2009

Utah v. White : Brief of Respondent

Utah Supreme Court

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Case No. 20090322-SC

IN THE

UTAH SUPREME COURT

State of Utah,
Plaintiff/Respondent,

vs.

Brenda Christine White,
Defendant/Petitioner.

Brief of Respondent

ON CERTIORARI TO
THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

This Court granted certiorari to review the decision of the Utah Court of Appeals in *State v. White*, 2009 UT App 81, 206 P.3d 646 (addendum A).

This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(a) (West Supp. 2009).

ISSUE PRESENTED AND STANDARD OF REVIEW

Whether the court of appeals erred in holding Petitioner was required to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to an affirmative defense of extreme emotional distress.[1]

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[1] The Court's Order granting certiorari referred to "an affirmative defense of extreme disturbance." Order dated 28 July 2009 (emphasis added). However, since 1999, the defense has been denominated "extreme emotional distress." Utah Code Ann. § 76-5-203 (West Supp. 1999) (emphasis added).

On certiorari, this Court reviews the decision of the court of appeals for correctness, including the "standard of review which it applied to the ruling of the trial court." *State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699. The court of appeals properly reviewed the trial court's ruling for correctness. *See White*, 2009 UT App 81, ¶ 16 (quoting *State v. Kruger*, 2000 UT 60, ¶ 11, 6 P.3d 1116).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

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

> (4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:
>
> (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or
>
> (ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.
>
> (b) Under Subsection (4)(a)(i) emotional distress does not include:
>
> (i) a condition resulting from mental illness as defined in Section 76-2-305; or
>
> (ii) distress that is substantially caused by the defendant's own conduct.
>
> (c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.
>
> (d) This affirmative defense reduces charges only as follows:
>
> (i) murder to manslaughter; and
>
> (ii) attempted murder to attempted manslaughter.

STATEMENT OF THE CASE

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

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

Petitioner filed a petition for interlocutory review. R. 664-694. The Utah Supreme Court granted the petition and transferred the case to the Utah Court of Appeals. R. 697. The court of appeals affirmed. *White*, 2009 UT App 81. This Court granted certiorari.

STATEMENT OF FACTS[2]

"I'm going to wipe you off this earth"

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

Petitioner had always told him that if they divorced, she would make their two daughters hate him. *Id.* At one point, Jon spent a night at his parents' home, but that night, Petitioner called his cell phone and had the girls scream into the phone, "Daddy, Daddy, why did you do this? Why are you hurting us? Why are you doing this to us?" R. 711: 94. Jon testified that "it broke me, and I couldn't do that to my girls at that time." *Id.* He moved back in. *Id.* But he moved out for good in November 2005, and the couple were divorced in July 2006. R. 711: 27-28.

After Jon moved out, Petitioner would "constantly call [his] cell phone and abuse [him] . . . [and] do her rants on [him]." R. 711: 99-100. She would call him at all hours, wake him up, and call when she was drunk. R. 711: 100. He finally

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[2] Because this is an interlocutory appeal, this Statement of Facts is composed of facts adduced at the preliminary hearing and proffered by the parties. Petitioner has not yet been proven guilty beyond a reasonable doubt and thus retains the legal presumption of innocence.

terminated his cell phone service, and refused to give Petitioner his new cell phone number, even though "[s]he asked for it continuously." R. 711: 100.

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

Outside, they discussed a term of the divorce settlement, which was that she would keep the home and all the equity in the home, but she had to get the home put into her name by March 30. R. 711: 32. She wanted Jon to sign a quit claim deed; he refused to do that until his name was taken off the two mortgages encumbering the home. R. 711: 32-33. She said that she was not refinancing the first mortgage because the interest rates were good, and that he was going to have to pay for it while she lived there. R. 711: 102. He explained that he would not deliver a quit claim deed to her until both liens were put in her name alone: "my attorney told me, if you want, we can give you extra time; I'll sign a quit [claim] deed and we'll put it in to trust, and . . . hold on to it until the loan was put in your name." R.

711: 34. Jon said, "you know, you need to actually make an effort here, too. I'm reaching out; you need to reach out also." R. 711: 102-03.

Petitioner handed Jon her phone and he explained his position to a bank officer on the phone. When he finished, he walked to her car and returned her phone. R. 711: 33-34, 102. Petitioner got "very aggressive," raising her voice, swearing, and impugning Jon. R. 711: 34-35. She told him that his daughters did not love him or want to see him anymore. Then she repeatedly played a song on her car stereo called *Angry John[ny]*. R. 711: 36. The lyrics are something like, "'Johnny, Johnny, angry Johnny; Jezebel, I want to kill you; I want to blow you away.'" And whenever the singer sang the words, "I want to blow you away," Petitioner would form her hands in the shape of a gun and point it at Jon's head. R. 711: 37. She did this well over 30 times. R. 711: 37. She said, "'say, isn't this a great song? Isn't this great how songs can just motivate people? Wouldn't this be great if it was a true song?'" R. 711: 37-38. She also lip-synced the lyrics. R. 711: 106.[3]

She stopped playing the song long enough to tell Jon that she needed money for daycare. R. 711: 38. He agreed to pay the daycare provider, as the mediation agreement required him to pay half of daycare expenses; however, she would not

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

tell him where the children were. *Id.* Finally she told him she would pay the entire amount and said that their daughters "don't love you, don't want to talk to you, don't want to see you." R. 711: 39. She also said that they referred to the man she was dating as "Dad," and that she wanted to terminate Jon's parental rights so they could have a dad. R. 711: 38. Jon testified that he would never do that: "My daughters are my life." *Id.* "I will assure you," Petitioner said, "you will never see your girls again." R. 711: 39.

In the course of this conversation, Petitioner referred to Jon's great-uncle Darrell, who had recently died, saying, "I'm sorry to hear about Uncle Darrell." R. 711: 103. And she mentioned that she had put their dog, Dutch, to sleep. R. 711: 105. They also spoke about Petitioner's father. She said, "He takes me out shooting guns a lot. Every time he teaches me how to shoot a gun, I think I'm shooting you." R. 711: 39.

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

"I knew she was going to kill me"

Jon went back to work, but he left at about 4:30 p.m. because he "was really shaken up by what she had said that afternoon." R. 711: 40, 107. He walked out of the building talking by phone to Tiffany Saltzman, his current wife. R. 711: 109. As

he walked toward his car in a two-level parking area he heard tires squeal, then heard a car accelerating extremely fast— "faster than [a car] should be underneath covered parking" — and when he turned around he saw Petitioner speeding toward him in her Ford Explorer: "I could see that cold, evil expressionless look in her face. I knew she was going to kill me." R. 711: 41-42. He jumped in between two cars "in the nick of time." R. 711: 42, 111.

Jon jumped over a three-foot cement wall and ran back toward the building, "yelling to people to call 911." R. 711: 43. A co-worker said, "we already have." *Id.* People were screaming. *Id.* Jon kept running toward what he thought would be the relative safety of Woodland Towers. *Id.* As he got to the building, he turned around and saw Petitioner speeding through the visitor parking area; people were yelling, "get in the building." R. 711: 44.

He entered the first set of doors, then the second set of doors, and "actually, for a split second, had a sense of security," but "it wasn't even a full second." *Id.* Petitioner crashed her Ford Explorer through the building, hitting Jon and knocking him about ten feet, leaving him dazed. *Id.* He remembered, as he hit the ground, "thinking I was dead; 'I'm not going to get out of this.'" *Id.* But he got up and ran. R. 711: 45. He headed down the middle corridor connecting the east entrance with the west lobby: "I just ran for my life." *Id.* Petitioner sped up and hit him again, spinning him around on the ground. *Id.* He tried to keep running, but he could not

put any pressure on his left leg, so he hopped down a hallway, went into a service room, and put his back up against the door, "just scared that she was going to come in there." *Id.* He was "shaking, bleeding, and just praying to God that [he could] live." R. 711: 45-46. About twenty minutes later, paramedics arrived, stabilized him, and transported him to the hospital. R. 711: 51.

