

2009

# Utah v. White : Brief of Appellant

Utah Supreme Court

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Mark L. Shurtleff, J. Frederic Voros, Jr.; Attorneys for Appellee.

Jason A. Schatz, Richard G. Uday; Attorneys for Appellant.

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**STATE OF UTAH,**

**Plaintiff/Appellee.**

**vs.**

**BRENDA CHRISTINE WHITE,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

**Case No. 20090322**

JASON A. SCHATZ, # 9969  
RICHARD G. UDAY, # 5355  
Attorneys for Appellant  
Schatz, Anderson & Uday, LLC  
57 West 200 South, Suite 200  
Salt Lake City, Utah 84101

ORAL ARGUMENT REQUESTED

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**IN THE UTAH SUPREME COURT**

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**STATE OF UTAH,**

**Plaintiff/Appellee.**

**vs.**

**BRENDA CHRISTINE WHITE,**

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**BRIEF OF APPELLANT**

**Case No. 20090322**

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Interlocutory appeal from the decision of the Utah Court of Appeals holding that the Appellant was required to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to an affirmative defense of extreme emotional distress as had been decided by an interlocutory order of the Honorable William W. Barrett, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah. Petition for Writ of Certiorari was granted by this Court by Order entered July 28, 2009.

MARK L. SHURTLEFF, # 4666  
J. FREDERIC VOROS, JR., # 3340  
Attorneys for Appellee  
Office of the Utah Attorney General  
160 East 300 South, Sixth Floor  
Salt Lake City, Utah 84114-0854

JASON A. SCHATZ, # 9969  
RICHARD G. UDAY, # 5355  
Attorneys for Appellant  
Schatz, Anderson & Uday, LLC  
57 West 200 South, Suite 200  
Salt Lake City, Utah 84101

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court has jurisdiction over interlocutory appeals involving a charge of a first degree felony. Utah Code Ann. § 78-2-2(3)(h) (2001).

## **STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

I: Whether the Court of Appeals erred in holding that Ms. White was required to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to presenting an affirmative defense of extreme emotional distress.

The Supreme Court Order granting the Petition for Writ of Certiorari identifying the issue is found at Addendum B.

### **Standard of Review:**

This Court has identified the following standard of review for a writ of certiorari to the Utah Court of Appeals and for the issue presented herein.

“On certiorari, we review the court of appeals' decision for correctness, giving its conclusions of law no deference.” State v. Casey, 2003 UT 55, ¶ 10, 82 P.3d 1106 (citations omitted). Whether a jury instruction on a lesser included offense is appropriate presents a question of law. See State v. Hamilton, 827 P.2d 232, 238 (Utah 1992). 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.” State v. Crick,

675 P.2d 527, 539 (Utah 1983). In addition, when the defense requests a jury instruction on a lesser included offense, the requirements for inclusion of the instruction “should be liberally construed.” State v. Hansen, 734 P.2d 421, 424 (Utah 1986).

State v. Spillers, 152 P.3d 315, 2007 UT 13, ¶ 10.

Trial court conclusions of law are reviewed by Utah appellate courts under a correction of error standard granting no deference to the trial court for its legal conclusions. State v. Pena, 869 P.2d 932 (Utah 1994); State v. Wanosik, 2001 UT App 241, 31 P.3d 615.

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

### **Amendment V, Constitution of the United States (full text)**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Amendment XIV, Constitution of the United States (in pertinent part)**

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Utah Code Ann. § 76-5-203(4) (in pertinent part): [Extreme Emotional Distress]**

(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;

.....

(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.



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**IN THE UTAH SUPREME COURT**

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**STATE OF UTAH ,**

**Plaintiff/Appellee.**

**vs.**

**BRENDA CHRISTINE WHITE,**

**Defendant/Appellant.**

**BRIEF OF APPELLANT**

**Case No. 20090322**

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**STATEMENT OF THE CASE**

This is an appeal from the decision of the Utah Court of Appeals holding that an accused is required to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to presenting an affirmative defense of extreme emotional distress.<sup>1</sup> The trial court, Judge William W. Barrett, Third Judicial District Court, denied the pretrial motion by the Defendant seeking permission to permit the jury to hear and to be instructed on the defense of extreme emotional distress.

