the defendant and Ms. Quintero continuing to follow him. (R. 112, p. 309, line 13 - p. 310, line 16).

According to Mr. Stevens' testimony, after the two vehicles went to the rear of the gas station building, Mr. Stevens got out of his vehicle, put his hands up as if to ask "What's going on?" (R. 112, p. 183, lines 11-13). The defendant's vehicle came to a stop approximately ten to fifteen away from Mr. Stevens, who was standing by a vehicle hoist. The defendant then drove towards Mr. Stevens and collided with the hoist. (R. 112, p.184, lines 2-24). The defendant then backed up his vehicle and proceeded to drive down the street. (R. 112, p. 185, lines 17-20). Shortly thereafter, the defendant returned to the gas station (R. 112, p. 238, lines 2-24) and, upon entering the gas station property, drove his vehicle towards Mr. Stevens. Mr. Stevens was struck by the defendant's vehicle. (R. 112, p. 242, lines 6-12).

The defendant claimed that his actions with regard to Mr. Stevens were based upon the defendant's fear for his life due to previous threats by Mr. Stevens and the fact that Mr. Stevens had a firearm. (R. 112, p. 315, lines 6-25). Based upon the investigation by Officer Ray, Officer Ray arrested the defendant. Ms. Quintero testified at trial that her prior statement given to Officer Ray, wherein she stated that Mr. Stevens was chasing them and had a gun, was a lie. (R. 112, p. 342, line 20 - p. 343, line 15).

SUMMARY OF ARGUMENTS

At the end of the prosecution's case, the defendant moved to dismiss the charge of criminal mischief based upon a lack of evidence that the defendant intentionally damaged the car hoist. The plaintiff argued that where defendant intended to hit Mr. Stevens, but missed, such intent should be transferred to the hoist and therefore defendant should be found guilty. However, under Utah Code Ann. § 76-2-105, an intent to harm Mr. Stevens could only be transferred to another person, not property. For this same reason, there was insufficient evidence presented to support the jury's verdict of finding the defendant guilty of criminal mischief.

During a brief recess in the trial, the defendant was seen by a juror in the hall while the defendant was wearing handcuffs. Defendant asserts that this event prejudiced the juror and the defendant moved for a mistrial. The court denied such motion after talking to the juror. The defendant asserts that the prejudice caused by the juror seeing the defendant in handcuffs could not be cured other than through a mistrial being declared.

The trial court should have allowed the defendant to use evidence of Mr. Stevens' character, prior bad acts and the existence of an *ex-parte* civil stalking injunction obtained by Ms. Quintero, to impeach Mr. Stevens' testimony and establish that the defendant acted in self-defense. Such should have been allowed under the Rules of Evidence since to do so would have established Mr. Stevens' character for violence under Rule 404(a)(2) and a motive for the defendant's defense of himself as permitted by Rule 404(b).

The defendant objected to Jury Instruction Nos. 11 and 12 on the grounds that they mis-stated the mental state required for the offense of aggravated assault. The defendant asserts that the requisite mental state for finding a violation of the aggravated assault statute is limited to intentional actions.

The defendant requested that his trial counsel interview and subpoena witnesses identified by the defendant who could testify as to Mr. Stevens' threats against the defendant. However, trial counsel failed to do so. The defendant also requested that trial counsel obtain copies of certain tape recordings in which Mr. Stevens threatened the defendant. Counsel again failed to do so. Such omissions by trial counsel were objectively deficient and but for such deficiencies, the defendant would have obtained a more favorable outcome at trial.

Despite knowing of and having access to the tape recordings, and despite a request for discovery from the defendant, the plaintiff failed to provide the defendant with copies of the tape recordings. By failing to disclose the existence of the recordings or provide copies of them, the plaintiff violated Rule 16 of the Utah Rules of Criminal Procedure and established case law requiring that all exculpatory and mitigating evidence be provided to a defendant, even if not requested. Such failures violated the defendant's due process rights.

ARGUMENT

In this appeal, counsel has determined that certain arguments of the defendant have some merit and therefore a brief filed in accordance with *State v. Clayton*, 639 P.2d 168, 169-170 (Utah 1981) (following *Anders v. California*, 386 U.S. 738, 744 (1967)), is not appropriate. However, counsel does believe that certain of the defendant's arguments do not raise meritorious claims. In order to meet counsel's obligation of effective representation of the defendant, while complying with counsel's duties to this Court and under the Code of Professional Conduct, counsel has separated those issues and arguments which counsel believes raise meritorious claims and those claims which the defendant wishes to have raised, under separate headings for the court's convenience. Counsel has conferred with the defendant at length in order to adequately set forth the defendant's claims.

I. The Defendant's Claims which Counsel Believes have Merit.

A. The trial court erred in denying the defendant's motion to dismiss the charge of criminal mischief under Utah Code Ann. § 76-6-106(2)(c)?

Count 2 of the Information (Count 3 of the Amended Information), charged the Defendant with criminal mischief, a third degree felony, under Utah Code Ann § 76-6-106(2)(c). Under such section, a person commits criminal mischief if such person "intentionally damages, defaces, or destroys the property of another." This charge was

based upon the defendant's collision with the car hoist. However, no evidence was presented by the plaintiff that the defendant "intentionally" damaged, defaced or destroyed the hoist. The plaintiff's evidence was limited to the alleged fact that the defendant attempted to hit Mr. Stevens with a vehicle and missed and hit the hoist. The plaintiff argued that the defendant's intention of hitting Mr. Stevens was transferred to the hoist and therefore the defendant was guilty of criminal mischief. *See* (R. 112, p. 384, line 8 - p. 388, line 8, attached hereto as Addendum 1.)

The theory of transferred intent states that "Where intentionally causing a result is an element of an offense, that element is established even if a different person than the actor intended was killed, injured, or harmed, or different property than the actor intended was damaged or otherwise affected." *See* Utah Code Ann. § 76-2-105. In this case there was no evidence whatsoever that the defendant intended to damage any property whatsoever. Thus, the theory of transferred intent does not apply. If the defendant had intended to damage Mr. Stevens' vehicle but instead damaged the hoist, transferred intent might be present. However, since, at best, the plaintiff's evidence could only show that the defendant intended to harm Mr. Stevens and no other person was harmed, transferred intent does not apply and the criminal mischief charge should have been dismissed. The defendant did not have any intent to injure any property and therefore his intent could not be transferred to the hoist.

B. There was insufficient evidence presented in the trial court to support the jury's verdict finding the defendant guilty of the charge of criminal mischief under Utah Code Ann. § 76-6-106(2)(c)?

Under Utah Code Ann. § 76-6-106(2), for the defendant to be convicted of criminal mischief, the plaintiff had to show that the defendant:

(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

(b) intentionally and unlawfully tampers with the property of another and as a result:

(i) recklessly endangers:

(A) human life; or

(B) human health or safety; or

(ii) recklessly causes or threatens a substantial interruption or impairment of any critical infrastructure;

(c) intentionally damages, defaces, or destroys the property of another; or

(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

Additionally,

For the defendant to successfully challenge the sufficiency of the evidence underlying his conviction, he must show 'when viewing the evidence and all inferences that may reasonably be drawn therefrom, in the light most favorable to the verdict of the jury, reasonable minds could not believe him guilty beyond a reasonable doubt.'

State v. Daniels, 584 P.2d 880, 882 (Utah 1978) (citations omitted). In this case, the only evidence presented was that the defendant attempted to run the vehicle the defendant was driving into Mr. Stevens and inadvertently hit the hoist. As argued above, since the defendant did not intend to damage any property by his actions, the elements required to convict the defendant of criminal mischief were not established and the criminal mischief charge should have been dismissed, even when the evidence and all inferences that may reasonably be drawn therefrom are viewed in the light most favorable to the verdict of the jury.

II. The Claims Raised by the Defendant.

A. The trial court erred in not declaring a mistrial after the defendant, at a recess in the proceedings, was seen by a juror while the defendant was in handcuffs and being escorted by a bailiff?

In this case, at a recess during the trial, one of the jurors saw the defendant in handcuffs and being escorted by a bailiff. After this fact was made known to the trial court judge, the judge interviewed the juror regarding the encounter and determined that

such encounter did not prejudice the juror's ability to fairly decide the case. (R. 112 at p. 270, line 12 - p. 282, line 22, attached hereto as Addendum 2). Defendant disputes that the juror could not have been prejudiced by seeing the handcuffs on the defendant and asserts that the trial judge should have declared a mistrial at that point.

A brief and fortuitous encounter of the defendant in handcuffs is not prejudicial and requires an affirmative showing of prejudice by the defendant. . . . The jury's inadvertent observation of defendant *outside* the courtroom prior to trial did not "dilute the presumption of innocence" so as to require a reversal absent evidence of actual prejudice.

State v. Wetzel, 868 P.2d 64, 70 (Utah 1993) (emphasis in original). The fact that the trial judge interviewed the juror in a noninflammatory way and determined that the juror was not prejudiced against the defendant would tend to cure any issue which might have been raised by the juror briefly seeing the defendant in handcuffs. Further, there is a lack of evidence in the record showing any actual prejudice.

- B. The trial court erred in refusing to allow the defendant to use evidence of past criminal convictions, currently pending criminal charges, and an existing *ex parte* civil stalking injunction against one of the alleged victims in order to impeach the testimony of such alleged victim or to establish the existence of threatening behavior by the alleged victim against the defendant and Ms. Quintero to prove that the alleged victim had a motive for threatening the defendant, thereby supplying a basis for the defendant's assertion of self defense?

Under Rule 404 of the Utah Rules of Evidence,

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

* * * *

(a)(2) *Character of alleged victim.* -- Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) *Character of witness.* -- Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* -- Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

The courts have determined that

In deciding whether evidence of other bad acts is admissible under Subdivision (b), the trial court must determine (1) whether such evidence is being offered for a proper, non-character purpose under this rule, (2) whether such evidence meets the requirements of Rule 402, and (3) whether such evidence meets the requirements of Rule 403.

State v. Webster, 2001 UT App 238, ¶31, 32 P.3d 976, 986. This however does not end the inquiry. "An erroneous decision to admit or exclude evidence does not, however, result in reversible error unless the error is harmful. . . . For an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." *Id.* at P38, 32 P.3d 988 (citations omitted).

Under Rule 607 of the Utah Rules of Evidence, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Rule 608(a) provides that

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Finally, under Utah Rule of Evidence 609(a)(2), "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."

In this case, the defense sought to cross-examine Mr. Stevens regarding past criminal convictions, currently pending criminal charges, and an existing *ex parte* civil stalking injunction against Mr. Stevens in order to impeach Mr. Stevens' testimony of the events which led to the charges being filed against the defendant. Such evidence was also

sought to establish the existence of threatening behavior by Mr. Stevens against the defendant and Ms. Quintero to prove a motive for the defendant's assertion of self defense. (R. at 112, p. 191, line 13 - p. 214, line 25, attached hereto as Addendum 3). Based upon Rules 404, 608 and 609 of the Utah Rules of Evidence, the trial court refused to allow defense counsel to inquire into Mr. Stevens' past criminal convictions, pending criminal charges or the existence of the *ex parte* civil stalking injunction. By doing so, the trial court prevented the defendant from seeking to discredit Mr. Stevens' testimony based upon Mr. Stevens' prior obstruction of justice conviction or the prior threats made by Mr. Stevens against the defendant and Ms. Quintero.

The emphasis of defendant's argument is that the trial court should have allowed the attempted cross-examination to show that Mr. Stevens was biased in his testimony since, as reflected in the written statements of the defendant and Ms. Quintero, the police report of the incident, and the *ex parte* civil stalking injunction, Mr. Stevens had made several threats against the defendant and Ms. Quintero causing them to fear for their safety. Since the trial court found that the past convictions did not fall within the requirements of admissibility under Rules 608 and 609 as bearing upon Mr. Stevens' character for truthfulness or untruthfulness, and did not involve dishonesty or false statements by Mr. Stevens, such evidence was not relevant or admissible. However, such evidence would have established Mr. Stevens' character trait of violence under Rule 404(a)(2). Additionally, such evidence certainly would have established the motive of the

defendant, as permitted by Rule 404(b) in seeking to defend himself from Mr. Stevens, which was the claim of both the defendant and Ms. Quintero in their written statements. If such evidence would have been allowed it is certainly probable that the jury could have taken a different view of the defendant's claim that he was acting in self defense. Such evidence was relevant under Rule 402 to the defendant's claim of self defense and would not have resulted in unfair prejudice, confusion of the issues, or misleading of the jury, since an explanation for such evidence being used to prove motive could be easily communicated to the jury. Based thereon, such evidence should have been allowed.

C. **The trial court erred in overruling the objection of the defendant to Jury Instruction Nos. 11 and 12, and in giving such jury instructions to the jury?**

At the time of the offenses alleged against the defendant, Utah Code Ann. § 76-5-103, provided that:

- (1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:
 - (a) intentionally causes serious bodily injury to another; or
 - (b) under circumstances not amounting to a violation of Subsection (1)(a), uses
 - (A) a dangerous weapon as defined in Section 76-1-601; or
 - (B) other means or force likely to produce death or serious bodily injury.