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

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

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

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

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

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

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

About a month and a half after "a wonderful anniversary weekend," Jon returned from a business trip where Tiffany Saltzman worked, and "over a very short period of time," he told Petitioner that was moving out and seeking a divorce. R. 711: 77. And he was "constantly text-messaging [Saltzman] on the cell phone." R. 711: 78. Also during this time, Jon was seeing less of their children and he began to withdraw from participating with them. R. 446. He was also uncooperative in coordinating visitation. R. 446.

When Petitioner sought Jon's cell phone number "to try to have him have contact with his daughters, . . . have an emergency number for him in the event that something happened and they needed to get hold of him," he either denied that he had a cell phone or "refused to give her the cell-phone number." R. 711: 78. On the date of the incident, Jon "came walking out of the building . . . talking on a cell

phone to the woman he was having . . . an extramarital affair with, with whom he is now married." R. 711: 75-76. This was for Petitioner "the final straw that broke the camel's back." R. 711: 78.

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

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

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

"Defendant White was not crying, upset, or emotional"

Prosecution proffers. The prosecutor proffered facts in her memorandum opposing Petitioner's motion in limine. These proffers included the following:

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

Shortly after the attack, while still seated in the Explorer, Petitioner called Jon's sister and told her that she thought she had just killed Jon. R. 460. Petitioner's "tone of voice was matter-of-fact and unemotional." R. 460. Deputy Terry McQueen approached Petitioner while she was still seated in the driver's seat of the Explorer. Deputy McQueen observed that "Defendant White was not crying, upset, or emotional." R. 460. Deputy McQueen also observed one empty prescription medication bottle in the car and another in Petitioner's purse. R. 460.

Petitioner was taken to Cottonwood Hospital, released, and interviewed at the Salt Lake County Sheriff's Office by Detective Brent Adamson. R. 460. Petitioner told Detective Adamson that she "got into a car accident" and drove through a building because she "took too much medication." R. 460. She later told the detective she was on Xanax, took Lexapro every other day, and had taken nine Valium capsules before returning to Jon's work that afternoon. R. 460-61.[4]

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

When told she was under arrest for running over her spouse, Petitioner expressed confusion about how Jon could have been injured and said that he was not even in front of her. R. 461. She recounted that she had gone to Jon's work at about noon that day to ask for his help in obtaining a second mortgage and described their conversation as "very decent." R. 461. Jon had asked how she was doing and arranged to pick up the children that weekend. *Id.* Jon told her that he was not going to sign anything, but to get the papers from the bank and he would look them over. She told him that was "fine." *Id.* When she returned later that afternoon and saw Jon in the parking lot, she called to him through her car window, asking him to sign the papers, and explained that she "was just trying to chase him to get the papers." *Id.* When Jon went inside the building, her "foot went on the pedal and [she] went through a building, and the other side of the building stopped [her] car." *Id.* She denied hitting Jon with the car. *Id.*

SUMMARY OF ARGUMENT

The court of appeals correctly held that Petitioner was required to demonstrate a highly provocative, contemporaneous trigger as a prerequisite to an affirmative defense of extreme emotional distress manslaughter. This has always been the rule in Utah, even if Utah cases have not used that precise verbal formulation. No Utah case has ever held that an extreme emotional distress

manslaughter instruction should be given where the evidence did not in fact feature a highly provocative, contemporaneous triggering event.

Even if this Court were to reject the court of appeals' statement of the rule, it should nevertheless affirm that court's result on the ground that the facts proffered by Petitioner here do not require a manslaughter instruction under our case law.

What this Court should not do is relax the requirement for a manslaughter jury instruction. The current rule, which has traditionally required a highly provocative, contemporaneous triggering event, promotes substantial justice and sets a sound guide for trial courts in future domestic violence cases. While relaxing the requirements for a manslaughter instruction may have the appearance of reform, in the domestic violence context, it would represent a great leap backward.

Deciding that a defendant's killing of another was "reasonable" under a set of circumstances is tantamount to judging it partially excusable on the ground that a reasonable person in like circumstances might have lost control of his or her emotions and acted similarly. But when a domestic relationship disintegrates and a jealous or rejected partner kills the fleeing partner, the law should not partially excuse the killing as "reasonable" or understandable merely because the killer's personal life has unraveled along with the relationship. A battered spouse or other partner fleeing a destructive relationship should be protected by the law. Inviting a jury to find a killing "reasonable" in such situations would reduce such protection.

Killing another is an extreme act. Its legal consequences should be partially excused only on a showing of extreme provocation. The facts of this case are not extreme, but common. Myriad people experience the kinds of personal, financial, and family stress Petitioner suffered – and worse – and yet do not attempt to kill the person they blame for their woes.

However, if this Court sees the matter otherwise and holds that an average reasonable person left by her spouse and suffering a gradual accretion of common life stressors might, upon seeing the ex-spouse talking on a cell phone to his current partner, lose self-control to the point of attempting to kill him, it should nevertheless not reverse, but remand. This is because the trial court found that Petitioner here was not in that situation. It ruled that she did not lose self-control at all, but acted according to a predetermined plan. If this finding is sustainable, Petitioner is not entitled to a manslaughter instruction even on her permissive reading of Utah law.

Because the court of appeals held that that proffered facts did not satisfy the Utah standard for a manslaughter instruction, it did not take the second step and review the trial court's finding that those facts did not actually provoke Petitioner to the point of a loss of self-control. Thus, even if this Court were to reverse that court on its reading of the manslaughter statute and case law, it should nevertheless remand for it to review the trial court's finding that Petitioner planned the attack.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER WAS REQUIRED TO DEMONSTRATE A HIGHLY PROVOCATIVE AND CONTEMPORANEOUS TRIGGERING EVENT AS A PREREQUISITE TO AN AFFIRMATIVE DEFENSE OF EXTREME EMOTIONAL DISTRESS

The court of appeals held that Petitioner was required to demonstrate a highly provocative, contemporaneous trigger as a prerequisite to an affirmative defense of extreme emotional distress. This holding correctly articulates the foundational principle of past Utah extreme emotional distress manslaughter cases. It is also a sound rule for future cases.

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

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

The court of appeals affirmed, holding that "[t]he trial court properly applied an objective standard for viewing the evidence proffered by Defendant, and it correctly concluded that a highly provocative, contemporaneous trigger is required for a person's loss of self-control to qualify as extreme emotional distress." *White*, 2009 UT App 81, ¶ 29.

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

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

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

In 1985, the Legislature made several changes to the definition of manslaughter, including replacing the subjective test with an objective one. The amendments specified that the reasonableness of an actor's explanation for his extreme emotional disturbance should be judged from the viewpoint, not of a person in the actor's situation under "the circumstances as he believes them to be," but of a reasonable person under the actual circumstances:

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

Utah Code Ann. § 76-5-205 (1985).

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

> It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:
>
> (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; . . .

Utah Code Ann. § 76-5-205 (1999). In addition, while retaining the objective definition of reasonableness, the Legislature clarified that "emotional distress does not include: . . . distress that is substantially caused by the defendant's own conduct." *Id.* This is the form of manslaughter in effect at the time of the instant charged offense.[5]

Law of affirmative defenses. Unless otherwise provided by statute, when a defendant presents evidence of an affirmative defense, the prosecution must negate it by proof beyond a reasonable doubt. Utah Code Ann. § 76-1-502 (West 2004); *State v. Low*, 2008 UT 58, ¶ 46, 192 P.3d 867. *Cf.* Utah Code Ann. § 76-5-205.5 (West 2004) (tacitly placing burden of establishing "special mitigation" by preponderance of the evidence on proponent of special mitigation). At the time of the instant offense, the prosecution was required to negate the affirmative defense of extreme emotional distress by proof beyond a reasonable doubt. Utah Code Ann. § 76-1-502 (West 2004); *Low*, 2008 UT 58, ¶ 46. This was a statutory requirement, not a constitutional one. *See, e.g., Patterson v. New York*, 432 U.S. 197 (1977) (approving statute placing on accused burden to establish by preponderance of evidence that he acted under extreme emotional disturbance).