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<sup>1</sup> This defense is codified within the Homicide statute at Utah Code Ann. § 76-5-203(4). The extreme emotional distress defense is more accurately and completely stated as “extreme emotional distress for which there is a reasonable explanation or excuse.” Ms. White will refer to the defense intending its full verbiage with the shorthand of “extreme emotional distress.”

That ruling of the district court was challenged by Petition for Interlocutory Appeal to the Utah Supreme Court which transferred the Petition to the Utah Court of Appeals. R. 697. The Utah Court of Appeals granted the petition to review the interlocutory order on January 31, 2008. The Court of Appeals then affirmed the lower court in its decision State of Utah v. Brenda White, 206 P.3d 646, 2009 UT App 81. Copy of Order attached at Addendum A.

Appellant then petitioned this Court by Petition for Writ of Certiorari asking the Court to correct the decision of the Utah Court of Appeals. This Court granted that Petition for Writ of Certiorari on July 28, 2009, as to the following issue: 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. Copy of Order attached at Addendum B.

### **STATEMENT OF THE FACTS**

Brenda Christine White was charged by Amended Information with two counts of criminal conduct: Attempted Murder, a First Degree Felony, and Criminal Mischief, a second degree felony. The charges stemmed from a single event occurring the 26th day of April, 2006, at 4021 South 700 East, a building complex known as the Woodlands Tower II, in Salt Lake County. R. 1-3.

On April 26, 2006, Brenda White arrived at the Woodland Towers office building to meet with her ex-husband Jon White to acquire his participation in refinancing the home mortgage as he had previously and repeatedly promised. Jon White told her to return later to talk. R. 711 at 31-33.

The couple had been married for eleven years; two children were born during the marriage. R. 711 at 28, 65-67. Jon White moved out of the home prior to Thanksgiving in November of 2005. Id. As a result of a mediation agreement, Jon White had promised to assist in refinancing the two mortgages, giving up his equity in the house to Ms. White in lieu of making any payments of alimony or paying any bills, including any portion of either of the mortgages. R 711 at 32. Jon White, however, then refused to cooperate with the refinance leaving her in financial disaster. She returned and they talked about the refinancing; he refused to assist with the refinancing as he had promised. Instead Jon White utilized his leverage on her need for the refinance to pressure her to sign divorce papers. R.711 at 36. Jon White returned to work and she left the area. R 711 at 34, 40.

Ms. White returned later that day, around 4:30 p.m., to again beseech her ex-husband for the assistance he had promised. R. 446, 448. She observed him exiting the office complex talking on a cell phone, a cell phone that he had repeatedly told her he did not own. R. 711 at 75. Ms. White had tried for months to obtain cell phone information from Jon White to facilitate communications with their children and to arrange visiting schedules for the two children. Jon White

had repeatedly responded that he did not possess a cell phone. R. 448-49; 711 at 75.

The State's probable cause statement from the Information describes the next events as follows:

The defendant drove over the raised curb of the parking structure [where Jon White was leaving work] and chased Mr. White through the parking lot as he ran toward the Woodland Towers. Mr. White entered the east side of the building through a double set of glass doors. Mr. White continued to run through the building to a lobby on the west side. The defendant drove her vehicle through the glass doors and down a hallway to the lobby. The defendant struck Mr. White with the explorer, causing Mr. White to flip over the vehicle and fall to the ground. The defendant drove through the lobby windows and stopped her vehicle. The defendant put her vehicle in reverse and backed into the lobby. Mr. White stood up and fled down a side hallway. The defendant turned her car around in the lobby and stopped the vehicle.

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

R. 2-3. A more detailed version of the facts of those events is contained in the Findings of Fact and Conclusions of Law and Order prepared by the prosecution and found in Addendum C. That rendition of the facts includes a recitation of Jon White's testimony from the preliminary hearing which indicates that after he had again refused to cooperate and assist in the refinance, Ms. White played a song on her car radio which contained the lyrics, "I want to kill you. I want to blow you away." Ms. White joined her fingers together, mimicked as a gun; and as the music played told him that when her father took her shooting, she thought about shooting him. Jon White testified that this action was repeated numerous times.