The plaintiff proposed Jury Instruction Nos. 11 and 12, to which the defendant objected. *See* R. 112, p. 355, line 8 - p. 364, line 3 and Jury Instruction Nos. 11 and 12 (R. 76 and 77), attached hereto as Addendum 4. The basis of the objection was that such instructions did not require a finding of intent but allowed conviction based upon intent, knowledge or recklessness. The trial court ruled that since no mental state was specified by the statute, and based upon the way the statute was written, intent was required as to § 76-5-103(1)(a) only, and an intentional, knowing or reckless state of mind was applicable to § 76-5-103(1)(b). Since the theory and evidence of the plaintiff's case relied solely upon § 76-5-103(1)(b), the issue is whether such section does apply an intentional, knowing or reckless state of mind.

In *In Re McElhaney*, 579 P.2d 328 (Utah 1978), under a version of § 76-5-103 similar to the statute existing on the date of the alleged offense in this case, the court found that: "Under 76-5-103(1) (a) the prosecution must prove the defendant intentionally caused serious bodily injury to another, but under 76-5-103(1) (b) no culpable mental state is specified and thus under 76-2-102 "intent, knowledge, or recklessness shall suffice to establish criminal responsibility." *Id.* The application of a mental state based upon intent, knowledge or recklessness with regard to charges under § 76-5-103(b) is further bolstered by the fact that in 2010, the legislature revised § 76-5-103 to delete any reference to "intent" as an element of the crime of aggravated assault. Based on the above, the trial judge was likely correct in his ruling on the disputed jury instructions.

D. The defendant was not afforded effective assistance of counsel.

To prove ineffective assistance of counsel, a defendant must show “(1) that counsel’s performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial.” *State v. Clark*, 2004 UT 25, P6. Additionally,

To demonstrate objectively deficient performance under the first part of the test, [the defendant] must overcome a strong presumption that . . . trial counsel rendered adequate assistance. (Citations omitted). In addition, we give trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them.

State v. Crosby, 927 P.2d 638, 644 (1996). Defendant asserts that trial counsel was ineffective based upon counsels’ failure to interview and subpoena certain witnesses and failure to obtain certain tape recordings containing exculpatory evidence.

i. Defense counsel failed to interview or subpoena witnesses identified by the defendant.

In this case, the defendant’s main defense for his actions were based upon a claim of self defense in that the defendant’s actions against Mr. Stevens were based upon Mr. Stevens’ previous verbal threats and threatening actions against the defendant and Ms. Quintero. However, other than referring to the written statements of the defendant and Ms. Quintero regarding such threats and actions, defense counsel asserted no independent evidence. In fact, in connection with the *ex parte* civil stalking injunction obtained by

Ms. Quintero against Mr. Stevens, a copy of which is attached hereto as Addendum 5, a written statement was filed with the court asserting that Mr. Stevens had threatened the defendant and Ms. Quintero. Additionally, other witnesses to the stalking were identified. Despite the existence of such statement and identified witnesses, and the fact that defendant had identified such witnesses to defense counsel, defense counsel did not contact such witnesses, subpoena them, nor seek to introduce such evidence. Had defense counsel done so, those witnesses could have established the prior threats and actions of Mr. Stevens against the defendant and such evidence would have bolstered the defendant's claim that he was acting in self defense in connection with his actions toward Mr. Stevens. Such evidence could certainly have resulted in the jury giving more credence to the defendant's self defense claim.

ii. **Defense counsel failed to acquire and offer into evidence copies of certain tape recordings of conversations between the defendant and the alleged victim.**

The defendant, in preparing his defense, informed trial counsel of the existence of certain tape recordings of conversations between Mr. Stevens and Ms. Quintero and the defendant. Such recordings were allegedly made by law enforcement officials working with Mr. Stevens in an attempt to obtain evidence against Ms. Quintero with regard to certain drug allegations. In such conversations, Mr. Stevens allegedly threatens the defendant. The plaintiff used an edited portion of such recordings during the defendant's sentencing to show that the defendant threatened Mr. Stevens. Despite having been told

of the existence of such recordings and their content, trial counsel did not obtain such recordings nor evaluate the content thereof for exculpatory evidence or for evidence to support the defendant's self defense claim.

Had trial counsel obtained and evaluated the recordings, and had the recordings contained exculpatory evidence or evidence supporting defendant's self defense claim, such evidence could have been presented to the jury to establish that Mr. Stevens had threatened the defendant, that defendant feared for his life, and that the defendant was acting in self defense with regard to Mr. Stevens. Therefore, the defendant was prejudiced by trial counsels' failure to obtain the recordings.

E. The prosecution willfully withheld certain tape recordings of conversations between the defendant and the alleged victim which would have been exculpatory of the defendant's actions or beneficial to the defendant's defense?

As stated above, at sentencing in this matter, the plaintiff used an edited recording of a conversation between the defendant and Mr. Stevens to show that the defendant had threatened Mr. Stevens prior to the date of the incident which led to the criminal charges against the defendant. The defendant had requested discovery from the plaintiff and specifically requested any tape recorded statements or videotaped statements by the defendant and any evidence that will tend to negate the guilt of the defendant. *See R.* at 15-16. Defendant had also requested supplemental discovery. The plaintiff's initial discovery response indicated that any and all statements made by the defendant, whether

written, recorded or oral, which were in the possession of the plaintiff were provided with such response and indicated that the plaintiff was unaware of any information which tended to negate, or mitigate, the guilt of the defendant, except as contained in the documents provided with such response. *See R.* at 10-11. The plaintiff also supplemented its discovery response, but the recordings at issue were not provided.

Rule 16 of the Utah Rules of Criminal Procedure provides

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment;

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

Additionally, in *State v. Worthen*, 765 P.2d 839 (Utah 1988), the Utah Supreme Court noted that the defendant had demanded that all exculpatory and mitigating evidence be provided by the State. The Court noted that

the prosecution had a duty to disclose such evidence. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); *State v. Jarrell*, 608 P.2d 218 (Utah 1980); Utah Code Ann. § 77-35-16(a) (1982). Indeed, due process requires the State to disclose even unrequested information which is or may be exculpatory. *State v. Carter*, 707 P.2d 656, 662 (Utah 1985).

Id. at 849.

The question as to what duty a prosecutor has to disclose allegedly exculpatory evidence in a criminal case depends on the nature of the evidence, whether the defense made a specific request for the evidence, whether the evidence is perjured, whether the defense knew, or, using reasonable diligence, should have known, about the evidence, and, to a certain extent, the conduct of the prosecution. The underlying concern is, of course, to make the judicial process a search for truth and not just an arena of competition between the prosecution and the defense.

....

Both the United States Supreme Court and this Court have dealt with the standards that should be applied in determining whether evidence should have been disclosed by the prosecution. In *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), the Court held that the prosecutorial suppression of evidence favorable to the accused, in the face of a specific request for the evidence, violates due process if the evidence is material either to guilt

or to punishment. Good faith of the prosecution in such an instance is irrelevant. . . .

This Court has recognized that a deliberate suppression by the prosecution of evidence which is material to the guilt or innocence of a defendant in a criminal case is a denial of due process. *State v. Stewart*, Utah, 544 P.2d 477 (1975); *Butt v. Graham*, 6 Utah 2d 133, 307 P.2d 892 (1957).


State v. Jarrell, 608 P. 2d 218, 223 - 224 (Utah 1980).

While the defendant's argument that his trial counsel was ineffective based upon such counsels' failure to obtain copies of the recordings at issue at defendant's request may tend to negate the argument that the plaintiff failed to disclose and produce unknown recordings, it goes without question that under the above cases, the plaintiff had a duty to disclose the existence of the recordings and produce the recordings without the defendant requesting the recordings. Most certainly, the plaintiff had a duty to disclose and produce such recordings in response to the defendant's initial and supplemental discovery request, even if the defendant did not specifically request such recordings, and based upon the plaintiff's continuing duty of disclosure. The plaintiff's failure to disclose and produce the recordings which contained exculpatory evidence violated the defendant's due process rights and justifies granting the defendant relief from the jury verdict in this case and ordering a new trial.

CONCLUSION

Based upon the above, the defendant respectfully request that this Court reverse the trial court's denial of the defendant's motion for a mistrial and remand the case to the trial court for a new trial. In the alternative, the judgment and verdict against the defendant should be vacated based upon the failure to provide the defendant with discovery in violation of the defendant's due process rights, failing to afford defendant effective assistance of counsel, failing to allow the defendant to cross-examine Mr. Stevens as desired, failing to properly instruct the jury with regard to the mental state required for aggravated assault, and failing to dismiss the charge of criminal mischief.

RESPECTFULLY SUBMITTED this 20th day of June, 2011.



Gary G. Kuhlmann
Attorney for Defendant/Appellant

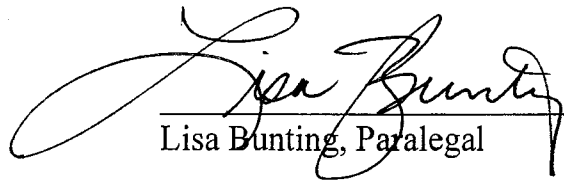
Certificate of Service

I hereby certify that on this 20 day of June, 2011, I mailed, by first-class mail, postage prepaid, a true and correct copy of the foregoing to:

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ADDENDUM

eyewitness identification instruction.

MR. CRAMER: Okay. And, Your Honor, as was said in My Cousin Vinny, we've given a good, logical, reasonable argument; motion denied.

THE COURT: I remember that. All right.

Any other instructions we need to talk about?

MR. CRAMER: No other instructions from us, Your Honor, and I believe that covers all of the State's proposed instructions, and I think we're set on that.

THE COURT: All right. I'll have them ready down to Number 17, then we'll have to talk about self-defense instructions and the last two stock instructions and that we'll be able to do at 8:30 tomorrow.

I also -- I think I gave you the verdict form, didn't I? There's nothing very interesting about that.

And so, if there's nothing else, we --

MR. CRAMER: Well, Your Honor, I think that we still need -- Mr. Taylor needs to make his motion to dismiss on prima facie, and then we'll be completed.

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MR. TAYLOR: That's correct.

THE COURT: Okay. Go ahead with that.

MR. TAYLOR: Thank you, Your Honor.

Like Mr. Cramer stated at the last one, I'll make a general motion to dismiss for the State failure to meet its prima facie case regarding probable cause as to each of the counts, 1 through five, and then I would just have some specific arguments as to just a couple of the counts themselves.

THE COURT: Go ahead.

MR. TAYLOR: With the Court's ruling as in regards to the Aggravated Assault with the reckless being a part of the elements, and that, I would make it as to Count II which is I believe the one that relates to Mr. Evans if my memory serves me correctly.

The testimony, and that, that was given in regards to Mr. Evans as it relates to the alleged assault: First of all, I don't believe there was any testimony by anybody that Mr. Cecil ever had any intent whatsoever to hurt Mr. Evans. I don't believe Mr. Evans said so, the officer, I don't believe there was any testimony at all by Mr. Stevens that Mr. Stevens had -- his testimony was that when they came back into the parking lot of the Chevron, when he

2 Mr. Stevens tried to hit him but never saw anything in
3 regards to Mr. Evans.

4 I think the officer's testimony was that
5 Mr. Cecil said that he saw Mr. Evans, that he may have
6 been close to him but he didn't hit him. And I
7 believe that Mr. Evans' testimony was that in his
8 opinion, I heard him coming, I jumped back out of my
9 way, he said, in fact he -- I think his testimony was
10 that I don't know that he would have even would have
11 hit me. And he was always -- seemed -- his testimony
12 and it (Inaudible) to that -- actually, said that the
13 way his eyes was fixed, that he always concentrated on
14 Mr. Stevens.

15 So I would say, based upon that, that the
16 State has failed to meet its prima facie burden as
17 regards to the Aggravated Assault that's alleged
18 against Mr. Evans.

19 MR. WEILAND: Your Honor -- not meaning to
20 interrupt. Oftentimes, rather than going through it,
21 could we just do it like charge by charge rather than
22 going through all the arguments and then having me go
23 all the way back and forgetting some? I mean, I don't
24 know if --

25 MR. TAYLOR: I don't have a problem if

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1 that's what he wants to do.

2 THE COURT: Okay.

3 MR. WEILAND: I have a very short term
4 memory.

5 THE COURT: Go ahead then, Mr. Weiland, on
6 the Count II, aggravated assault.

7 MR. WEILAND: All right. Your Honor, with
8 regards to Count II, we believe that under 76-2-105,
9 which talks about transferred intent, that says where
10 intentionally causing a result is an element of the
11 offense what -- that element is established even if a
12 different person other than the actor intended was
13 killed, injured or harmed.