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[5] The section was renumbered in 2000. *See* Utah Code Ann. § 76-5-203 (2000). In 2009, the Legislature added extreme emotional distress to the category of special mitigation and placed the burden of proof on the party claiming the extreme emotional distress. *See* Utah Code Ann. § 76-5-205.5(1)(a) &(b) (West Supp. 2009).

"When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented . . . that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant." *Low*, 2008 UT 58, ¶ 25. However, a defendant is not entitled to an instruction if the evidence of extreme emotional distress is "so slight that all reasonable people would have to conclude against the defendant on that point." *State v. Piansiaksone*, 954 P.2d 861, 871 (Utah 1998) (citing *State v. Harding*, 635 P.2d 33, 34 (Utah 1981)); *State v. Castillo*, 23 Utah 2d 70, 72-73, 457 P.2d 618, 620 (1969)). The court may refuse to instruct on a defense theory supported by a defendant's own testimony, if the "great weight of the evidence . . . runs contrary to defendant's claim." *State v. Kell*, 2002 UT 106, ¶ 24, n. 5, ¶ 25, 61 P.3d 1019.

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

A. Utah manslaughter cases require a highly provocative, contemporaneous triggering event.

The Petition asserts that the court of appeals "decided . . . for the first time in Utah authority, that a 'highly provocative, contemporaneous triggering event' is required to be objectively demonstrated by the Petitioner before relying on the statutory defense of extreme emotional distress." Pet. at 12. In fact, the court of appeals did nothing more than correctly read this Court's opinions.

1. Utah manslaughter cases require a highly provocative triggering event.

Utah courts have long given, with this Court's approval, instructions requiring an external "triggering event" to which defendant's reaction must be reasonable. *See, e.g., State v. Bisner*, 2001 UT 99, ¶ 60, 37 P.3d 1073 (Utah 2001) (approving jury instruction stating, "For manslaughter to apply, the 'extreme emotional disturbance' must be triggered by something external to the accused, and his reaction to such external stimulus must be reasonable"); *State v. Piansiaksone*, 954 P.2d 861, 872 (Utah 1998) (same); *State v. Gardner*, 789 P.2d 273, 283 (Utah 1989) (same); *State v. Bishop*, 753 P.2d 439, 467 (Utah 1988) (same). Indeed, this Court in *Bishop* rejected a challenge to a manslaughter instruction where the challenge complained the instruction "required the disturbance to be 'triggered.'" *Bishop*, 753 P.2d at 471. The Court found no error with the phrase "triggered by an external event." *Id.* at 472. This requirement of an external trigger is now codified in the

manslaughter statute, which excludes "distress that is substantially caused by the defendant's own conduct." Utah Code Ann. § 76-5-203 (West 1999).

The court of appeals also held that the triggering event must be "highly provocative." *White*, 2009 UT App 81, ¶ 1. Again, this is nothing new. Extreme-emotional-distress manslaughter cases in Utah have always featured a highly provocative trigger.

State. v Shumway, 2002 UT 124, 63 P.3d 94, involved a knife attack. It exemplifies the type of highly provocative event required to submit an extreme-emotional-distress defense to a jury. Shumway, a 15-year-old boy, killed his friend Chris with a butcher knife during a sleepover at the friend's house. 2002 UT 124, ¶ 2. An argument over a videogame spiraled out of control when Chris, who had a reputation for being a "hothead" and losing his temper, retrieved a knife and lunged at Shumway. *Id.* at ¶ 10. Evidence suggested that Shumway had endured years of bullying by his peers, and that "all of this 'came out on Chris' when the boys fought over the knife." *Id.* This Court ruled that Shumway was entitled to an extreme emotional distress instruction. 2002 UT 124, ¶ 13.

State v. Spillers, 2007 UT 13, ¶ 13, 152 P.3d 315, involved a pistol-whipping. Spillers and his friend Bo argued, Bo accusing Spillers of having "snitch[ed]" on him to drug enforcement agents. 2007 UT 13, ¶ 3. According to Spillers, Bo, who had a reputation for violence, retrieved a firearm and struck Spillers on the back of the

head, a blow that left him "cloudy, dazed, uncomfortable, and scared." *Id.* Bo then approached him "with his arm cocked to strike again." *Id.* Spillers then shot him dead. *Id.* This Court ruled that Spillers was entitled to an extreme emotional distress instruction. 2007 UT 13, ¶ 20.

Cases lacking a highly provocative trigger do not warrant a manslaughter instruction. *State v. Price*, 909 P.2d 256, 263 (Utah App. 1995), presented no highly provocative triggering event, and the court of appeals concluded that the record was "devoid" of any evidence of extreme emotional distress. *Id.* Price shot his ex-girlfriend. *Id.* at 258. Earlier in the evening she went out with another man, leaving their child in the care of a friend. *Id.* When Price asked to pick the child up, the friend refused. *Id.* Later that evening Price confronted the ex-girlfriend and became frustrated when she "just ran off at the mouth" and "hurt his feelings." *Id.* at 258, 263. When apprehended, Price was "crying and visibly shaken." *Id.* at 258. The court of appeals held that frustration and hurt feelings do not rise to the level of extreme emotional disturbance. *Id.* at 263.

2. Utah manslaughter cases require a contemporaneous triggering event.

Similarly, Utah manslaughter cases have always required the trigger to be "contemporaneous." *White*, 2009 UT App 81, ¶ 1.

State v. Clayton, 658 P.2d 624 (Utah 1983), is illustrative. After a Provo bar fight, Clayton went home, retrieved a gun, and, about 20 minutes after leaving the bar, returned to it, argued with the victim, and shot him dead. *Id.* at 625. This Court had little trouble affirming the trial court's refusal to instruct on extreme emotional disturbance. "The passage of time between the fight and defendant's return to the bar tends to negate the 'heat of passion' explanation," it wrote. *Id.* at 626.[6] "Further, defendant testified that in returning to the bar he acted purposefully with the stated intent of collecting from the victim the title to his car and some money owed him." *Id.*

Similarly, in *Piansiaksone*, this Court saw "no basis in the evidence to support the view that Piansiaksone killed the victim as the result of an extreme emotional disturbance." 954 P.2d at 871. Piansiaksone was told by Nuk, someone he respected as an older brother, that the victim was beating Nuk's sister and "'disrespecting' his family." *Id.* The court found "conspicuously absent" any evidence that "Nuk worked Piansiaksone into a frenzy." *Id.* It found no basis for concluding that anything "*suddenly* overwhelmed Piansiaksone's self-control and caused him to kill the victim." *Id.* (emphasis added).

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[6] The "extreme emotional disturbance" standard "reformulates and enlarges" the "heat-of-passion standard . . ." *State v. Standiford*, 769 P.2d 254, 259 (Utah 1988).

This Court addressed the issue of contemporaneousness as early as 1904. *State v. Botha,* 27 Utah 289, 75 P. 731 (1904). There, a jealous 28-year-old husband shot his 16-year-old wife and, notwithstanding her pleading as she died, shot and killed a neighbor man who had befriended her. The crime suggested, this Court observed, "the lamentable thought that, after all, no creature upon God's footstool is susceptible of greater cruelty than fallen man." *Id.* at 737. With respect to the doctrine of heat-of-passion manslaughter, the Court declared, "If a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life or the adultere[r]'s, . . . the homicide is only manslaughter. But if, on merely hearing of the outrage, he pursues and kills the offender, he commits murder." *Id.* at 736 (quoting 2 Bishop, Crim. Law (7th Ed.) 708). Manslaughter thus requires "an overpowering passion, *no time for cooling having elapsed.*" *Id.* (emphasis added).