Jon White also testified that she also referred to him as a parasite and that she was going to wipe him off the earth. *Id.*; R. 711 at 35-38.

A preliminary hearing on the matter was held December 1, 2006. During the preliminary hearing the prosecutor inquired how long prior to the divorce had he contemplated thoughts or discussions of divorce. R. 711 at 60-65. Jon White testified that over five years it progressively had gotten worse. He also indicated he had moved out earlier in 2004 for a period of time. During cross-examination of Jon White, the defense attempted to inquire into specifics about the deterioration of the marriage, manipulation of Ms. White, the divorce and other related issues. R. 711 at 60-64. The court initially permitted that questioning over the objection of the State. However, when the defense began to explore questions regarding sexual relations, the State objected again. R. 711 at 70-72. The defense insisted that not only had the State opened the door, but also indicated its intent to present and develop the affirmative defense of extreme emotional distress through such questioning. The court ruled that the defense could question Jon White about anything he may have done to try to provoke his ex-wife but sustained the objection about sexual relations. *Id.*, R. 711 at 74-76.

The State sought a clarification of the magistrate's use of the term "provocation" attempting to limit the inquiry to only events of the day of the alleged crimes. R. 711 at 71. An in-chambers discussion occurred where the defense proffered the testimony of certain actions and events which the ex-husband employed over the more recent period of the marriage to manipulate and

distress Ms. White. R. 711 at 74-82. This testimony included Jon White's treatment of Ms. White through the marriage, including a rather recent period of Jon White's marital infidelity, an extra-marital affair with a co-worker. R. 711 at 75-76. The defense also proffered an instance later in the marriage documented by a police investigation and report of the possession and use/abuse of child pornography by Jon White. R. 711 at 73-75. Additionally, the defense introduced a proffer describing a sexual tryst the ex-husband had arranged where he orchestrated a "threesome" with yet another co-worker and Ms. White. R. 711 at 74-80.

Other problems existed in the marriage and more specifically the dissolution of the marriage and were proffered to the district court in support of the motion in limine. R. 714. Ms. White and the children were not receiving any financial support from Jon White from the time he left at Thanksgiving of 2005 and she was forced to make a mediation agreement in January to settle the divorce on the promise of getting some money to support the family. Poor legal advice assured her that giving up monthly income via alimony, house and bill payments was a fair trade for his half of the equity in the home. R. 443-50. There were no temporary orders obtained by her lawyer to provide for interim payments and the settlement agreement signed in January provided none, except for child support beginning in March. Id.

Ms. White was on medications for anxiety, depression and sleep. R. 444. During this time Jon White was to provide health coverage for the family but on

two separate occasions he cancelled the coverage causing a lapse in her ability to acquire the medication which resulted in an increase in her anger, her depression and all that went with it. Ms. White, on one occasion, was required to go to Jon White's workplace herself to have the insurance benefits reinstated. In the meantime she was without her medications. She had no money to pay for them. Moreover, she deteriorated in her mental state and ability to deal with all that was going on around her. Id.

She was a single mother of two children working a \$ 12.50 cent an hour job, at a telephone call center, with new financial obligations of approximately \$ 1,400.00 per month on a first and second mortgage, plus credit card debt resulting from the marriage of another \$ 200.00 to \$ 300.00 per month and all the other family expenses. R. 433, 443-450.

Ms. White had to increase her work from part-time to full time; and in fact, began to work overtime—often working up to as much as 60-70 hours a week to try and make ends meet. Id. Ms. White saw less of her children than before which resulted in additional stressors from the children. And at the same time, Jon White began to withdraw from participating with the children. R. 446. Jon White would make the visits difficult for Ms. White; for example, he would insist on an 8 o'clock pickup of the children on times when he knew Ms. White was in a group counseling class that did not terminate until 8 p.m. Id. He would require that Ms. White leave the counseling sessions early to pick up the children at 8 p.m., rather

than waiting until 8:15 p.m., or he would require her to arrange for someone else to do so.