14 And so we believe that under -- if his
15 intent was to as the statute shows that his intent was
16 to hit Mr. Stevens and that he went directly after
17 him, if he -- if he -- and because he was so close
18 there at the time that it caused fear and alarm in
19 Mr., you know, Evans, we believe that also can be met
20 with that same act.

21 I know that the evidence is -- and even
22 the Defendant's own -- the testimony is that the
23 officer asked him, he said, yes, he did have to jump
24 out of the way.

25 And as to the intent, I would argue that the intent is

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was to kill -- to get Mr. Stevens; however, by doing so, he also caused an aggravated assault against Mr. Evans because (Inaudible) right next to him and both of them (Inaudible) and he -- all the -- it's uncontroverted evidence that he had to jump out of the way to avoid being hit himself.

THE COURT: Uh-huh.

MR. WEILAND: And so we believe that there is a prima facie case for that count under the transferred intent statute.

THE COURT: Okay.

Mr. Taylor?

MR. TAYLOR: Our argument would be to that, Your Honor, is that if he's going to argue transferred intent, then he can't be -- either he has to argue specific intent and he was specifically trying to hurt Mr. Evans or he has to argue general intent, that -- in other words, he can't say that he was trying to -- either he has to say he specifically trying to hurt Mr. Evans or he was specifically trying to hurt Mr. Stevens. He can't say that.

(Discussion off the Record.)

MR. TAYLOR: He can't be arguing reckless when he's arguing on the specific -- transferred

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intent --

THE COURT: Yes.

MR. TAYLOR: -- there's no such thing as transferred reckless.

THE COURT: Yes, I want to look at that because I don't think that's... (Inaudible).

Well, I kind of go a different direction with respect to the charge of Aggravated Assault as to Mr. Evans. I think the evidence which has been given if it were taken by the jury in the light most favorable to the prosecution, it would be sufficient for the jury to conclude that Mr. Cecil in using the elements instruction, intentionally, knowingly or recklessly committed an act with unlawful force or violence that caused or created a substantial risk of bodily injury to Mr. Evans.

I don't know that the jury could necessarily -- well, I guess, the jury could, again, if they took everything in the State's favor, conclude that Mr. Cecil intentionally attempted to do bodily injury.

The threat -- the threat element of it doesn't really apply to the situation regarding Mr. Evans. But I think more so committing an act with unlawful force or violence that can cause or created a

could conclude constituted an aggravated assault again with the second element being added in.

So I'm going to deny the motion to dismiss Count II with that record.

Well, okay, I think that's enough on that.

What's next?

MR. TAYLOR: All right. Count III, I believe, is the Criminal Mischief. This one here I think that the State has failed to meet its burden of proof even on a prima facie level even giving all inferences in favor of the State. In fact, I don't think there are any inferences. I believe the State has to prove even at prima facie level that he intentionally damaged, defaced or destroyed the property of the other, in this case the hoist or the lift.

There's been no testimony whatsoever that it was his intent to damage the lift. There has been testimony that he saw Mr. Stevens there and he was trying to hit Mr. Stevens, but that's not having any intent whatsoever to damage the lift.

So I don't think that even viewed in the light most favorable to the State even with all of the inferences found in their favor, I don't think there

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are any inferences that he had any intent to damage that Chevron's lift. And I would ask that that one be dismissed.

THE COURT: Mr. Weiland?

MR. WEILAND: And, Your Honor, I believe there is a -- a theory. And if I could, I would like to draw the Court's attention with a picture, State's Exhibit Number 2, specifically the photograph taken of the lift and the area -- we would argue that that statute is a specific intent with the intent to destroy -- damage the property of another.

THE COURT: Uh-huh.

MR. WEILAND: In that picture...

(Discussion off the Record.)

MR. WEILAND: Mr. -- the facts of the case was that Mr. Stevens was behind that -- I mean, if I could, there was -- when asked -- there was -- does this accurately depict -- he says, "Well, everything but the police car was not there." He says, "The car was not there." In fact, he was in front of the police car. And if you look, there was a trailer right there.

THE COURT: Uh-huh.

MR. WEILAND: At that angle, he had to go through that -- in order to hit Mr. Stevens behind it,

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couple of pictures, the way the damage is done in the vehicle on itself, it isn't -- I mean, it's not like off the side.

I would argue that that was his intent, his intent was to get Mr. Stevens and destroy anything in its way to get it, and that's why he gunned it and it went so hard to cause that much damage, the damage to the front bumper. And I believe that he pushed on the gas in an effort to -- he had to destroy the property that was in the way to get at Mr. Stevens.

And so I believe there is a prima facie case based on the evidence that he did, in fact, destroy property of another based on -- you know, the evidence that he revved his engines and gunned it and he went fast.

The testimony is that there was significant damage to that front bumper. It's a 1976 GMC which the testimony was with those massive steel bumpers with all that damage. We believe it was his intent to destroy the property in the way to getting at Mr. Stevens.

THE COURT: Okay.

MR. TAYLOR: We don't question that there was damage to his bumper, but I do dispute that there

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was ever any evidence that was -- can even allude that it was his purpose to destroy or damage that lid. The testimony was, yes, he revved his engines and he sped and he hit the lift, but the idea he was trying to run over Mr. Stevens, that there was never any testimony whatsoever at least not that I heard that he purposely tried to damage that lift.

Mr. Evans -- Mr. Stevens was behind the lift and the lift may have been there, but there was never -- no testimony at all his purpose was to damage that lift.

THE COURT: Okay. Well, those are interesting arguments. In my view, those are good arguments for the jury to hear. I think the defense has a perfectly credible, appropriate argument that there wasn't any evidence of an intent to damage, deface or destroy the property of another so the jury could not find element two of Criminal Mischief.

Mr. Weiland has a good argument that the intent was to damage that property so he could get to the person behind it. I think both of those are arguable under the evidence that the jury has before it. And so I think I need to give the instruction and allow the jury to decide whether they think there was sufficient evidence of intent rather than me making

I understand Mr. Weiland's argument, and I hadn't thought of it that way. But I think it's certainly a reasonable argument to make.

And so I'll leave Count III in. I'll deny the motion to dismiss on that, leave Count III in for the purpose of letting the jury decide that issue another of intent. Interesting.

Okay. Mr. Taylor?

MR. TAYLOR: The only other one I would argue based upon the State's argument just barely is back to the accident involving property damage. And their argument is that he intentionally damaged that lift, then I don't think that Count IV can stand.

THE COURT: Let's (Inaudible) --

MR. CRAMER: -- based upon the idea -- if it was an accident, it's that argument we've been --

THE COURT: Yes, the argument from the prelim.

Okay, Mr. Weiland?

MR. WEILAND: And, Your Honor, with that, again, my argument is that I don't believe the legislature intended to include accident. And without -- I mean, I believe it's much broader. Accident also includes an intentional act. It's not just as we

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often refer to as an accident. I believe that, you know, if you intentionally cause damage to another car, that it is your duty to stick around and give the same information that you normally would.

I don't believe that their intent was to, all right, if you intended to cause the accident, then therefore you don't need to stick around. I think what they mean by accident is when two vehicles collide or when there is a collision, you need to stick around and provide the same information that you normally would. And it's not broadened to say, oh, if you intended the act, then therefore you're free to go.

THE COURT: So how do I know what the legislature intended?

MR. WEILAND: Well, I mean, because -- I mean -- my question is: I don't know what they meant by accident. I mean, did they -- the definition of "accident," does that include an intentional act that caused -- or does it just mean...

THE COURT: Well, it usually doesn't, does it? I mean, if someone's climbing -- if someone's climbing to Angels Landing and jumps off eyes wide open, we wouldn't call that an accident, we'd call it

a suicide

(Lunch Recess.)

THE COURT: Returning to the record without the members of the jury and without a prosecutor for that matter.

MR. TAYLOR: That's all right. We don't need him.

(Discussion off the Record.)

THE COURT: The last juror just arrived back so we're ready to bring the jury in unless there's something we need to talk about.

MR. CRAMER: Your Honor, there's a couple things from the Defense perspective. I think that there was an inadvertent situation. (Inaudible) transported all where a juror saw Mr. Cecil in the back being taken back to his cell. I believe he was handcuffed, he was still in his courtroom clothes.

THE COURT: Yes. The officer mentioned that to me. Again, will you describe while we're here in the record where Mr. Cecil was when that juror came back.

A VOICE: Yes, Judge. We were exiting out this door after we had broke, and she was walking down the corner of the hall. It was very brief.

Once I recognized her, we were probably

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midway out in the hall, the door hadn't even completely closed. I just opened the door, brought her back in and let her continue on down the hall.

THE COURT: Okay.

What do you think?

MR. CRAMER: Well, Your Honor, I think I know what the Court will say, but I think the Court needs to understand where I'm coming from again. I always have to look at these things from an appellate angle as well as from a trial angle.

THE COURT: Of course.

MR. CRAMER: And I think that the case law is clear that if something happens that gives a juror an impression that your client is in custody, then that gives them kind of a prejudice against him that they feel: "Well, he's in custody, then he must be guilty for it."

I think the appropriate resolution would be to -- I don't know whether you talk to a juror about it, but we'd move for a mistrial on those grounds to preserve that argument.

THE COURT: Yes.

MR. CRAMER: Because I think that it could prejudice him and she could very well go into deliberations and say, "Well, I saw him and he was

2 THE COURT: Yes. Do you think she did see
3 him and recognize that he was in handcuffs?

4 A VOICE: I don't believe she would of --
5 there's no way she seen the back of him.

6 THE COURT: From --

7 A VOICE: (Inaudible) recognize that he
8 was at all in handcuffs.

9 A VOICE: I was right behind her and I saw
10 the door open and then step out, and like he said,
11 the door hadn't even closed and they backed out. And
12 I -- from her impression of her leaving, I don't think
13 she thought anything -- I don't even know if she
14 recognized him as being the Defendant or any different
15 than me escorting the jury out into the hallway.

16 THE COURT: Uh-huh.

17 A VOICE: But, again, that's --

18 THE COURT: Mr. Cecil --

19 A VOICE: I can only speculate on what she
20 thought.

21 THE COURT: -- what do you think that
22 juror saw?

23 THE DEFENDANT: I'm not sure. I know she
24 saw my hands behind me back. Whether or not she saw
25 metal on my wrists or what, I don't know.

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1 THE COURT: Okay.

2 THE DEFENDANT: I can't say.

3 THE COURT: Was it a matter of maybe a
4 second or was it several seconds?

5 THE DEFENDANT: Yes, it was very brief, a
6 couple of seconds, maybe.

7 THE COURT: Yes.

8 When you had Mr. Cecil come back in the
9 courtroom, how did you do that?

10 A VOICE: I just opened the door asked him
11 to step back inside. Put my hand right on his
12 shoulder and said, "Step back inside."

13 THE COURT: Okay.

14 Well, Mr. Weiland, what do you think?

15 MR. WEILAND: (Inaudible) probably get
16 more details for the record. I mean, how wide is the
17 hallway?

18 A VOICE: Four feet.

19 MR. WEILAND: And with that door?

20 A VOICE: Three and a half, four feet,
21 maybe.

22 MR. WEILAND: And with that door open,
23 would you say it's half the distance in the hallway?

24 A VOICE: Right (Inaudible).

25 MR. WEILAND: And you are on the other

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A VOICE: Yes, we had exited the door, the door frame on the other side of the door as it opens.

MR. WEILAND: And you were in the one half of the hallway which you had a perfect view of the juror?

A VOICE: Yes.

MR. WEILAND: Where was Mr. Stevens -- I'm sorry, Mr. Cecil?

A VOICE: He was right to the side of me.

MR. WEILAND: All right. And did he have a clear view of the juror as well?

A VOICE: I'm sure he did. I didn't ask him if he had seen her.

MR. WEILAND: I mean, I -- and then -- and how long did it last, that --

A VOICE: Maybe a max of two to three seconds. It was very, very brief. As soon as I recognized that it was the jury member, I turned him around (Inaudible).

MR. WEILAND: And when you observed the jury member, was she looking at your --

A VOICE: She looked -- she was looking at me.

MR. WEILAND: Yes.

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And did she -- was there any noticeable expression on her face?

A VOICE: No.

MR. WEILAND: All right. And then you immediately just put him back in?

A VOICE: Yes, I brought him back in here.

MR. WEILAND: I would object to a ministerial. I don't think -- at this -- you know, we have no information that the juror even saw him, it's very brief. There was a -- even kind of some version that it was very brief, but he doesn't even know that she saw him.

MR. CRAMER: Your Honor, the only thing I would say in rebuttal, briefly, is just that there really is no -- you know, he's being escorted by law enforcement, although it's probably not physically possible for the juror to have seen his cuffs because it sounds like they were face to face. Still the fact is he was being escorted, his hands were behind his back, he was taken back by law enforcement into the courtroom. You know, it's an inference that he is in custody. I wasn't there. Mr. Taylor wasn't there. It's not like we were all walking out en masse as the defense team.