The point of these cases is not that a defendant's personal history can never contribute to a finding of extreme emotional distress—after all, the court cited Shumway's history of being bullied in ruling that he was entitled to a manslaughter instruction. *See Shumway,* 2002 UT 124, ¶ 2. The point is that personal history must be coupled with, and play a supporting role to, some proximate, highly provocative event. Thus, the court of appeals accurately characterized and applied the precedents of this Court by holding that a showing of a "highly provocative,

contemporaneous trigger" is required to support an extreme-emotional-distress jury instruction. *White*, 2009 UT App 81, ¶ 1.

3. The instant facts do not warrant a manslaughter instruction under Utah law, however characterized.

The court of appeals chose the phrase "highly provocative, contemporaneous trigger" to characterize the line dividing cases where the defendant acted under extreme emotional distress from cases where the defendant did not. As demonstrated above, that characterization is apt. But however the cases are characterized, the case at bar presents no facts remotely comparable to precedents where a manslaughter instruction was appropriate.

Shumway alleged that Christopher lunged at him with a kitchen knife; Spillers alleged that Bo clubbed him over the head with a gun; Defendant alleges that Jon talked on a cell phone. Common experience teaches that, while the rational faculties of an "average reasonable person," *Shumway*, 2002 UT 124, ¶ 9, might be overborne by intense feelings such as passion or anger by aggressive knife play or pistol-whipping, the same is not true of seeing someone talking on a cell phone.

The instant case more closely resembles cases in which Utah courts have rejected a claim that the jury should have been instructed on manslaughter. For example, like Clayton, Petitioner returned to the scene of an earlier confrontation about a property title, but she did so after a four-hour cooling off period rather than

a 20-minute one. As in *Clayton*, the "passage of time between the fight and defendant's return to the bar tends to negate the 'heat of passion' explanation." *Clayton*, 658 P.2d at 626. Likewise, the factors this Court found "conspicuously absent" in Piansiaksone's defense are also absent here. *Piansiaksone*, 954 P.2d at 871. The instant record contains no evidence that Jon or anyone else "worked [Petitioner] into a frenzy," or even that she was in a frenzy. *Id.* Petitioner's situation is also more akin the facts of *Price*. Price became frustrated when his ex-girlfriend "ran off at the mouth" and "hurt his feelings." *Price*, 909 P.2d 256, 258, 263. When apprehended, Price was "crying and visibly shaken." *Id.* at 258. Like Piansiaksone and Clayton, Price was not entitled to a manslaughter instruction.

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

Consequently, even if this Court were to reject the court of appeals' characterization of extreme emotional distress manslaughter as requiring a "highly provocative, contemporaneous trigger," it should nevertheless affirm on the ground that the instant facts do not warrant an instruction on attempted manslaughter.

B. Requiring a highly provocative, contemporaneous triggering event to establish manslaughter promotes substantial justice.

In addition to being uniformly recognized as the law of Utah, the rule requiring evidence of a highly provocative, contemporaneous trigger before instructing the jury on extreme emotional distress manslaughter is a sound principle to guide trial courts in instructing future juries in domestic violence cases.

While relaxing the legal standard for finding manslaughter may have the appearance of reform, in practice it operates to perpetuate destructive relationships. Based on a systematic study of fifteen years of "passion murder cases," Professor Victoria Nourse concluded that in the context of relationship homicides, "reform" in this area often "leads to a murder law that is both illiberal and often perverse." Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331, 1332 (1997).

For example, Professor Nourse found that a significant number of cases involving a purportedly liberalized manslaughter defense involved "no sexual infidelity whatsoever, but only the desire of the killer's victim to leave a miserable

relationship." *Id.* Thus, juries were permitted to return manslaughter verdicts where the victim left the relationship, moved the furniture out, planned a divorce, or sought a protective order. *Id.* Moreover, in jurisdictions where the manslaughter requirements have been relaxed, "infidelity" has been construed to include dancing with another man, dating another man, or pursuing a new relationship after a final decree of divorce has been entered. *Id.* at 1333. "Reform in other areas of the law has encouraged battered women to leave their victimizers," she writes. *Id.* at 1334. "Reform of the passion defense, however, discourages such departures, allowing defendants to argue that a battered wife who leaves has, by that very departure, supplied a reason to treat the killing with some compassion." *Id.* Nourse concludes "that the common law approach toward the provocation defense, deemed an antique by most legal scholars, provides greater protection for women than do purportedly liberal versions of the defense." *Id.*

Nourse's analysis makes clear that, in cases involving one partner leaving a relationship, to instruct a jury on manslaughter on less than compelling facts is to align the law, in part, on the side of the jealous partner and against the fleeing partner. It is to legally declare the act of killing in this context understandable and even, in significant degree, excusable.

The doctrinal locus of this issue is the concept of reasonableness: the question of which provocations are "reasonable" presupposes value judgments about which

types of homicides deserve a measure of lenity under law and which do not. Professor Nourse argues that mitigation should be reserved for only those killers who kill "with a rage shared by the law":

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

Id. at 1393.

Petitioner here did not act "with a rage shared by the law." While the average reasonable person might under the circumstances of this case have been so enraged as to write the victim an angry letter, stalk him, slander him, or even strike him, she would not have been so enraged as to attempt to kill him. To permit an accused, on facts akin to those proffered by Petitioner here, to enlist the sympathies of the law in his or her favor would in most cases of this sort undermine the law's protection where it should, if anything, be bolstered.

The traditional Utah rule, which does require a highly provocative, contemporaneous trigger, was not only properly applied in this case, but is a sound rule for future domestic violence cases.

C. Defendant's other arguments lack merit.

1. The court of appeals correctly viewed the evidence from the viewpoint of a reasonable person.

On certiorari, Petitioner continues to maintain, as she did below, that the Utah extreme emotional distress standard is a predominantly subjective one, and thus that the reasonableness determination should be assessed from the standpoint of "'the subjective, internal situation'" of the defendant. Pet. Br. at 25 (quoting *People v. Casassa*, 404 N.E.2d 1310, 1316 (N.Y. 1980)).

This Court did not grant certiorari on this issue. However, against the possibility that this Court will view it as a "subsidiary question fairly included" within the question on which certiorari was granted, *State v. Leber*, 2009 UT 59, ¶ 10, the State will briefly discuss the question of whether the Utah standard is predominantly an objective or a subjective one.

Since at least 1973, the extreme emotional disturbance or distress manslaughter defense has been available in Utah only to those who kill under the influence of extreme emotional disturbance or distress "for which there is a reasonable explanation or excuse." Utah Code Ann. § 76-5-205(b) (Allen Smith Co. 1973). Since 1985, the reasonableness of the explanation or excuse has been "determined from the viewpoint of a reasonable person under the then existing circumstances." Utah Code Ann. § 76-5-205 (1985). And the statute now expressly

excludes "distress that is substantially caused by the defendant's own conduct." Utah Code Ann. § 76-5-205 (West Supp. 1999). Both the plain language of these sections and the intent of the Legislature are clear: the test is based not on the peculiarities of a particular defendant, but on a *reasonable* person under the external circumstances of the case. In fact, the term *reasonable* or its variant appears five times in subsection 76-5-203(4) (West 2004).

This Court has recently read this language to mean that extreme emotional distress manslaughter applies only when a person is exposed to stress of sufficient intensity that it would overwhelm the self-control of "the average reasonable person":

> [A] person suffers from an extreme emotional disturbance "when he is *exposed* to extremely unusual and overwhelming stress" such that
>
> > the average reasonable person under that stress would have an extreme emotional reaction to it, as a result of which he would experience a loss of self-control and that person's reason would be overborne by intense feelings such as passion, anger, distress, grief, excessive agitation, or other similar emotions.

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

Petitioner relies on New York law, primarily *People v. Casassa*, 404 N.E.2d 1310, 1315 (N.Y. 1980). *See* Pet. Br. at 25. *Casassa* construes a New York statute declaring that the reasonableness of an excuse "is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." *Id.* at 1315-16. This language is materially identical to the pre-1985 Utah statute; in fact *Casassa* cites the pre-1985 Utah statute. *Id.* at 1316. Accordingly, to follow *Casassa* here would be in effect to judicially repeal the 1985 amendment to the Utah manslaughter statute.