As money became more difficult her ability to pay for medications decreased and her doctor assisted by providing sample packets of the medications whenever she could. However, that doctor died in early April leaving her without a treatment doctor and without appropriate medication. R. 446-47; 711 at 79.

The mediation agreement, determined in January, to eventually become the divorce settlement, still left her without finances. The unfortunate settlement provided that Ms. White would receive the equity in the home, but would be required to pay from that equity an approximated additional \$ 10,000.00 of debt accumulated during the marriage. Of course, she had to pay these bills in the interim, while waiting for the settlement date to arrive. R. 447.

While the settlement agreement would provide Ms. White with child support of approximately \$ 650.00 per month, no relief was in sight. R. 447. She fell behind in house and bill payments despite working so much overtime. As part of the settlement agreement urged on her by her counsel, Jon White insisted that he not participate in paying the house payments and that he surrender his half of the equity in trade for no alimony and no payments. Id.

The unfortunate reality of the settlement was that the equity she now had in the home was of no value unless she could get the money out and pay the living expenses, mortgages and other bills. Id. If she could not refinance the mortgages and get the equity out to live on she could even lose the house. Ms. White began



to see the potential of this reality after the settlement and her finances did not improve. R. 447-48. She desired to refinance the home to free up that money to live on and pay the bills as anticipated in the agreement. However, due to her short work history, large debt and late payments, Ms. White could not get a loan to refinance the home. Ms. White approached Jon White for the assistance with the refinance that he had promised, and he vacillated and backed out of his agreement to do so. R. 447-48; 711 at 33-35.

Ms. White could not obtain the refinancing without him. Id.

She finally contacted new counsel and discussed attempting to re-open the divorce agreement as unworkable. R. 444, 448.

Jon White then agreed to assist with the refinance but then he would back out again. R. 448.

The relationship between Jon White and the children became more problematic. He spent less time with them, disappointed them more and was unavailable for contact. Ms. White requested that he provide his cell phone number to her so the kids could contact him directly, but he repeatedly told her that he did not have one. R. 448-49. He was becoming less and less involved in caring for and caring about his family. Id.

The day of the incident, April 26th, Ms. White went to Jon White's workplace earlier in the day to speak with him and have him talk on the phone to the mortgage broker. He refused to do so until later in the day. When she went

back the second time, he spoke with the mortgage broker but he would not cooperate in the refinance. R. 711 at 33-34.

During the second visit Ms. White spoke with Jon White again about the refinance of the mortgages and assisting in providing for his children. Ms. White felt he had promised to assist her in releasing the equity from the home. R. 448.

When Ms. White saw Jon White leave the workplace talking on a cell phone, a cell phone that he denied owning for communication with the children. Ms. White was overcome with all that has been described above. R. 449. Her anger, agitation, loss, grief and the disappointment for her and the children resulted in her inability to control herself. Those emotions controlled her actions. R. 448-49.

These events and others including the fact that Ms. White was only recently aware that Jon White now was actively dating the co-worker with whom he had the affair, were at the base of the defense theory of the case supporting the request to permit the defense of extreme emotional distress to the jury. R. 447-49. All of these events were described as occurring within the last two to three years, some even more recent in time and prior to the offenses in question. R. 711 at 76.

The district court denied the motion in limine. R. 648; R. 715. Both the State and the trial court agreed with the defense request to petition for interlocutory review and indicated that appellate review and guidance would be of benefit to lower courts and should be sought. R. 715 at 11. The Utah Supreme Court transferred that petition to the Utah Court of Appeals which granted the

petition. The Court of Appeals decision, State v. White, 206 P.3d 646, 2009 UT App 81, affirmed the trial court's denial of the motion in limine. Ms. White then petitioned for Writ of Certiorari which this court granted on the issue presented herein. Addendum B.