THE COURT: And how might it have appeared

2 just speculation for all of us. It could very well
3 have appeared to her like Mr. Cecil was being directed
4 and controlled by the officer. It could have looked
5 like the officer is holding the door open and saw
6 Mr. Cecil and the juror in the hall and maybe that was
7 not -- that's something I'd already instructed them
8 not to have happen, so he had Mr. Cecil go back in the
9 room since there's no place really for a juror to go
10 except down the hall.

11 Well, we can go speak to Ms. Allen in
12 chambers if you want to?

13 I don't want to -- you know, by
14 questioning, emphasize something she hasn't even
15 thought about. But I suppose one approach would be to
16 just to say to her: "I understand that you and
17 Mr. Cecil happened to be passing in the hall, was
18 there anything about that, that concerned you?" I
19 don't know. That may suggest to her that maybe she
20 missed something that she should have been concerned
21 about.

22 MR. CRAMER: Well, maybe just --

23 I know the Court's probably already read
24 instructions about not communicating or talking.

25 THE COURT: Yes.

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1 MR. CRAMER: Just to avoid the -- you
2 know, yes. Some type of inappropriate perception,
3 whether anything went badly or not. Perhaps the Court
4 could ask her in terms of that, just say: "It is my
5 understanding from the bailiffs that you were leaving
6 at the same time, saw Mr. Cecil in the hallway. Can
7 you just tell me what your impression was?" Just ask
8 her and open-ended question. And perhaps the Court
9 could just do that in camera without us here but with
10 the record going so that she wouldn't feel...

11 THE COURT: And the only place that I'd
12 have to do that is in the courtroom here because I
13 can't record in chambers with court going on over
14 there.

15 MR. CRAMER: Oh, okay.

16 THE COURT: Well, I might be able to,
17 actually, by switching the camera in there, but then
18 they wouldn't be getting a record of whatever it is
19 they're doing so...

20 MR. CRAMER: Okay.

21 THE COURT: What do you think,
22 Mr. Weiland, is that worth doing?

23 MR. WEILAND: The only concern I have, I
24 mean -- and I'll defer to the Court. I'm just -- it's

25 hard -- you know, when you say, you know, "Don't think

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THE COURT: Yes.

MR. WEILAND: And that situation where we're asking more into it. If she -- but if there is a (Inaudible) of instructions, you say, "Hey, I understand that you saw Mr. Cecil in the hallway and to avoid the appearance of impropriety, do you want to tell us about it? Did you see anything?" I don't know.

MR. CRAMER: I think that would be appropriate. I would ask the Court to do that again just looking to complete a record.

THE COURT: Uh-huh, yes, I would like to. Well --

MR. CRAMER: And, again, I'm with Counsel, I don't want it to be something that we flag her to: Why are they asking me that? So, if we could do it as very low key.

THE COURT: Yes.

MR. CRAMER: I'm afraid with the Court sitting on the bench it's not going to be able to be low key just because of the natural authoritative position the Court holds.

THE COURT: (Inaudible) authority more than that.

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I don't know what to tell you.

MR. CRAMER: Is it -- we don't have court reporters anymore.

MR. TAYLOR: Is there any personal recording device that could be used?

THE COURT: Not really. I suppose we could go into Judge Shumate's chambers if he's not in here. He's got the stand alone thing.

THE CLERK: (Inaudible) video recorder?

THE COURT: Yes, for video. I wouldn't even necessarily want her to know that it was being recorded.

MR. CRAMER: No, I don't think that --

THE COURT: We started it and then --

MR. CRAMER: Just start it and have her come in.

THE COURT: (Inaudible) ask her to come in.

MR. CRAMER: Just have the Court chat with her.

THE COURT: (Inaudible) in the chairs.

MR. CRAMER: Yes.

THE COURT: Maybe we should go with that. I think we better do that because I don't want (Inaudible) --

2 caution, Your Honor.

3 THE COURT: -- assuming whatever it is she
4 saw or thought, or I don't know what her experience is
5 and what she might conclude.

6 But I will go ahead and do that. Let's
7 recess here and get set up. And then if you'll come
8 with me, we'll get Ms. Allen to come in and speak to
9 me in just a minute.

10 Now, I'm going to have to tell her what to
11 tell the other jurors about her coming to talk to me.
12 All I would tell her is that as -- just to tell the
13 other jurors as she was leaving, she passed by
14 somebody in the hallway. And I just wanted to know if
15 anything had been said -- I don't even want her --
16 I'll instruct her: "Don't tell anybody who it was
17 that you passed." And I think, you know, she seems
18 pretty smart and conscientious, and I think that
19 she'll do that.

20 MR. CRAMER: That will be fine,
21 Your Honor. Thank you.

22 THE COURT: Okay.

23 MR. WEILAND: Your Honor. I'm just
24 (Inaudible) which juror -- Ms. Allen?

25 THE COURT: Ms. Allen (Inaudible).

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1 MR. WEILAND: Do we have two Ms. Allen's
2 on the stand?

3 THE COURT: No, we only have one left.

4 MR. WEILAND: Oh, that's right, okay. I
5 know who you're talking about.

6 THE COURT: Yes, Ms. Allen with the dark
7 hair.

8 (Recess.)

9 THE COURT: Again, returning to the record
10 with the Court with Mr. Cecil and Counsel for the
11 parties, not the members of the jury. We couldn't
12 make the recording equipment work in Judge Shumate's
13 chambers. And so we just went into my chambers, the
14 Clerk, the Bailiff and I and were there, and we
15 brought Ms. Allen in and I said to her -- I can't say
16 it exactly, but I said that I had just heard that she
17 had inadvertently passed some -- passed Mr. Cecil in
18 the hallway, and I just wondered if there was anything
19 that concerned her about that. And she said -- she
20 said, "No, the Bailiff had opened the door and I saw
21 him there and I just put my head down and didn't make
22 any eye contact." And she -- I said, "Was there
23 anything that concerned you or did anybody say
24 anything?" She said, "No. Not at all."

25 And so then I told her that I just wanted

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something or, you know, had a question about it. And then I asked if she had said anything to anybody on the jury, and she said, "No." And then I said, "Well, when you're going back, they may wanted to know why I was talking to you, so I'd like to have you just tell them that you inadvertently passed somebody involved in the case in the hallway and I just wanted to know if there had been anything said." Okay. And I told her not to say who it was that she had passed in the hallway. And she seemed very clear on that.

So I think, at this point, I won't declare a mistrial. I think we're okay on that score. And she didn't seem to be -- she didn't seem to be concerned while she was saying she was not concerned, do you understand what I mean. She didn't indicate anything otherwise in her demeanor or tone of voice or anything at all.

MR. CRAMER: Okay. Thank you, Your Honor.

THE COURT: Anything on the record you wanted to make on that, let's do that.

MR. CRAMER: Thank you, Your Honor. No.

The only other record I would make is that I believe the State's next witness is Ms. Quintero, my only concern on that is if...

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MR. WEILAND: I'm sorry, Your Honor, I --

MR. CRAMER: If her testimony is going to be such that she is going to say under oath that she lied on this witness statement form, then I think she needs to be represented, and I don't want to be objecting in the middle of her testimony and saying she needs an attorney before she either perjures herself here or admits to perjury by saying that this is a lie.

THE COURT: Okay.

MR. CRAMER: So, if that's going to be the nature of her testimony, I think she needs to be represented and it needs to be done now.

THE COURT: What do you know about that?

MR. WEILAND: Your Honor, I had spoken with her at length. I informed her that, you know, she could be looking at possible charges of the -- you know, writing a false report to police officers, a class B Misdemeanor, and she goes, "I don't care. I'm willing to testify truthfully," and that's what she wants to do.

And so she has been advised. But she says, "I want to testify truthfully." And if you want to bring her in and ask her certain questions yourself then that's fine.

MR. CRAMER: And that's fine if that's what she wants to do. But I still think that she needs to be represented before she makes such a decision.

THE COURT: She needs to at least be advised that she --

MR. CRAMER: She needs to be advised of her rights and I think she needs an attorney because whether the County decides to press charges or not now, I mean, that may be an issue later down the road. I don't want to --

THE COURT: Where is she?

MR. WEILAND: She's right outside.

THE COURT: Okay.

Let's bring her in and see what her thinking is about that.

MR. CRAMER: We could grab maybe Mr. Terry or somebody from next door and see --

THE COURT: Let me ask her if she wants to. If she declines and she has an opportunity, I think that is her choice.

MR. CRAMER: Okay, thank you, Your Honor.

THE COURT: All right. What's your name, ma'am?

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MS. QUINTERO: Anjelica Quintero.

MR. WEILAND: Your Honor --

THE COURT: Ms. Quintero --

MR. WEILAND: I just wanted to be sure (Inaudible).

THE COURT: Yes. We want to make sure you're recorded. Can you come up and take a seat on the witness stand. You'll be up here soon, apparently. There's something that the attorneys have notified me of that I need to ask you about. And so, again, now that you're near a microphone, would you say your name again please?

MS. QUINTERO: Anjelica Quintero.

THE COURT: And you're going to be called as a witness in this case, and apparently you made a written statement to the police officers at an earlier point back in March or early April, is that right?

THE WITNESS: Yes.

THE COURT: And it's been suggested that your testimony today might be different from what you said in your written statement?

THE WITNESS: Yes.

THE COURT: Is there a possibility of that?

THE WITNESS: Yes.

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Q. Did you tell the officers everything truthfully the first time?

A. Yes.

MR. WEILAND: Nothing further.

THE COURT: You may cross-examine.

MR. TAYLOR: Thank you.

CROSS-EXAMINATION

BY MR. TAYLOR:

Q. Your full name is Michael Paul Stevens?

A. Yes, it is.

Q. What is your date of birth?

A. January 16, 1974.

Q. So how old are you now?

A. 35.

Q. 35?

How long did you date Anjelica, is it, Anjelica Quintero?

A. Anjelica.

Q. Okay. How long did you date Anjelica?

A. For a few months starting in November.

Q. That would be November of 2008?

A. Yes.

Q. And about approximately what time did you stop dating her?

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A. January.

Q. What type of a relationship did you have with her?

A. We had, for the most part, an exclusive relationship.

Q. Did you ever get in arguments?

A. No, not really.

Q. What caused you to stop seeing her?

A. Just because I just didn't have an interest in seeing her. She showed more her true colors, and I didn't have an interest in that and I didn't want to be around it.

Q. At some point in time on the day in question here, on the 30th of March of this year, did you make a statement to Officer Ray, who's right here, that Anjelica thought that you were out to get her for getting you arrested on a marijuana charge?

MR. WEILAND: Objection, Your Honor.

MR. TAYLOR: It's a statement made by a party in interest in the matter.

MR. WEILAND: May we approach?

(Discussion off the Record.)

THE COURT: Members of the jury, there's a question of evidence I've got to discuss with Counsel. I have to excuse you to the jury room so I

2 about it freely. We'll get you back in just a few
3 minutes.

4 (Jury Leaves.)

5 THE COURT: Okay. First of all,
6 Mr. Taylor, tell me what it is you want to go into on
7 this line of questioning?

8 MR. TAYLOR: The only thing that I was
9 going to ask him was just simply the statement that he
10 made to Officer Ray in the police report where he had
11 mentioned that Anjelica Quintero -- that he was out to
12 get her for getting him arrested on a marijuana grow
13 up on Pine Valley Mountain, and that he has pending
14 charges --

15 THE COURT: What's the relevance of that?

16 MR. TAYLOR: It goes to the statement that
17 hasn't been into evidence yet, but Mr. Weiland alluded
18 to it that Mr. Cecil and Anjelica Quintero had
19 contacted law enforcement regarding threats that had
20 been made to them by Mr. Stevens and this was
21 Mr. Stevens' response to the officer as to why would
22 they -- why would such a call have been made in the
23 first place to dispatch.

24 THE COURT: Yes. But I'm still wondering
25 -- so, what is the relevance of that information even

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1 if it is correct?

2 MR. TAYLOR: Well, the relevance is, is
3 that -- our whole side of the story has to do with
4 this issue of self defense. If Mr. Stevens had made
5 threats to Mr. Cecil and Ms. Quintero, and that this
6 was the underlying reason regarding that Mr. Stevens
7 was out to get Ms. Quintero for allegedly calling law
8 enforcement in regards to a marijuana grow. It shows
9 bias for one thing, as to, you know, the statements
10 that he would make but also it's directly related to
11 who's chasing who. In other words, is there an issue
12 of self defense?

13 THE COURT: Uh-huh.

14 MR. TAYLOR: It gets to the underlying
15 reason why Mr. Cecil or Ms. Quintero would be alarmed
16 by Mr. Stevens' presence in the first place.