Petitioner describes the difference between assessing reasonableness "from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be" (the New York standard) and assessing reasonableness "from the viewpoint of a reasonable person under the then existing circumstances" (the Utah standard) as "a distinction in degree and not the subjective nature of the viewpoint." Pet. Br. at 25. It is not. The New York standard, as Petitioner elsewhere acknowledges, looks to "the subjective, internal situation" of the defendant. Pet. Br. at 25. It is thus subjective in nature. The Utah standard, as this Court has held, looks to the effect of the stress to which a defendant is exposed

on "the average reasonable person." *Shumway*, 2002 UT 124, ¶ 9. It is objective in nature.[7]

2. The statutory shift from "disturbance" to "distress" harms, not helps, Petitioner's argument.

Petitioner sees significance in the legislative shift from extreme emotional *disturbance* to extreme emotional *distress* and criticizes the court of appeals for making "no distinction between 'disturbance' and 'distress'" cases and for citing them interchangeably. *See* Pet. Br. at 17. Petitioner suggests that the latter term "more easily connotes a build-up over time." *Id.*

On the contrary, the court of appeals correctly relied on "disturbance" cases as well as "distress" cases. Neither term has anything to do with a build-up over time. *See Webster's Third New International Dictionary* 660, 661 (3rd ed. 1993). And to the extent the terms differ, the distinction harms rather than helps Petitioner's argument. In fact, by replacing *disturbance* with *distress,* the Legislature tightened the manslaughter standard.

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[7] The extreme emotional distress defense does have a subjective prong: the actor must have in fact acted "under the influence of extreme emotional distress." Utah Code Ann. § 76-5-203 (3)(a)(i); *Piansiaksone*, 954 P.2d at 871 (error in instructions mandating order of deliberation harmless where record did not show that the defendant's alleged dislike of victim "suddenly overwhelmed [his] self-control and caused him to kill the victim"); 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 15.2(a), (c) (1986) (voluntary manslaughter as result of "reasonably induced emotional disturbance" requires that "[t]he defendant must have been in fact provoked").

Disturbance connotes an interruption in the normal course of things. It is defined as "an interruption of a state of peace or quiet," "agitation," or "abnormal variation from a mental or emotional norm." *Id.* at 661. *Disturb* "implies interference with one's mental processes caused by worry, perplexity, or interruption." http://www.merriam-webster.com/dictionary/ discompose (visited 9 October 2009).

In contrast, *distress* is defined as "anguish of body or mind" and "commonly implies conditions or circumstances that cause physical or mental stress or strain, suggesting strongly the need of assistance; in application to a mental state, it implies the strain of fear, anxiety, shame, or the like." *Webster's Third New International Dictionary* 660 (3rd ed. 1993). *Distress* also "implies an external and usually temporary cause of great physical or mental strain and stress." http://www.merriam-webster.com/dictionary/distress.

Accordingly, the Legislature replaced a term connoting agitation or abnormal variation from a mental or emotional norm with one connoting great mental strain or stress resulting from an external cause. In other words, if anything, one might question whether prior cases satisfying the older *disturbance* standard also satisfy the current *distress* standard. However, like the court of appeals, the State sees nothing decisive in the switch.

3. Petitioner requested the trial court to address the extreme emotional distress issue pretrial.

Scattered throughout Petitioner's brief are references to the "current posture" of the instant case, that is, the fact that the trial court addressed the extreme emotional distress issue pretrial. *See, e.g.*, Pet. Br. at 15; 15, n.3; 19. To the extent Petitioner implies error on the part of the trial court in addressing the issue pretrial, any error was invited. *See State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) ("[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.").

That the trial court here addressed the issue pretrial is in fact unusual. Petitioner is correct that the trial courts in *Price, Piansiaksone,* and *Clayton* all ruled after hearing the evidence at trial. *See* Pet. Br. at 19. However, the trial court here addressed the issue pre-trial at Petitioner's request. Petitioner filed a motion in limine seeking a "pre-trial order authorizing the defense of Extreme Emotional Distress to be presented as a question of fact to the jury." R. 433. In support of that motion, Petitioner proffered additional facts both orally and in writing. *See, e.g.*, R. 443-48. R. 711: 74-79. Proceeding by proffer was sound trial strategy. It allowed Petitioner to place before the trial court voluminous factual material that might have been excluded as irrelevant at trial. She was also able to test the waters by proffering her interior mental and emotional impressions without the risks

attendant to testifying under oath and subject to cross-examination. For example, her proffers included references to her alleged "anxiety, anger, loss, distress and agitation" and her alleged "emotions, anger, frustration, disappoint[ment], and . . . excessive agitation . . . ." R. 444, 450.

There was nothing improper in Petitioner's requesting the trial court to determine this issue pre-trial. But having done so, she may not complain that the trial court acceded to her request. Appellants are not entitled to "both the benefit of not objecting at trial and the benefit of objecting on appeal." *State v. King*, 2006 UT 3, ¶ 13, 131 P.3d 202 (citations omitted).

D. If this Court agrees with Petitioner, it should remand the case to the court of appeals to reach a remaining dispositive issue.

Although the statutory test for reasonableness is wholly objective, the extreme emotional distress defense does have a subjective prong. That the stress claimed by a defendant is of sufficient magnitude to overcome the average, reasonable person is necessary under the statute, but it is not sufficient. In addition, the accused herself must have been overcome; she must in fact have acted "under the influence of extreme emotional distress." Utah Code Ann. § 76-5-203 (3)(a)(i); *Piansiaksone*, 954 P.2d at 871 (error in instructions mandating order of deliberation harmless where record did not show that the defendant's alleged dislike of victim "suddenly overwhelmed [his] self-control and caused him to kill the victim"); 2 Wayne R.

LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 15.2(a), (c) (1986) (voluntary manslaughter as result of "reasonably induced emotional disturbance" requires that "[t]he defendant must have been in fact provoked").

Here, the trial court concluded that Petitioner failed this second, subjective prong: "[t]he circumstances of the crime itself indicate that Defendant White had not lost self-control at the time of the incident, but appeared to be acting in accordance with a plan." R. 652. The court cited facts indicating that Petitioner "was aware of what she was doing and was in control of her faculties during the time in question." *Id.* If this finding is correct, Petitioner is not entitled to an extreme emotional distress jury instruction under any standard.

Petitioner challenged this finding in the court of appeals, but that court did not reach the issue. *See White*, 2009 UT App 81, ¶ 28, n.4. The Petition did not address the issue. *See* Petition at 11-19. Nor does Petitioner's merits brief. *See* Pet. Br. at 12-28.

Therefore, if this Court agrees with Petitioner that the court of appeals erred in determining that a highly provocative, contemporaneous trigger is required under Utah law, it should not reverse, but remand with instructions for the court of appeals to determine, under the correct standard, Petitioner's contention that the trial court erred in finding that she did not in fact lose self-control here.

CONCLUSION

This Court should affirm the ruling of the court of appeals.

Respectfully submitted 13th October 2009.

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CERTIFICATE OF SERVICE

I certify that on 13th October 2009, two copies of the foregoing brief were

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

Addenda

Addendum A

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Brenda Christine White, Defendant and Appellant.	OPINION (For Official Publication) Case No. 20071008-CA F I L E D (March 26, 2009) 2009 UT App 81

Third District, Salt Lake Department, 061902834
The Honorable William W. Barrett

Attorneys: Jason A. Schatz, Salt Lake City, for Appellant
Mark L. Shurtleff and J. Frederic Voros Jr., Salt Lake City, for Appellee

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Before Judges Bench, Orme, and Davis.

BENCH, Judge:

¶1 In this interlocutory appeal, Defendant Brenda Christine White challenges the denial of her motion in limine to include a jury instruction regarding the affirmative defense of extreme emotional distress. Contrary to Defendant's argument, the trial court did not err in evaluating the proffered evidence through an objective viewpoint. Nor did the trial court err in its conclusion that a highly provocative, contemporaneous trigger is required for Defendant's reaction to qualify as extreme emotional distress. As the triggering factors proffered by Defendant do not reach this level, the trial court correctly determined that she was not entitled to a jury instruction on this affirmative defense. We affirm.