17 THE COURT: Okay. Mr. Weiland?

18 MR. WEILAND: Your Honor, if the question
19 is about regarding threats, he could ask specifically:
20 "Did you make any threats?" But I think it's improper
21 to talk about -- I mean, he can't be impeached on a
22 criminal matter that he hasn't even been prosecuted
23 on. There's no conviction and so just bringing up --
24 alludes to this marijuana grow. I think it's
25 impermissible. If he wants to ask about: "Did you

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regarding something that's totally irrelevant, I think it's improper.

THE COURT: Well, improper why?

MR. WEILAND: Well, number one, it's a prior bad act and under Rule 60 -- sorry.

THE COURT: Well, we're probably talking about 404B, "Where evidence of other crimes or wrongs or acts is admissible for purposes of proving motive" and other things.

MR. WEILAND: Right. And then what -- and I would believe that it falls under any of those categories.

THE COURT: Well, Mr. Taylor is suggesting it -- he's trying to show that this witness has a motive to -- to not tell the truth because he's been accused of something by the people that were on the other side of this dispute.

MR. WEILAND: Well, to not tell the truth and that's why he's been chased off the side of the road. I just don't see the connection.

THE COURT: Not telling the truth about whether he even was chased off the side of the road. I mean, that's the Defense theory of it, so he wants to suggest a motive for the witness to not tell the

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truth. Even if that's the case, though, Mr. Taylor, I don't know why -- I don't know why it would be relevant what particular accusation had been made against Mr. Stevens.

MR. TAYLOR: As far as -- you mean the marijuana grow itself?

THE COURT: What's the woman's name? We keep calling her 14 different versions.

MR. WEILAND: It's spelled Anjelica, but it's Anjelica, and that's why I (Inaudible).

THE COURT: Okay, so Anjelica?

MR. WEILAND: Yes.

THE COURT: Quintero is that the last name?

MR. WEILAND: Yes.

THE COURT: What difference does it make what she might have accused Mr. Stevens of doing?

MR. TAYLOR: Well, maybe it goes to -- it goes -- I mean, it's Mr. Stevens' own statement in the investigation of the matter (Inaudible) the officer asked him, you know, "I received this call and they said that you were making threats." Because the officer is out looking for Mr. Stevens. Why -- and then he asked him why would -- you know, "What's with this?" And this is his reason for it.

2 statement?

3 MR. TAYLOR: (Inaudible).

4 THE COURT: What did he say specifically
5 in his statement?

6 MR. TAYLOR: According to the officer, he
7 said that they had broken up a few weeks ago. He said
8 he was arrested recently for the marijuana grow in
9 Pine Valley. He said that for some reason Anjelica
10 thinks he's out to kill her for getting him arrested.
11 And then when he went on and said that Michael told
12 him that he never made any threats to Anjelica or
13 (Inaudible) or Michael claimed he didn't know.

14 MR. WEILAND: And so, if anything, he's
15 saying to the officer he's never made any threats, and
16 now they want to bring in the fact that he thinks
17 Anjelica -- he said that he thinks Anjelica is upset
18 at the -- I mean, I don't see how it comes in.

19 THE COURT: Yes, I'm having real trouble
20 finding a straightforward analysis through that.

21 MR. TAYLOR: It also goes to the
22 (Inaudible) bias -- if he has pending charges against
23 him in the Fifth District Court and the State has
24 flown him down here from the State of Alaska, he has
25 pending felony charges here, I think that there will

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1 always be (Inaudible) bias --

2 THE COURT: Does Mr. Stevens have pending
3 felony charges?

4 MR. TAYLOR: He does.

5 THE COURT: Okay. Is he presumed innocent
6 like Mr. Cecil?

7 MR. TAYLOR: Yes, he is.

8 THE COURT: Okay. So what can be said
9 about that, that's not unfairly prejudicial to a jury?

10 MR. TAYLOR: I think it goes to bias as to
11 whether or not the State has made any type of
12 agreement with him in regards to his case (Inaudible).

13 THE COURT: Well, that's not what you were
14 asking him about though.

15 MR. TAYLOR: Well, no, I'm asking him
16 about that. But I would be eventually be asking him
17 about that. I guess we just try to cover all of the
18 bases now.

19 Also I think under 6-13, prior statement
20 of the witness, could come in as well, I think.

21 THE COURT: For any purpose and any prior
22 statement?

23 MR. TAYLOR: Unless it's unduly
24 prejudicial under (Inaudible).

25 THE COURT: Well, all 613 says, though, is

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assumes that there'd be relevance behind the whole discussion.

MR. TAYLOR: I think if Mr. Stevens -- he can clarify and say, you know, he didn't say.

THE COURT: Well, let's go back to your question, though, okay. What was it you were asking Mr. Stevens when we got derailed?

MR. TAYLOR: Well, I just asked him if he made that statement to Officer Ray.

THE COURT: The statement that, "Anjelica thinks I'm trying to get her"?

MR. TAYLOR: Uh-huh.

THE COURT: Okay.

MR. WEILAND: I mean --

THE COURT: That far --

MR. WEILAND: Well, I mean --

THE COURT: To go that far or to ask the witness about his statements. We're not speculating because apparently it's his written statement.

MR. WEILAND: No, it's not his written statement. You see, it's speculation. The officer says, "Why you think Anjelica" -- or "Why do you think they're upset?" And he's speculating to the officer why he thinks that -- I mean.

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THE COURT: Yes, that's true.

MR. TAYLOR: That's his opinion, though.

THE COURT: But if Mr. Stevens is required to testify and if he testifies consistently with his written statement, he could be asked about that. And if he had an opinion or some reason to have an opinion, he could express that same opinion, that he thinks that Anjelica -- it gets too complicated when you say it that way.

I guess, Mr. Taylor, what I'm trying to do is find a way for this to be expressed that's not just essentially mudslinging.

MR. TAYLOR: I'm not --

THE COURT: That he has his own criminal charges, therefore the jury should conclude something or the other. And that's not what you're trying to ask him about, and that's not what you're trying to do. But I'm trying to find a way to express that isn't -- to the jury, doesn't come out that way.

Can you think of some way to do that? I mean, you're doing it by way of leading question, which is, of course, fine from your side of it, but if there's something in your leading question that is not admissible or that is unfairly prejudicial, then I can't let you use a leading question that way.

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2 THE COURT: Can you just ask Mr. Stevens:
3 "Didn't you tell the officer that Anjelica had accused
4 you of committing some crime and you thought that she
5 was afraid you were trying to get revenge?" Or
6 something like that?

7 MR. TAYLOR: I could certainly ask that.
8 However, I still think that it's admissible for me to
9 ask him whether or not he has any pending felony
10 charge here for the bias as to whether or not -- you
11 know, is he receiving some benefit or motivation in
12 regards to this case that's somehow going to help him
13 in his pending felony matters in this very court.

14 THE COURT: Well, I don't know the
15 charges, per se.

16 MR. TAYLOR: (Inaudible).

17 THE COURT: Well, as you know, charges per
18 se don't mean much of anything to me when I'm trying a
19 case. Why should I let you talk to the jury about
20 that?

21 MR. TAYLOR: Well, I guess -- it goes to
22 the bias, that he's able to work out a favorable plea
23 agreement or whatever he might be able to work out in
24 his case.

25 THE COURT: You know, we can talk a long

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1 time about that.

2 MR. TAYLOR: And you can just say --
3 either answer "yes" or "no".

4 THE COURT: And slap a lot of black paint
5 all over the witness and come out with nothing except
6 the black paint; or do you have any evidence that
7 there's any kind of plea agreement?

8 MR. TAYLOR: I do not.

9 THE COURT: Has there been anything
10 offered to Mr. Stevens related to his case and
11 connected to his testimony in this case?

12 MR. WEILAND: There had been an offer but
13 it has been rejected and then I -- we -- I'm informed
14 last night -- I mean, we could ask him out there:
15 "Have there been any promises made to you regarding
16 your other case?"

17 THE WITNESS: No, I did reject the offer
18 that was proposed to my attorney.

19 MR. WEILAND: And then he wanted to handle
20 this case and then -- get it over with before you made
21 any exception of any other offer and that was with
22 Brenda Whiteley.

23 THE COURT: Uh-huh.

24 MR. WEILAND: Has -- and I guess I should
25 have asked, but there's been no promises made to him

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THE COURT: Yes.
Well, Mr. Taylor --
MR. WEILAND: I mean, I don't mind him asking: "Have there been any promises made to you for your testimony today?"

THE COURT: I'm not sure. That's a plain vanilla kind the question.

MR. WEILAND: Well, (Inaudible).

THE COURT: (Inaudible) the question though of suggesting that the witness has criminal charges against him still is one that I'm not very happy with because charges are charges, not an apt expression but charges are a dime a dozen, anybody can have charges. Mahatma Gandhi had charges, Jesus had charges, you know, Martin Luther King had charges.

MR. TAYLOR: I agree with Your Honor from that perspective.

THE COURT: And so the specifics of what those charges are, I think, goes too far and becomes unfairly prejudicial because it just suggests to the jury something that hasn't been proven, hasn't been established and really may never be. But I -- I think once there are charges pending, it would be fair for the witness to be asked if he has criminal charges

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pending and if anybody's -- if he's made a deal with the Prosecution related to his testimony.

MR. TAYLOR: That's fine.

THE COURT: Now, you can ask that and knowing what the answer is going to be, I don't know at it helps, but that's kind of up to you. But I think to suggest that this is the nature of the charges and -- I think that goes too far.

(Discussion off the Record.)

MR. TAYLOR: I should probably bring this up, too, as long as the jury is out.

THE COURT: Yes.

MR. TAYLOR: We do have a (Inaudible) opinion, a couple of prior convictions that have to do with crimes of moral turpitude in our -- the role that we are also going to question him about. Whether he had a prior criminal history on two specific charges.

THE COURT: What are they?

MR. TAYLOR: One of them is attempted obstruction of justice in 2005, and the other is attempted to sell or supply alcohol to minors in 2004.

THE COURT: Now, how would those be permissible because I know that they -- the Court of Appeals has had all kinds of grief. In fact, I've heard it directed to the (Inaudible) opinion about the

2 know whether we'd know what crime of moral turpitude
3 is, but how would those two be such that they would be
4 relevant to his credibility?

5 MR. TAYLOR: Well, on the -- (Inaudible)
6 obstruction of justice, I guess, has to do with
7 dishonesty, with truth and veracity, I take it.

8 THE COURT: Do you know what the facts
9 were?

10 MR. TAYLOR: I do not know what the facts
11 of the case were, just that he has the conviction.

12 THE COURT: Because obstruction of justice
13 might be someone at the door saying: Is so and so
14 home and the person saying, "No, he's not." You know,
15 I suppose that's a lie. It's not a big thing in my
16 mind, but it is prosecutable.

17 MR. TAYLOR: The rule itself talks about
18 truth or -- that sort of thing. It doesn't use the
19 words crime of moral turpitude, of course,
20 (Inaudible).

21 THE COURT: Were either of those felonies?

22 MR. TAYLOR: They are not.

23 THE COURT: Felonies.

24 Well, I'm kind of trying to go through the
25 list, and think of good permissible ways for those to

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1 be used, but I'm not coming up with it.

2 Okay. Under Rule 608: Credibility can be
3 attacked by specific instances of conduct. But that's
4 not really what you're talking about here. You're
5 talking about just a charge.

6 The evidence of bias, bias, prejudice or
7 any motive to misrepresent. I would allow you to ask
8 him about pending criminal charges and whether he's
9 made a deal for his testimony.

10 MR. TAYLOR: So I could ask him whether he
11 has any pending criminal charges?

12 THE COURT: Is that objectionable?

13 MR. WEILAND: I mean, again --

14 THE COURT: I guess it does suggest more
15 than -- yes. Maybe I just have to restrict it to
16 asking him if he's made any agreements for his
17 testimony to get any benefits. I just don't want
18 to -- you know, I just don't want to open a can that
19 has odor in it and has nothing else. There's no
20 conviction, no evidence that could be given about this
21 specific charge. I'm not sure why this is so hard for
22 me this morning. I mean, I had a good breakfast, I
23 should be able to think through this.

24 MR. TAYLOR: And this also relates to
25 Officer Ray. I mean, eventually, when we get to

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about the calls and that, that came in to him. I mean, his investigation where he's deciding why Mr. Cecil and Ms. Quintero make a phone call to him and tell him that they're fearing for their life if there's absolutely no explanation that can be given. I mean, Mr. Stevens gave his explanation as to why he thought that was. He didn't say he did it, he just said this is my explanation, this is what I understand.

MR. WEILAND: Ms. Quintero is here, and she could testify -- they could ask her directly. They could also ask Ms. Stevens directly: Have you made any threats?

THE COURT: Uh-huh.

I'm still just struggling to find probative value in that written statement of this witness that is greater than the prejudicial effect. I guess that's really what I'm struggling with, and I'm just not finding it.

MR. TAYLOR: One other that I intended to -- you know, unless the Court has a problem with that, with Mr. Evans, made this statement as well, that as far as his relationship with his stepbrother, the one time stepbrother, that they had -- they didn't have

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essentially much of a relationship because he thought that he, once again, used drugs and there was a safety issue for his family. That's essentially his words that's also in the statement.