BACKGROUND

¶2 Defendant and the victim, Jon White, were married for eleven years before Mr. White left the marital home and initiated divorce proceedings. According to Defendant, Mr. White had caused stress for her during the marriage due to his infidelity, his use of pornography, and his pressuring her to participate in

a sexual "three-some." The couple's separation in November 2005 had caused additional stress to Defendant due to Mr. White's subsequent failure to provide financial support, his withdrawal from contact with their children, and his cancellation of Defendant's health insurance coverage at a time when she needed medication for anxiety, depression, and sleep. The mediation of the couple's property settlement had also, in Defendant's eyes, produced an unfair result and burdened her with financial obligations that she struggled to meet during the time between entering into the settlement agreement and the finalization of the divorce.

¶3 In an attempt to address her mounting financial difficulties, Defendant sought to refinance the home that she had received as part of the property settlement. When she learned that she could not obtain refinancing without Mr. White's assistance, she requested his help. According to Defendant, Mr. White agreed to help but subsequently vacillated between cooperating and refusing to cooperate in the refinancing process.

¶4 On April 26, 2006, shortly after noon, Defendant went to Mr. White's workplace to speak with him regarding the refinancing of the home. Mr. White approached Defendant, explained that she needed to leave because she had "harassed employees [t]here before," and accompanied her to the elevator and out of the building. Once outside, Defendant and Mr. White discussed the terms of the property settlement and the refinancing of the home. Mr. White refused to sign a quitclaim deed as requested by Defendant until Defendant took his name off the two mortgages encumbering the home. While they stood outside Mr. White's workplace, Defendant had Mr. White speak to the bank officer on her cell phone where he reiterated his position.

¶5 Mr. White concluded the phone call and walked Defendant back to her car where they continued to discuss the issue of the quitclaim deed and refinancing. The conversation escalated in intensity, and Defendant raised her voice and impugned Mr. White. Defendant began repeatedly playing a song on her car stereo called "Angry Johnny," in which the lyrics state, "Johnny, Johnny, angry Johnny . . . . I want to kill you; I want to blow you away." Each time the singer sang the words "I want to blow you away," Defendant lip-synced the words, formed her hands in the shape of a gun, and pointed them at Mr. White's head. She did this over thirty times. Defendant also stated, "Isn't this great how songs can just motivate people? Wouldn't this be great if it was a true song?" Defendant also mentioned that her father took her "out shooting guns a lot" and that "[e]very time he teaches [her] how to shoot a gun, [she] thinks [she's] shooting [Mr. White]."

¶6 Defendant eventually stopped playing the song and told Mr. White that she needed money for daycare. Mr. White agreed to pay, but Defendant would not tell him where the children were attending daycare. Defendant withdrew her request for daycare money and told Mr. White she wanted to terminate his parental rights. The conversation ended and Mr. White returned to work. As they parted, Defendant stated, "You are a parasite on this earth and I'm going to wipe you off this earth."

¶7 Approximately four hours later, Defendant returned to Mr. White's workplace. As she waited in the parking area in her Ford Explorer, Defendant saw Mr. White exit the building and walk toward his car while talking on a cell phone. According to Defendant, Mr. White had repeatedly denied owning a cell phone and had used this purported lack of a cell phone as an excuse for his lack of communication with the children and the difficulties in arranging visitation schedules for them. Defendant would later proffer that seeing Mr. White talking on the cell phone caused all the accumulated stress from the marriage and separation to overwhelm her, which in turn caused a sudden burst of anger, agitation, loss, grief, and disappointment.

¶8 As she watched Mr. White talking on his cell phone, Defendant drove her vehicle toward him, accelerating quickly. When Mr. White heard tires squealing, he jumped between two parked cars and then over a three-foot cement wall at the end of the covered parking structure. Mr. White ran back through the visitor parking lot and toward the building. As he approached the east entrance of the building, Defendant sped through the visitor parking lot in Mr. White's direction and turned the vehicle toward the building. Mr. White ran through the first set of doors, and Defendant drove the vehicle through the building's glass doors. Defendant struck Mr. White with the vehicle, throwing him back approximately ten feet. Mr. White arose from the ground and ran down a corridor to the west lobby on the opposite side of the building. Defendant followed Mr. White down the hallway and hit him with her vehicle a second time. After this second strike, Mr. White flew over the hood of the vehicle and landed on the ground, injuring his left leg. While Mr. White hobbled down a small hallway and hid in a service closet, Defendant drove her vehicle through the glass windows of the west lobby, reversed the vehicle back through the lobby, briefly pulled forward again, and finally stopped.

¶9 Defendant was charged with attempted murder, see Utah Code Ann. § 76-5-203(2) (Supp. 2003), and criminal mischief, see Utah Code Ann. § 76-6-106 (Supp. 2002). She subsequently filed a motion in limine seeking a "pre-trial order authorizing the defense of Extreme Emotional Distress to be presented as a question of fact to the jury." Defendant argued that, on the date of the incident, she had lost self-control due to stressors

that had accumulated over time and that she was therefore entitled to present a jury instruction for the affirmative defense of extreme emotional distress. Defendant proffered evidence regarding the dissolution of her relationship with Mr. White and the financial difficulties arising after their separation. Additionally, she proffered facts regarding the unexpected death of her therapist three weeks before the incident.[1]

¶10 In response to Defendant's motion in limine, the prosecution proffered additional evidence. Shortly after the attack, while still seated in her vehicle, Defendant had called Mr. White's sister and told her that she thought she had just killed Mr. White. Her tone of voice was reportedly matter-of-fact and unemotional. Furthermore, when a deputy approached Defendant while she was still seated in the driver's seat of her vehicle, the deputy observed that Defendant was not crying, upset, or emotional. The same deputy observed one empty prescription medication bottle in Defendant's car and another in her purse.

¶11 The prosecution further proffered that in an interview with a detective at the Salt Lake County Sheriff's Office, Defendant told the detective that she been in a car accident and drove through a building because she took too much medication. Defendant told the detective that she was on Xanax and Lexapro and that she had taken nine Valium capsules before returning to Mr. White's workplace that afternoon. Defendant expressed confusion about how Mr. White could have been injured and explained that she was just trying to chase him to get some paperwork. She also told the detective that when Mr. White went inside the building, her foot just went on the pedal and she went through the building.

¶12 Finally, the prosecution proffered that Defendant contacted the police in December 2005 to report her suspicion that Mr. White had viewed and stored child pornography on their home computer. The police reviewed the materials supplied by Defendant and found no evidence of child pornography. The investigation concluded, and charges were never brought against Mr. White.

¶13 The trial court denied Defendant's motion in limine, ruling that "[t]he defense of extreme emotional distress is not

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[1]Defendant was no longer covered by Mr. White's health insurance, and her therapist was providing her with free samples of the medication she needed. When the therapist died, Defendant was no longer able to receive the free samples. According to Defendant, Mr. White was not supposed to have cancelled her insurance coverage until a later date.

applicable" to Defendant's case. Specifically, the trial court held that "[t]he extreme emotional distress defense is available only to defendants who have been subjected to stress that would cause the average reasonable person to have an extreme emotional reaction and experience a loss of self-control." The trial court concluded that the factors proffered by Defendant did not meet that criteria because the stressors were not sufficiently provocative or closely related in time to Defendant's purported loss of self-control. Rather, the trial court determined that the stressors cited by Defendant were common occurrences--marital difficulties, financial stress, divorce complications, and death of a health care provider--many of which occurred weeks to years before the April 26, 2006 incident. As a result, the trial court concluded that there is "no rational basis in the evidence for [Defendant]'s theory that she committed Attempted Manslaughter rather than Attempted Homicide."

¶14 Additionally, the trial court concluded that "[t]he circumstances of the crime itself indicate that Defendant White had not lost self-control at the time of the incident, but appeared to be acting in accordance with a plan." In support of this conclusion, the trial court cited the fact that Defendant had returned to Mr. White's workplace approximately four hours after the couple's disagreement and the fact that Defendant negotiated a complicated driving pattern to pursue Mr. White. According to the trial court, these facts "indicate[] that Defendant White was aware of what she was doing and was in control of her faculties during the time in question."

¶15 Defendant subsequently petitioned for interlocutory appeal, which we granted.

ISSUES AND STANDARD OF REVIEW

¶16 Defendant asserts that the trial court erred in its conclusion that there was no basis in the evidence to justify a jury instruction on the affirmative defense of extreme emotional distress. More specifically, Defendant argues that the trial court erred (1) by failing to evaluate the evidence presented from the subjective viewpoint of Defendant and (2) by concluding that the stressors identified by Defendant were "too remote in time" or were not of a sufficiently "provocative character" to qualify as a trigger for extreme emotional distress. Defendant also claims that the trial court improperly determined that she was acting according to a plan rather than under a loss of self-control because such factual matters should be resolved by the jury. "Whether a trial court committed error in refusing to give a requested jury instruction is a question of law, which we review for correctness." State v. Kruger, 2000 UT 60, ¶ 11, 6 P.3d 1116.

ANALYSIS

¶17 Defendant claims that the trial court erred by refusing to approve her requested instruction on the affirmative defense of extreme emotional distress. Pursuant to Utah statute, "[i]t is an affirmative defense to a charge of . . . attempted murder that the defendant . . . attempted to cause the death of another . . . under the influence of extreme emotional distress for which there is a reasonable explanation or excuse." Utah Code Ann. § 76-5-203(4)(a)(i) (2008). "When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented . . . that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant." State v. Low, 2008 UT 58, ¶ 25, 192 P.3d 867. However, a court need not give the requested jury instruction where "the evidence in support [of the defendant's theory is] so slight that all reasonable people would have to conclude against the defendant on that point." State v. Piansiaksone, 954 P.2d 861, 871 (Utah 1998). In other words, the requested jury instruction need not be given where the evidence is "so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether . . . defendant [acted] . . . while under the influence of an extreme emotional disturbance." Id. at 872 (first omission in original) (internal quotation marks omitted); see also State v. Kell, 2002 UT 106, ¶ 25 & n.5, 61 P.3d 1019 (concluding that evidence was insufficient to provide a rational basis for a jury instruction on an affirmative defense because "[t]he great weight of the evidence . . . runs contrary to [the uncorroborated testimony of the] defendant[]" offered in support of the claim).

I. Objective Standard for Viewing Evidence

¶18 Defendant first claims that the trial court erroneously concluded that she was not entitled to a jury instruction on extreme emotional distress because the trial court did not view her proffered evidence from her subjective viewpoint. Utah Code section 76-5-203(4) states that extreme emotional distress "for which there is a reasonable explanation or excuse" is an affirmative defense to the charge of attempted murder. Utah Code Ann. § 76-5-203(4)(a)(i). Further, the statute mandates that "[t]he reasonableness of an explanation or excuse . . . be determined from the viewpoint of a reasonable person under the then existing circumstances." Id. § 76-5-203(4)(c). Relying on a New York case, People v. Casassa, 404 N.E.2d 1310 (N.Y. 1980), Defendant asserts that the statute's requirement to view the explanation or excuse in light of the then existing circumstances obligates the trial court to view "the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however

inaccurate that perception may have been." See id. at 1316. We disagree.

¶19 Defendant's reliance on Casassa is misplaced. The statute underlying the Casassa court's decision required the reasonableness of an excuse "to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Id. at 1315-16 (emphasis added) (internal quotation marks omitted). This language is not found in Utah's current statute regarding the affirmative defense of extreme emotional distress. In fact, comparable language was removed from Utah's statutory scheme. Prior to 1985, Utah's statute regarding manslaughter--the predecessor to the affirmative defense at issue here--stated that "[t]he reasonableness of an explanation or excuse of the actor . . . shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." Utah Code Ann. § 76-5-205(2) (1973) (emphasis added). With the 1985 amendments to this statute, the legislature excised the phrase "as he believes them to be" and revised the statute to read, "The reasonableness of an explanation or excuse . . . shall be determined from the viewpoint of a reasonable person under the then existing circumstances." Id. § 76-5-205(3) (Supp. 1985). Although the legislature subsequently recast extreme emotional distress manslaughter as an affirmative defense to murder rather than a lesser included offense,[2] it retained the language regarding the viewpoint through which the reasonableness of the excuse is determined. Compare id. § 76-5-203(3)(a)-(d) (1999), with id. § 76-5-203(4)(c) (2008).

¶20 Although a trial court is statutorily required to consider the circumstances surrounding a defendant's extreme emotional distress, those circumstances must be viewed from the viewpoint of a reasonable person. Thus, the legal standard is whether the circumstances that a particular defendant faced were "such that the average reasonable person would react by experiencing a loss of self-control." State v. Spillers, 2007 UT 13, ¶ 14, 152 P.3d 315 (internal quotation marks omitted). The trial court correctly identified this legal standard and did not err in evaluating whether the stressors proffered by Defendant would cause a reasonable person to experience a loss of self-control.

II. Contemporaneous Provocation Required

¶21 Defendant additionally argues that the trial court erred in refusing to adopt her requested jury instruction based on the

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[2]State v. Low, 2008 UT 58, 192 P.3d 867, contains an overview of the transition of manslaughter from a lesser included offense to an affirmative defense to murder. See id. ¶ 22.

conclusion that Defendant had not experienced a highly provocative, contemporaneous stress as a trigger for her emotional distress. Utah courts have defined extreme emotional distress as "intense feelings, such as passion, anger, distress, grief, or excessive agitation," that "overwhelm[]" a person's reason. Id. ¶ 14. The stress triggering these feelings must be "'an external event'" or an "external initiating circumstance." State v. Bishop, 753 P.2d 439, 472 (Utah 1988), overruled on other grounds by State v. Menzies, 889 P.2d 393 (Utah 1994). The stress that triggers extreme emotional distress does not include "a condition resulting from mental illness" or "distress that is substantially caused by the defendant's own conduct." Utah Code Ann. § 76-5-203(4)(b)(i)-(ii). Rather, feelings of extreme emotional distress are a result of exposure to a stress that is "extremely unusual and overwhelming." Spillers, 2007 UT 13, ¶ 14 (internal quotation marks omitted).

¶22 Defendant points to State v. Shumway, 2002 UT 124, 63 P.3d 94, and State v. Spillers, 2007 UT 13, 152 P.3d 315, to support her contention that stressors that alone are not highly provocative may nonetheless trigger extreme emotional distress when those stressors accumulate over time. In Shumway, the Utah Supreme Court held that the defendant was entitled to a jury instruction regarding extreme emotional distress based on evidence that the victim "initiated a violent and traumatic act by attacking [the defendant] with the knife," that the victim "had a reputation for being a 'hothead' and losing his temper," and that the defendant "had been bullied and pushed around by his peers since he was in the third grade, [which all] 'came out on [the victim]' when the [victim and the defendant] fought over the knife." 2002 UT 124, ¶¶ 11, 10. In Spillers, the supreme court held that the defendant was entitled to a jury instruction on extreme emotional distress where the defendant shot the victim three times following an argument in which the victim "accused [the defendant] of snitching on him to drug enforcement agents regarding a drug deal." 2007 UT 13, ¶ 3. Among the evidence that the Spillers court concluded justified the instruction was the fact that the victim "retrieved a firearm," "struck [the defendant] on the back of the head," "cock[ed] his arm back to strike [the defendant] again," and "had a reputation for violence." Id. ¶ 16. Defendant emphasizes that two of the factors considered by the supreme court--the reputation of the victim in both cases and the bullying experienced by the minor defendant in Shumway--were either acquired over time or occurred years before the violent incident.