THE COURT: Okay. But how does that relate to anything relevant to this case?

MR. TAYLOR: Well, part of our defense and what we're looking at, of course, is the Court would eventually give a self defense instruction. And if he's made calls to law enforcement and said that threats were made.

THE COURT: Now, who is it that "he" you're talking about.

MR. TAYLOR: I'm talking about Mr. Cecil and Ms. Quintero.

THE COURT: Okay.

MR. TAYLOR: So that it gives some reason then as well as, you know -- you know an officer says on the stand that Mr. Cecil and Ms. Quintero both told law enforcement that they saw Mr. Stevens with a gun in his waistband.

THE COURT: Well, certainly they can testify about that. Reports of threats being made still are marginally relevant at all. Again, anything can be reported to somebody.

2 directly relates to the crime itself that we have for
3 trial, I just don't see that as being anything other
4 than just kind of a self-serving statement, I guess.
5 Observations related to these crimes is what we really
6 ought to be focusing on.

7 Well, Mr. Taylor -- I don't know, I'm just
8 not -- I would allow you to ask the witness whether he
9 has made any agreements with the Prosecution or
10 anybody else to testify in a particular way in order
11 to get an advantage in something he's interested in.
12 You could ask him whether he's made any threats.

13 What else is it that you really wanted to
14 know about?

15 MR. TAYLOR: The only other thing that I
16 think I would ask him regarding this sort of thing is
17 whether he's aware of the ex parte protective order,
18 stalking injunction that was entered by Judge Shumate
19 about four days after this occurred --

20 THE COURT: Well --

21 MR. TAYLOR: -- in which he names
22 Mr. Cecil as one of the protected persons; he was
23 served with it.

24 THE COURT: But it was ex parte, no
25 hearing?

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1 MR. TAYLOR: It just still says the
2 ex parte order, so I'm assuming that there was not a
3 hearing, but he was served.

4 THE COURT: Yes.

5 MR. TAYLOR: And it was signed.

6 MR. WEILAND: Your Honor, if they'd like
7 to open that up, that's fine because in that it was
8 filed after the fact, and I've already alleged to it.
9 There was not any mention of any gun whatsoever.

10 THE COURT: Yeah, you did, you did mention
11 that.

12 MR. WEILAND: But I'm not offering it into
13 evidence.

14 THE COURT: Uh-huh.

15 MR. WEILAND: I'm just going address
16 Ms. Anjelica about it.

17 THE COURT: You see, that's the problem
18 with the stalking injunction and the protective order
19 procedure, particularly stalking injunctions because
20 if somebody is served with one of those, it still is a
21 one-sided, unheard, untested allegation, and the party
22 who receives it may just ignore it. That doesn't mean
23 that anything has been proved.

24 MR. TAYLOR: I wasn't going to ask him
25 about it other than that he was aware that there was an

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THE COURT: That's about the same as asking if there are charges pending. If they haven't been tried, if they haven't been heard by a Court, they're just charges, they're just allegations, and I just don't think that -- I don't know, I just have a problem with that as evidence because I think it suggests something to a jury who may -- who would have no reason to understand the stalking injunction or protective order process; it would suggest more to them than it really means.

Do you understand what I'm saying?

MR. TAYLOR: No, I understand where you're coming from.

THE COURT: Ex parte stalking injunctions only mean that somebody wrote up a good petition, that's all it means. The Judge doesn't weigh it, the Judge just says: It alleges enough; bingo, there's your ex parte stalking injunction.

Then if we have a hearing, it may be a whole different matter.

To me it's just the same as the pending criminal charges. It may well be the case, but I don't see it has any particular relevance even to credibility unless you get evidence that there's been

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some kind of a deal made related to pending criminal charges.

MR. TAYLOR: Sure. Did the Court have a problem with Mr. Evans testifying about what he stated to the Officer about his relationship with his brother?

THE COURT: Tell me again what that was.

MR. TAYLOR: Essentially he told the Officer that he didn't have much of a relationship with his brother because of -- he said that he used drugs and that (Inaudible) safety issue for his family, something to that effect.

THE COURT: I guess that would still be a question of what specifically it is that Mr. Evans knows as opposed to what he suspects, because if it was just suspicion, certainly he's entitled to act on it but it's not -- it wouldn't be relevant evidence.

I mean, I suspect lots of things in the course of trials that, you know, aren't proved. I just have to kind of push those aside.

MR. TAYLOR: Can I question him as to why he made a statement as to detail?

THE COURT: That --

MR. TAYLOR: Mr. Evans.

THE COURT: As to why he made the

MR. TAYLOR: In other words, why he would suspect him if he had any actual knowledge of --

THE COURT: Well, you could certainly ask him if they had any kind of -- what their relationship was, and if his answer was, "It wasn't very close," then the relevance of why it wasn't close goes into Mr. Evan's speculation mostly, unless you're going to have Mr. Evans testifying that Mr. Stevens came down to the shop and used drugs while he was watching, and even that, I don't know how that's relevant to anything that Mr. Stevens is saying today.

MR. TAYLOR: Yes, I guess we just put our objection on the record.

THE COURT: Yes, and I hope I'm not missing something here, but I'm just not finding that line through one of the rules that I'd like to in order to let you question him about that.

MR. TAYLOR: Just have to determine whether or not Mr. Cecil testified or not (Inaudible) somewhere so...

MR. WEILAND: If I understand correctly, I take this also as a motion (Inaudible) the State that there will be no mentioning of any arrest of Mr. Stevens regarding a marijuana grow in Pine Valley

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several months prior?

THE COURT: Yes, I don't see any relevance to that in itself, and I see some clear danger of unfair prejudice, and so I don't think that could be asked about.

MR. WEILAND: All right, thank you, Your Honor.

(Discussion off the Record.)

THE COURT: Okay. Mr. Taylor, anything else we ought to be discussing before we get the jury back?

MR. TAYLOR: Not that I can think of. I'll probably think of something (Inaudible).

THE COURT: Yes, I know how that works.

MR. WEILAND: I believe, from the State (Inaudible) jury probably appreciated this time to stand.

THE COURT: Probably so.

Do we need a break? Does anybody here need to go out before we continue?

MR. WEILAND: Your Honor, I just need to talk to him briefly.

THE COURT: Okay. Let's take just five minutes.

(Recess.)

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we are back on the record with parties,
the witness, Counsel, not the members of the jury.

I went back to find my notes, and I
couldn't remember which session it was, but I found it
from the District Court conference this year in May.
Professor Medwed from the University of Utah Law
School did a discussion on Rule 608 and 609, and
that's where we are on this, and I think what I've
included, I'm satisfied with. There is one thing
that I wanted to point out for Mr. Taylor on these --
there are past convictions that Mr. Stevens has and
they are not more than ten years' old and if a
conviction involves dishonesty or false statement,
even that is admissible and you may inquire on that.

The problem with just having the name of
the charge is that obstruction of justice might be
missing a joint out the window of the car, which
doesn't involve false statement. It might be: No,
absolutely not, I haven't seen him for years, and it's
somebody who's hiding behind the couch. You know,
that kind of thing, which would be a false statement.
So, if you know what that is and it is a dishonesty or
false statement that could be inquired into; if not, I
couldn't be able to allow that.

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MR. TAYLOR: (Inaudible) underlying impact
(inaudible) factual basis for that.

THE COURT: All right.

All right, have we got the jury back?

MR. CRAMER: One more thing. We just
wanted to put on the record that both witnesses were
here during this entire discussion because they are
attorneys and they're allowed to be in the courtroom.
At during this discussion of what is their testimony
that may be asked of them, they were here.

THE COURT: Uh-huh. Okay. Good point,
good point, thank you.

All right. Let's get the jury back in.

(Discussion off the Record.)

(Jury Present.)

THE COURT: Please be seated.

(Discussion off the Record.)

THE COURT: We'll continue then with
cross-examination.

MR. TAYLOR: Thank you, Your Honor.

Mr. Stevens, I believe that you testified
that you went to see a friend at the Adobe Ridge
apartment?

A. Yes.

Q. Apartments there?

2 that friend about, do you remember what you went to
3 see that friend about?

4 A. I went to see him to get \$200 that he owed
5 me.

6 Q. Were you able to -- was he able to make
7 that payment to you or --

8 A. Oh, no, he had avoided me for a couple of
9 days.

10 Q. Was he there?

11 A. No, he wasn't. I talked to somebody that
12 was at his residence.

13 Q. Do you know about how fast you were going
14 when you drove into the Chevron the second time?

15 A. The second time I went into the gas
16 station?

17 Q. Uh-huh.

18 A. When I was being chased?

19 Q. I believe that was your testimony.

20 A. I wasn't paying attention to the speed.
21 It was faster than I would have normally gone into the
22 station.

23 Q. Would you say that you were speeding?

24 A. Well, I don't think the station parking
25 lot has a speed limit, but I definitely was going in a

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1 little quicker than if I was just going to get gas.

2 Q. Have you had occasion to see the -- hasn't
3 been introduced yet by the State -- but have you seen
4 the video that the gas station made of the event?

5 A. No, I haven't.

6 Q. You've never seen that video? Okay,
7 Did you drive between the diesel pumps?

8 A. Yes.

9 Q. And went around to the -- around the back
10 side of the station, drove up alongside the hoist and
11 stopped?

12 A. Yes.

13 Q. That was your testimony.

14 And how far would you say that Mr. Cecil
15 was behind you?

16 A. My guess was 10, 15 feet.

17 Q. Okay. So he was just following right
18 along just right behind you?

19 A. Came up to a stop, 10, 15 feet behind my
20 vehicle.

21 Q. You got out of your vehicle and was
22 standing by the hoist?

23 A. Yes.

24 Q. Now, did you just pull right up to the
25 hoist and get out of the vehicle, get out of your

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me.

And so if you will come back tomorrow morning at 9:00, we'll have those instructions all ready to go and we'll start reading them. And it will take us probably an hour to do the final jury instructions and the closing arguments, and then it will be time for you to reach your decision.

Any questions?

Okay. With that, then, I'll excuse you for the evening. You can go out with the Bailiff and I'll see you tomorrow morning at 9:00. Thank you.

(Jury leaves.)

THE COURT: Please be seated. The members of the jury have left. The door to the hallway is now closed.

Let's go ahead with defense motions first.

MR. CRAMER: Your Honor, don't know if the Court wants -- it seems for us logical from our perspective to talk about jury instructions first before Mr. Taylor does his motion.

THE COURT: Okay. Well, let me tell you what I have then and we can work from that point. Let's see, I have most of the remaining instructions in order here. There are two Instruction Number 9's

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in any stock instructions as you're aware, and I would use the one that provides that the Defendant has the absolute right under the Constitution to remain silent. That one's, obviously, the one that applies here.

Number 10 is the mens rea, definitions of "intentional knowing and reckless."

Number 11 I have is the elements of Aggravated Assault, and I've used the one that Mr. Weiland prepared and just put a number on it.

MR. CRAMER: And that's the one we have the question on, Your Honor.

THE COURT: Okay.

MR. CRAMER: It seems to us that Aggravated Assault as laid out in the statute of 76-5-103 is a specific intent crime, that it has to be intentional.

76-5-103 (1), person commits Aggravated Assault as defined in 102, which is the definition of "assault."

THE COURT: Uh-huh.

MR. CRAMER: And he intentionally causes serious bodily to another or under circumstances not amounting to a violation of Subsection 1(a) uses a dangerous weapon or other means or force likely to

2 intent in there is intentional. There's no knowing or
3 reckless in it.

4 THE COURT: Now, there are two
5 possibilities: It's the causing bodily injury or
6 using a dangerous weapon.

7 MR. CRAMER: Correct.

8 THE COURT: Are they the same mens rea for
9 both of those?

10 MR. CRAMER: Well, we submit, Your Honor,
11 because -- was it's all one statute.

12 Under circumstances not amounting to a
13 violation of 1(a) just means the serious bodily injury
14 isn't created, but that the person uses a dangerous
15 weapon or other such means or force likely to produce
16 death or serious bodily injury.

17 THE COURT: Uh-huh.

18 MR. CRAMER: So really the only difference
19 there in Subsection b is, well, it didn't cause
20 serious bodily injury but it was likely to. So the
21 difference there is not really the mens rea, the
22 difference there is what happened for exactly the same
23 purposes as we have here, and that's why it's charged
24 as a third, because under Subsection 2, 1(a) is a
25 Second Degree felony. Then, if a serious bodily

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1 injury happened, Subsection 3 1 B is a Third Degree
2 Felony. The serious bodily injury didn't happen, but
3 I because it was likely to:

4 THE COURT: Use of a dangerous weapon --
5 MR. CRAMER: Correct.

6 THE COURT: -- or other means or force
7 likely to produce.

8 MR. CRAMER: Right. Now, the dangerous
9 weapon statute, I think -- as an and aside -- is
10 Constitutionally vague. But in this search for the
11 circumstance, a vehicle can clearly be considered one.
12 So I'm not going to argue that.