¶23 Contrary to Defendant's contention, however, these cases reinforce the requirement that a defendant's loss of self-control be in reaction to a highly provocative triggering event. In Shumway, the defendant's violent act was provoked when the victim "initiated" a fight by attacking the defendant with a knife. See

2002 UT 124, ¶ 11. Likewise, in Spillers, the defendant killed the victim immediately after an argument escalated and the victim brandished a gun, threatened the defendant, struck the defendant, and attempted to strike him again. See 2007 UT 13, ¶¶ 3, 16. The victims' reputations for violence and the Shumway defendant's history of being bullied merely placed in context the contemporaneous and intense provocation experienced by the defendants.

¶24 A highly provocative trigger has been consistently required for a defendant in Utah to make a claim of extreme emotional distress. Where a defendant shot his ex-girlfriend because she "'just ran off at the mouth,' frustrated him, and hurt his feelings," we concluded that there was no evidence supporting the defendant's contention that he was acting under the influence of extreme emotional distress. State v. Price, 909 P.2d 256, 263 (Utah Ct. App. 1995). We stated, "Defendant is remiss in his assertion that frustration and hurt feelings reach the level of extreme emotional disturbance." Id. The Utah Supreme Court similarly rejected a claim of extreme emotional distress where the defendant shot the victim at the request of a close personal friend after the victim had beat the friend's sister and disrespected the friend's family. See State v. Piansiaksone, 954 P.2d 861, 871 (Utah 1998). The supreme court noted that the close personal friend had not "worked [the defendant] into a frenzy" and "there [was] no evidence that [the defendant] himself would find [the victim's disrespect of the friend's family] a particularly provocative act on the victim's part." Id.

¶25 Furthermore, Utah law requires that the highly provocative event must be contemporaneous with the defendant's loss of self-control or such loss of self-control cannot be attributed to extreme emotional distress. In State v. Clayton, 658 P.2d 624 (Utah 1983), the supreme court upheld the trial court's refusal to instruct the jury on attempted manslaughter as a lesser included offense to attempted murder,[3] citing the passage of time between the provocative event and the defendant's violent action as determinative. See id. at 626. The defendant and the victim in Clayton had fought at a bar, and friends broke up the fight after the victim had pushed the defendant backward into a window. See id. at 625. The defendant left the bar, returned fifteen or twenty minutes later with a gun, and then confronted and shot the

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[3]The lesser included offense to attempted murder at issue in State v. Clayton, 658 P.2d 624 (Utah 1983), is the functional equivalent to the affirmative defense to attempted murder in this case. See generally State v. Low, 2008 UT 58, ¶ 22, 192 P.3d 867 ("In 1999, extreme emotional distress and imperfect self-defense were removed from the manslaughter statute and inserted into the murder statute as affirmative defenses to murder.").

unarmed victim. See id. The supreme court explained that even a twenty-minute "passage of time between the fight and defendant's return to the bar tends to negate the 'heat of passion' explanation" for the defendant's actions. Id. at 626.

¶26 Notwithstanding this case law, Defendant argues that she is entitled to the requested jury instruction because the mistreatment she received from Mr. White in the years preceding their divorce is relevant to the affirmative defense of extreme emotional distress, just as ongoing domestic violence is relevant to a claim of self-defense. As Defendant indicates, Utah statutory law allows a jury to consider "any patterns of abuse or violence in the parties' relationship" to determine whether a person may claim self-defense in using force against another. See Utah Code Ann. § 76-2-402(5)(e) (2008). The legislature explicitly stated that its intent in enacting this statute was to allow "otherwise competent evidence regarding . . . [the] response [by a victim of domestic violence] to patterns of domestic abuse or violence [to] be considered by the trier of fact in determining [the] imminence" of another's use of unlawful force "or [the] reasonableness" of the domestic violence victim's belief that force is necessary to defend him or herself. Id. § 76-2-402 Legislative Intent.

¶27 This statute is inapplicable to Defendant's case. At no point in the proceedings did Defendant allege that she believed that Mr. White was about to use unlawful force against her or commit a forcible felony as he walked to his car, or that she was attempting to prevent death or bodily injury as she chased Mr. White with her vehicle. See generally id. § 76-2-402(1) (stating that a person may only claim that his or her use of force was self-defense when "he or she reasonably believe[d] that force [was] necessary to prevent death or serious bodily injury to himself or a third party as a result of the other's imminent use of unlawful force, or to prevent commission of a forcible felony"). And we find it significant that the legislature has not enacted similar provisions in the statutory framework for the affirmative defense of extreme emotional distress.

¶28 Ultimately, the only contemporaneous, provocative event that preceded Defendant's loss of self-control was Mr. White's use of a cell phone that he had previously denied possessing. This event is not sufficiently provocative, even when viewed in its unique context, to entitle Defendant to a jury instruction on the affirmative defense of extreme emotional distress. Although Defendant had the opportunity to proffer as much evidence as she deemed necessary to show that she qualified for this affirmative defense, the only other factors actually proffered--marital difficulties, financial stress, parenting issues, other difficulties with divorce, and the death of a therapist--lack the requisite contemporaneous relationship to her loss of self-

control. The trial court therefore correctly determined that the factors cited by Defendant do not rise to the level of an "extremely unusual and overwhelming" stress and that there is no reasonable basis in the proffered evidence upon which the jury could conclude that the defense of extreme emotional distress applies to Defendant's crime.[4]

CONCLUSION

¶29 The trial court did not err in denying Defendant's motion to adopt a jury instruction on the affirmative defense of extreme emotional distress. The trial court properly applied an objective standard for viewing the evidence proffered by Defendant, and it correctly concluded that a highly provocative, contemporaneous trigger is required for a person's loss of self-control to qualify as extreme emotional distress.

¶30 Accordingly, we affirm.

_____
Russell W. Bench, Judge

¶31 WE CONCUR:

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Gregory K. Orme, Judge

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James Z. Davis, Judge

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[4]As we find these issues to be dispositive, we do not address Defendant's other claim of error.

Addendum B

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

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

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

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

FINDINGS OF FACT

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

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

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

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

CONCLUSIONS OF LAW

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

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

3. The reasonableness of these stressors as an adequate excuse or explanation for a loss of self-control is further diminished by the length of time between the stressors and the incident. Several of the stressors that Defendant White proffers (the threesome, the pornography investigation, and the death of Ms. Talbot) occurred several weeks to years before April 26th, 2006. Furthermore, the Court has reviewed the two most recent decisions of the Utah appellate courts dealing with extreme emotional distress, and has noted that in both cases a highly provocative event occurred immediately before the crime. (State v. Shumway, 3 P.3d 94; State v. Spillers, 152 P.2d 315 (Ut. S.Ct. 2007). In the case at bar, there is a complete absence of a similarly provocative event on or near the day in question.

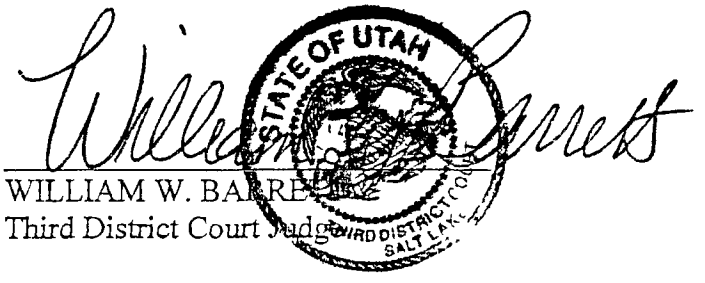
4. The circumstances of the crime itself indicate that Defendant White had not lost self-control at the time of the incident, but appeared to be acting in accordance with a plan. The disagreement about the quit-claim deed occurred during the noon hour, and the crime occurred more than four hours later at approximately 4:30, when Mr. White was walking across the parking lot toward his vehicle. The complicated driving pattern that Defendant White negotiated to pursue Mr. White also indicates that Defendant White was aware of what she was doing and was in control of her faculties during the time in question.

ORDER

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

Dated this 10 day of Dec., 2007.

By the Court:



WILLIAM W. BARRETT
Third District Court Judge

Approved as to form:

_____

Jason Schatz
Counsel for Defendant

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