13 THE COURT: Mr. Weiland had that defined
14 as any item capable of causing death or serious bodily
15 injury --

16 MR. CRAMER: And that's true, Your Honor,
17 that --

18 THE COURT: -- and then had the facsimile
19 part, which is not something we need.

20 MR. CRAMER: Right. And I think for this
21 case that would be well. Realistically, an envelope
22 could meet that definition if it had anthrax in it.

23 THE COURT: Right.

24 MR. CRAMER: So that's just an aside.

25 I think that the mens rea on that

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can't be knowing --

THE COURT: Now, on every element of it or on the use of a dangerous weapon?

MR. CRAMER: I think -- I think on A under the jury instruction -- I think that B and C, there's a difference there, and I think that's the problem we're having. I think it's intentional. It's a specific intent all the way through.

But we've got two statutes that are mixed here, one that allows knowingly, intentional, reckless or this one under which he's charged which requires intentional.

So I think that this would have to be rewritten to mirror 76 5-103, and the Jury Instruction should only include language of intentional.

I think it's like the aggravated -- or the attempted murder statute. It's a specific intent crime, and that's what you have to prove.

THE COURT: Oh, but 103 incorporates the definition of "assault," and then adds A and B as the aggravated parts. So we'd have to have a normal definition of an assault.

MR. CRAMER: Okay.

THE COURT: Or otherwise the jury would

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just be left to ponder what assault really means.

MR. CRAMER: I understand, but --

THE COURT: So that's Mr. Weiland's element number one.

MR. CRAMER: Okay.

THE COURT: But then the element number two, I do understand, I think, you're argument that that's an intentional rather than any one of the three.

Now, wherever it is, the statute also provides that if the mental state is not specified, then it can be any one of --

MR. CRAMER: That's correct.

MR. WEILAND: 76-2-102, Your Honor.

THE COURT: Yeah, okay.

MR. CRAMER: That's correct. And I stipulate to that, Your Honor. But this statute, 76 5-103, has a specific intent element in it.

THE COURT: It does as to 1(a), certainly.

MR. CRAMER: Well -- and I think it does as to 1 B, as well, Your Honor, unless the Court's going with under circumstances not amounting to a violation of subsection 1(a), and those circumstances being a different mental intent, a different mens rea. But I really don't think it is. I think it's more a

2 assault as opposed to the mental intention here within
3 that statute.

4 THE COURT: Uh-huh, correct.

5 All right. On that one point,
6 Mr. Weiland, what's your response?

7 MR. WEILAND: Your Honor, my argument is
8 that -- as to 1(a), there is a specific intent
9 (Inaudible) intentionally. And the State legislators
10 specifically did not include any mental element as to
11 1 B, and that's for -- that's why you have the fall
12 back position of 76-2 102 which says that and when a
13 definition of the offense is not specific, does not
14 specify of a culpable mental offense and that offense
15 is not involve strict liability, intent, knowledge or
16 recklessness shall suffice to establish criminal
17 responsibility.

18 We believe that the State Legislature was
19 clear in that Count I A does include intentionally,
20 and that's why also the violation -- I'm now reading
21 off Subpart 2. It's a violation of subsection 1(a) is
22 a Second Degree felony because it does require that
23 enhanced, strict -- or I mean the enhanced mental
24 element.

25 THE COURT: Uh-huh.

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1 MR. WEILAND: But when -- and then it
2 says, "One -- under Subsection 3, violates subsection
3 1 B is a Third Degree Felony. And I believe that they
4 -- the State legislature reviewed that and says that
5 they do have the specific intent to cause serious
6 bodily injury to another, then it is a further
7 enhanced or there is a -- I call it as general intent
8 include recklessness while under Subsection 1 B, and
9 that's why it's only a Third Degree Felony.

10 If Counsel is saying it's the same mental
11 intent for both, then my argument would be that it all
12 -- the entire statute should be a second degree felony,
13 and not -- but since they differentiated it, they
14 wanted to -- they meant to include, and they
15 specifically did not include a mental state, and
16 that's why we need to go to the fall back of 76 2-102.

17 THE COURT: All right. Okay.

18 MR. CRAMER: Your Honor, in rebuttal, I
19 would only submit that the only difference between
20 1(a) and one B is that in 1(a) someone did have
21 serious bodily injury, and that's what makes it a
22 second degree felony, not the mental intent.

23 In 1 B, there was no serious bodily injury
24 but could have been, and therefore that's why it's a
25 third, not because of the change of manner intent.

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MR. CRAMER: Otherwise, they would have written it differently, that you had to have a specific mental intent for both elements.

MR. WEILAND: Brief response to that: If that was their true intentions, they would have a person -- well, after the -- a person commits aggravated Assault if he commits assault as defined and he intentionally semicolon -- or colon --

THE COURT: Yes.

MR. WEILAND: -- and so that's why it does not include both. But they separated it, and they put the specific mental element in 1(a) and not 1 B.

THE COURT: Yes, I understand that analysis. And that's the way I would read it objectively.

Now, if intentionally were meant to qualify both A and B, then it would either be stated in both A and B or it would be put before the colon and before A and B.

The only way I can divine legislative intent is from the way they constructed the statute itself, and I think that's correct.

Now, that being said, Mr. Weiland, are you going to be arguing that Mr. Cecil recklessly used a

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vehicle or --

MR. WEILAND: Your Honor, in light --

THE COURT: -- willingly or intentionally.

MR. WEILAND: Yes, I'm going to argue all three. I mean, with the arguments from counsel that I'll -- during cross-examination, well, isn't it true that he -- you know, you were standing in the way? I mean, I believe the evidence is different, but I would like to leave that open to, you know, be able to argue that that was his intent.

THE COURT: Yes.

Well, okay, with that record, I'm going to consider it as an objection to instruction 11, and overrule the objection. I'll give element two the way it is written there, because that is the way that I would understand the statute even though it's a bit incomplete to state intentionally in one part of it and then just state nothing in another part. But I think that's the way I would understand that.

All right. Other any other points on these elements --

MR. CRAMER: No, Your Honor. If the Court would just go through with the rest of the instructions, and if we have objections, we'll make them.

2 Aggravated Assault instructions that Mr. Weiland
3 prepared.

4 13 is the definitions, act, bodily injury
5 and dangerous weapon, but I would eliminate the B part
6 of dangerous weapon and just include the any item
7 capable part because it is not a facsimile (Inaudible)
8 we're looking at here.

9 Now, on the Criminal Mischief element,
10 there was something that -- oh, I recall what it was,
11 and we had this in a trial not long ago involving
12 another charge of Criminal Mischief.

13 And then is the question whether the value
14 of the property is something that the jury is to
15 decide. If they are, we need a special verdict for
16 that because otherwise we don't know what the jury
17 decided.

18 So, if we tell the jury that it's -- they
19 need to decide the value of the property with at least
20 a thousand dollars and less than \$5,000, then that
21 needs to be in the verdict form as part of the special
22 verdict.

23 It can be done. It's just that it's a
24 little more complicated than a normal guilty or not
25 guilty verdict.

364

1 Is that what you were thinking of doing
2 with that element?

3 And let me tell you: In the other trial,
4 we eliminated that element, but I think it was because
5 the defense in that case stipulated that if there was
6 damaged caused, it was at least a thousand. And, in
7 fact, I think in that case it was more than 5,000, but
8 the Prosecution had charged it as a Third Degree
9 Felony.

10 Was that your case?

11 MR. WEILAND: That was my case,
12 Your Honor.

13 THE COURT: Okay. Which case was that?

14 MR. WEILAND: That was State v. Stevens.

15 MR. CRAMER: That's correct, Your Honor.
16 That's the one we did three weeks ago.

17 THE COURT: Okay. That's right. That's
18 right okay.

19 MR. WEILAND: So, I mean -- what I recall
20 is that we also just left that element in, that it was
21 just a -- one of the final elements and they must
22 prove that it was a -- and then what we did was --
23 (Inaudible).

24 MR. CRAMER: (Inaudible).

25 MR. WEILAND: Yes. It was at least a

365

INSTRUCTION NO. 11

The following are the elements of the crime of Aggravated Assault, as charged in Count 1:

1. The defendant:
 - a. intentionally attempted, with unlawful force or violence, to do bodily injury to another, to wit: Michael Stevens; or
 - b. intentionally, knowingly or recklessly threatened, accompanied by a show of immediate force or violence, to do bodily injury to another; or
 - c. intentionally, knowingly or recklessly committed an act, with unlawful force or violence, that caused or created a substantial risk of bodily injury to another; and
2. The defendant intentionally, knowingly or recklessly used a dangerous weapon.

If you find from the evidence, beyond a reasonable doubt, element 1a, 1b or 1c, and element 2, you must find the defendant guilty of the crime of Aggravated Assault.

If you do not find from the evidence, beyond a reasonable doubt, element 1a, 1b or 1c, and element 2, you must find the defendant not guilty of Aggravated Assault.

INSTRUCTION NO. 12

The following are the elements of the crime of Aggravated Assault, as charged in Count 2:

1. The defendant:
 - a. intentionally attempted, with unlawful force or violence, to do bodily injury to another, to wit: Todd Evans; or
 - b. intentionally, knowingly or recklessly threatened, accompanied by a show of immediate force or violence, to do bodily injury to another; or
 - c. intentionally, knowingly or recklessly committed an act, with unlawful force or violence, that caused or created a substantial risk of bodily injury to another; and
2. The defendant intentionally, knowingly or recklessly used a dangerous weapon.

If you find from the evidence, beyond a reasonable doubt, element 1a, 1b or 1c, and element 2, you must find the defendant guilty of the crime of Aggravated Assault.

If you do not find from the evidence, beyond a reasonable doubt, element 1a, 1b or 1c, and element 2, you must find the defendant not guilty of Aggravated Assault.

Request for Civil Stalking Injunction

FILED
DISTRICT COURTCase Number: 2009 APR - 1 PM 1:06
090500997

Court: Washington County Hall of Justice

County: Washington State: Utah

BY SRM

Beacham

1 Petitioner (person needing protection):

Angelica Quintero

First Middle Last

Address and phone # (to keep private, leave blank):

258 South 200 West #4

St. George, Utah 84770

435-229-3791

435-652-3124 (Work)

Name and phone number of Petitioner's attorney (if any):

2 Respondent (person you need to be protected from):

Mike Stevens

First Middle Last

Other names used: Ryder

Address:

3424 South River Road #G-6

Bloomington Hills, Utah 84790

A judge can grant a stalking injunction *only* if the Respondent did these 3 things:

- (1) The Respondent stalked you specifically, two or more times. "Stalked" means the Respondent stayed physically or visually close to you, made verbal or written threats to you, or did something that was threatening.
- (2) The Respondent knew or should have known that the stalking would cause you to fear that you or a family member could be physically hurt or emotionally distressed, or that a reasonable person would be afraid of being physically hurt or emotionally distressed, and
- (3) The Respondent's stalking actually made you or an immediate family member emotionally distressed or fearful that you would be hurt. An "immediate family member" means your spouse, child, sibling, or any other person who lives with you now, or who lived with you within the past 6 months.

Note! In addition to your own statements in this Request, you must provide some other evidence of stalking, like police reports, sworn statements from witnesses, audiotapes, photos, letters, etc.

For a complete definition of stalking, see Utah Code §§ 76-5-106.5 and 77-3a-

101- 103.

3 Provide as much information as you can about the Respondent. If you don't know, write "unknown."

Respondent's Employer (Name and address):

unemployed drug dealer

Best place and time to find the Respondent: *Place: home Time: unknown*

Other addresses (hangouts): *one & only Bar Five House Bar elks lodge*

Describe Respondent's vehicle: Make: *Chevy* Model: *Blazer*

Year: *unkno* Color: *blue/green with tan stripe down the bottom* License Plate: *unknown*

If more than one vehicle, describe here: Make: *Ford* Model: *Expedition*

Year: *unknown* Color: *Red with tan stripe down the bottom* License Plate: *z463dx*

Has the Respondent used weapons or been violent in the past? ☒ Yes ☐ No ☐ Don't know

Is the Respondent a law enforcement officer, government investigator,
or licensed private investigator? ☐ Yes ☒ No ☐ Don't know

4 Describe the stalking below:

a. When and where did the stalking events happen? (*Attach additional pages if necessary.*)

1st stalking event:

When:

January 20 2009

Where:

Maverik 690 s river rd

2nd stalking event:

When:

March 11 2009

Where:

on the phone

b. Who did you report the stalking to (if anyone)?

store director debbie tracy

c. List names of all people who witnessed the stalking:

Katrina Barney, Chrystle Weeks, Paula, Derek Hymas, Vladimir Nominoff,

d. List any evidence you have of the stalking, like transcripts, audiotape, police reports, photos, sworn statements from witnesses (affidavits), etc. You must attach at least one of these to this form.

Police Report 03/30/09

Police Report 03/31/09

Written statement of witness Derek Hymas 04/01/09

DATE: 11/11

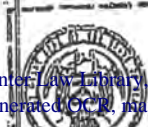
11/11/11 2009

ly name is Derek Hyman, ²⁻⁸⁻⁸⁶ Angie Quinteros nephew.
 was walking with her on 3-28-09 when her
 & boyfriend ^{Mike Stevens} pulled up next to us while we
 were walking to Walgreens. He physically threatened
 myself and my Aunt. I've never met him before
 & he most likely mistook me to be her
 current boyfriend John Cecil. He said "you two
better watch yourselves, I'll get you." He was driving
 older dark blue Chevy blazer. Also he had
 no children with him. I don't feel threatened in any
 way but he has been looking for Angie and harassing
 She is definitely scared for her life and needs
 action to take place. Thank you.

Derek Hyman April 1, 2009

ENDESCRIBED AND SWORN TO BEFORE ME

THIS 11 DAY OF April 2009



DAVID A GONZALEZ
 Notary Public
 State of Utah

My Commission Expires Feb. 12, 2011

04/01/09
12:56

0902213.txt
St. George Police Department
Officers Report

4362
Page: 1

Incident Number: 09P008328 Nature: Threatening Case #: 0902213

Location:

Addr: 258 S 200 W
City: St George

St: UT Zip: 84770

Area: P3
Contact: Angelica

Alert Codes:

Complainant: 266505

Lst: QUINTERO

Fst: ANGELICA

Mid: M

DOB: 04/09/79 SSN:

Adr: 258 S 200 W

Rac: L Sx: F Tel: (435)229-3791

Wrk: (435)628-1015

Cty: St George

St: UT Zip: 84770

Offense Codes: THRE THREAT AGAINST LIFE / PRO
STLK STALKING
Circumstances: BM88 No Bias
WNONE No Weapon or Force Used
SUN Using: NOT suspected
LT13 Highway/Road

Responding Officers: Schafer, James 2X32

Rspnsbl Officer: Schafer, James Agency: SGPD

Received By: Oldroyd, Kierst

Last RadLog: 09:54:51 03/31/09 CMPLT

How Received: P IN PERSON

Clearance: RSP Reviewed Sgt Palmer

When Reported: 09:19:08 03/31/09

Disposition: INA Disp Date: 03/31/09

Occurrd between: 12:30:00 03/28/09

Judicial Sts:

and: 13:30:00 03/28/09

Misc Entry:

INVOLVEMENTS:

Date	Description	Relationship
03/31/09	QUINTERO, ANGELICA M	Complainant
03/31/09	QUINTERO, ANGELICA M	VICTIM
03/31/09	09:19:08 03/31/09 Threatening	Initiating Call

Initial Contact
(UCA 63g-2-103(14)(a)(b))

Responsible Officer: J. Schafer

P.O. Number :83

Incident/Case #: 09P008328/0902213

Date/Time of Report: Tue Mar 31 09:54:04 MDT 2009

INITIAL CONTACT:

On 3-31-09, Ofc. Schafer responded to the lobby of the Police Station on a threatening complaint. Angelica Quintero stated that her ex boyfriend threatened her on 3-28-09. Ofc. Schafer made contact with denied the allegations. This case is inactive due to a lack of evidence.

- e. Describe what the stalker did and why it made you or your family member feel emotionally distressed or afraid of being physically harmed, and why it would have made a reasonable person feel emotionally distressed or afraid of being physically harmed:

Jan 20 2009. Parked outside my work for hours watching me thru the window watching what i did who I talked to. Made me very uncomfortable. Felt like I wasnt safe.

March 28 2009. Walking to Walgreens with my nephew Derek Hymas Mike Stevens pulled up behind us and spoke very clearly saying "I'm gonna get you. You better watch yourself! I will get you." This made me feel like fleeing the country. I am scared to death of my life, my parents lives & I really need help from the police. Every time I've called them, they(officer Barton)told me I was just trying to make trouble for Mike. What is it going to take? me being dead before you take this seriously???

- f. Other facts:

I know the reason this man wants me harmed. I believe he thinks I turned him in for growing Marijuana in Central. I did not snitch on him.

- ☐ Check here if you need more space. Ask the clerk for the "Describe Stalking" form. Fill it out and attach it to this form.

5 Other Court Cases

- a. Are there other Court orders to the Respondent about stalking? ☐ Yes ☒ No
(If Yes, fill out below and attach a copy of the court order.)

- b. Have you or the Respondent ever been involved in any other court case involving either of you?
☐ Yes ☒ No (If yes, list ALL court cases below):

Type of Case	County and State	Court Case # (NOT the police report #)	Person Involved	Did the judge make an order?

Please, Judge, I am asking you to:☒ Make the orders I have checked below,**6 ☒ Personal Conduct**

Order the Respondent not to stalk me.

7 ☒ No Contact

Order the Respondent not to contact, phone, mail, email, or communicate with me in any way, either directly or indirectly, or any person listed below:

Other people the Respondent must not contact:

Name	Relationship to Petitioner	Address
LaNeta A. Quintero (67)	Mother	258 South 200 West #4 St. George, UT 84770
Robert M. Quintero (65)	Father	258 South 200 West #4 St. George UT 84770
John V. Cecil (31)	Fiance	684 Buena vista
Derek J. Hymas (23)	nephew	684 buena vista

8 ☒ Stay Away

Order the Respondent to stay away from:

☒ a. My current or future: ☒ Vehicle ☒ Job ☐ School ☒ Home, premises and property (My current addresses are listed below):

Home address: 258 south 200 west #4 St. George UT 84770

Work address: USDA Forest Service Forsythe Trail Road

School address:

Vehicle description: 76 blue gmc pickup license #2B6872

☒ b. Other (specify): 684 Buena Vista, Washington UT 84780**9 ☐ Other Assistance Needed** (List below any other orders needed to protect you and other protected people listed on page 1 of this form):

The Petitioner must read and sign below:

I swear that:

- I am the Petitioner and I have read this petition,
- I am a victim of stalking and believe the Respondent is the stalker, and
- I live in this county or the Respondent lives in this county, or the stalking took place in this county.

Date: 04/01/09

Petitioner's signature: ▶

Amberlynn D. Smith

If the Petitioner is a minor, then parent or guardian must sign below.

I swear that:

- I am Petitioner's parent or guardian and I have read this petition,
- Petitioner is a victim of stalking and I believe the Respondent is the stalker, and
- The petitioner lives in this county or the Respondent lives in this county, or the stalking took place in this county.

Date: _____

Parent or guardian's signature: ▶

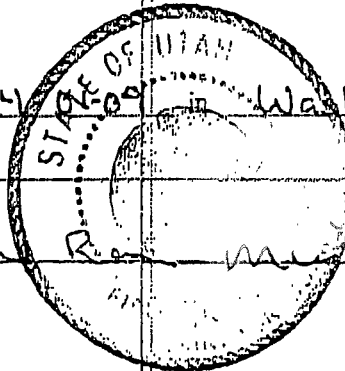
Print Parent or guardian's name: _____

Clerk or Notary Public fills out below:

Subscribed and sworn to before me on (date) 4/1/09 in Washington County, Utah

Clerk or Notary's Signature: ▶

Clerk's name: John R. Smith



Temporary Civil Stalking Injunction

Ex Parte Order



Case Number: 090500997
 Court: Washington County Hall of Justice
 County: Washington State: Utah

Petitioner (protected person):

Angelica Quintero

First Middle Last

Address and phone # (to keep private, leave blank):

258 South 200 West #4

St. George, Utah 84770

435-229-3791

435-652-3124 (Work)

Petitioner's attorney (if any):

Name

Phone #

Respondent (person Petitioner is protected from):

Mike Stevens

First Middle Last

Other names used: Ryder

Address:

3424 South River Road #G-6

Bloomington Hills, Utah 84790

Warning! ☒ Weapon Involved

Findings: The court has reviewed the Petitioner's Request for Stalking Injunction, finds there is reason to believe it has jurisdiction over the parties and this case, that stalking has occurred, and that the Respondent is the stalker. The Respondent has the right to a hearing, if he or she asks for it.

(Utah Code §77-3a-106.5, §77-3a-101.)

The court orders the Respondent to obey all orders initiated on this form.

☒ You must not contact or stalk the Petitioner.

This order ends 3 years
after it is served.

Warnings to the Respondent:

- Attention: This is an official court order. No one except the court can change it. If you disobey this order, the court may find you in contempt. You may also be arrested and prosecuted for the crime of stalking and any other crime you may have committed in disobeying this order.
- If you do not agree with this order, you can ask for a hearing to tell your side. Your request must be in writing, and must be filed at the court listed below within 10 days of the date you were served with this order. If you do not ask for a hearing within 10 days, this order will last for 3 years after it is served. You can still ask for a hearing after 10 days, but then you must persuade the court the injunction is not needed.

Other people protected by this order:

Name

Age

Relationship

LaNeta A. Quintero (67) - Mother

Robert M. Quintero (65) - Father

John V. Cecil (31) - Flance

Derek J. Hymas (23) - nephew

Describe Respondent:

Sex	Race	Date of Birth	Ht	Wt
Male	White (Not Hispanic)	01/16/1975	6'3"	170
Eyes	Hair	Social Security # (only the last 4 numbers)		
brown	brown	unknown		
Distinguishing features (like scars, tattoos, limp, etc.): <u>receding hairline</u>				
Driver's license issued by (State):				
Expires: <u>unknown</u>				
Best time and place to find Respondent: (Time): <u>unknown</u> (Place): <u>home</u>				

• Court address to ask for a hearing: *Washington County Hall of Justice, 220 North 200 East, St. George, Utah 84770*

- This order is valid in all U.S. states and territories, the District of Columbia, and tribal lands. If you go to another U.S. state, territory or tribal land to violate this order, a federal judge can send you to prison.
- **No guns or firearms!** It is a federal crime for you to have, possess, transport, ship, or receive any firearm or ammunition, including hunting weapons, while this stalking injunction is in effect.

Violence Against Women Act of 1994, 18 U.S.C. §§ 2265, 2262, 18 U.S.C. § 922(g)(8)

To: *Mike Stevens*

Obey all orders initialed by the judge.

Violation of these orders is a criminal Class A Misdemeanor, punishable by up to one year in jail and a fine. A second or subsequent violation can result in more severe penalties.

1 ☒ **Personal Conduct Order**

Do not stalk the Petitioner. This means you must not follow, threaten, annoy, harass, or cause distress to the Petitioner. For a legal definition of stalking, see Utah Code, sections 77-3a-106.5 and 77-3a-101.

2 ☒ **No Contact Order**

Do not contact, phone, mail, e-mail, or communicate in any way with the Petitioner and any person listed below, either directly or indirectly.

Other people you must not contact: *LuNeta A. Quintero (67), Robert M. Quintero (65), John V. Cecil (31), Derek J. Hymas (23)*

3 ☒ **Stay Away Order**

Stay away from:

- ☒ a. The Petitioner's current or future: ☒ Vehicle ☒ Job ☐ School ☒ Home, premises and property (list current addresses below):

Home address: *258 south 200 west #4 St. George UT 84770*

Work address: *USDA Forest Service Forsythe Trail Road*

School address:

Vehicle description: *76 blue gmc pickup license #2B6872*

- ☒ b. Other (specify): *684 Buena Vista, Washington UT 84780*

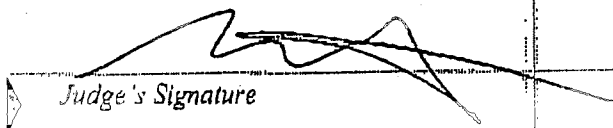
4 ☐ **Other Orders (List below):**

Date: *1 Apr 09* Time: *1418* ☐ a.m. ☒ p.m.

Judge's Name: *James L. Slaughter*

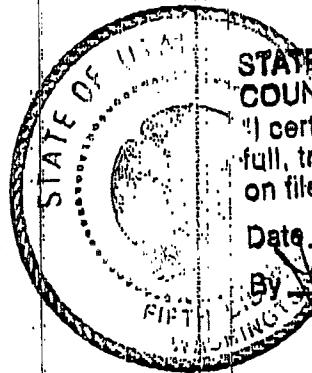
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Machine-generated OCR, may contain errors.


Judge's Signature

Disability Accommodations and Interpreter Services

Assistive listening systems, sign language and oral language interpreter services are available at no charge in stalking proceedings. Contact the clerk's office at least 5 days before your hearing.

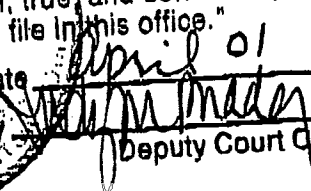


STATE OF UTAH
COUNTY OF WASHINGTON

I certify that this document or record, is a full, true, and correct copy of the original, on file in this office." } :SS

Date

By


Deputy Court Clerk

April 01, 2009