### **SUMMARY OF THE ARGUMENT**

The Utah Court of Appeals erroneously concluded that Utah law requires that before an accused may present the affirmative defense of extreme emotional distress to the jury she must demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to relying on the defense. This decision is in error. This Court should find the facts of this case to be more than sufficient evidence to meet the correct standard of presenting the case to the jury on the defense of extreme emotional distress for which there is a reasonable explanation or excuse.

While the State may take from the same evidence and claim an intentional act to attempt to commit murder, reasonable minds may differ whether the reasonable person under those same stressors and circumstances would have an extreme emotional reaction to it and experience a loss of self-control such that the person's reason would be overborne by the intense feelings discussed above. That understanding is all that is required for this Court to reverse the decisions of the Court of Appeals and the trial court and authorize introduction of the defense.

This argument is particularly compelling when the cases cited and relied on by the Court of Appeals predate the change in statutory language in the defense from “extreme emotional *disturbance*” to “extreme emotional *distress*.”

In Ms. White’s case, no single violent event triggered her behavior. Rather a loss of self control arguably occurred due to a lengthy repeated and escalating pressure overborne by intense feelings such as passion, anger, distress, grief, excessive agitation and similar emotions. These stressors very realistically were extreme and overwhelming for someone under the then existing circumstances reasonably brought about over time by the external forces of Jon White’s behavior towards her, coupled with the escalating financial pressures and extreme family and work stressors, including the death of her doctor and counselor and the changes in her medicine regime. Her circumstances meet the requirements of submitting the affirmative defense of extreme emotional distress to the jury.

### ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT AN ACCUSED IS REQUIRED TO DEMONSTRATE A HIGHLY PROVOCATIVE AND CONTEMPORANEOUS TRIGGERING EVENT AS A PREREQUISITE TO PRESENTING THE STATUTORY AFFIRMATIVE DEFENSE OF EXTREME EMOTIONAL DISTRESS TO THE JURY.

The Utah Court of Appeals decision concludes that Ms. White was required and failed to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to presenting the statutory affirmative defense of extreme

emotional distress to the jury.<sup>2</sup> That decision is contrary to Utah case authority and not supported by the cases the Court of Appeals relies on for its conclusions.

**a. Ms. White enjoys the right to present her defense to the jury.**

It has long been the law that a Defendant is entitled to have the jury instructed on her theory of the crime if there is *any basis* in the evidence to support that theory. State v. Brown, 607 P.2d 261, 265 (Utah 1980)(emphasis added). Ms. White indicated an intent to rely on the defense of “extreme emotional distress for which there is a reasonable explanation or excuse,” an affirmative defense. As an affirmative defense, much like self defense, the

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<sup>2</sup> The trial court denied Ms. White’s motion in limine to present the defense of extreme emotional distress to the jury by making four distinct conclusions of law. R. 651-52.; Addendum C at 4-5. The trial court denied the motion by concluding as a matter of law that Ms. White did not present sufficient evidence to justify an argument to the jury that she suffered from extreme emotional distress when she allegedly committed the offenses in question. Conclusion # 1; R. 651; Addendum C at 4. The trial court then omitted an important subjective statutory perspective (the viewpoint of the reasonable person *under the then existing circumstances*) when it concluded as a matter of law that factors proffered by Ms. White would not cause the average reasonable person to suffer from extreme emotional distress. Conclusion # 2; R. 651; Addendum C at 4-5.

The third conclusion of the trial court erroneously determined that Ms. White’s claimed defense of extreme emotional distress was inadequate as a matter of law due to stressors being too remote in time and lacking a highly provocative triggering event. Conclusion # 3; R. 652; Addendum C at 5. Finally, the fourth conclusion of law replaced the trial court’s judgment for that of a jury and concluded pre-trial that Ms. White did not lose self-control, had a plan and was aware of what she was doing as evidenced by the complicated driving pattern of negotiating a chase and a crash into the lobby of an office building in pursuit of her alleged victim. Conclusion # 4; R. 652; Addendum C at 5.

defendant desiring to utilize that defense must initially demonstrate a sufficient basis from which jurors may reasonably entertain the defense in order for the question to be submitted to the jury. This Court has instructed on this basic due process principle:

If the defendant's evidence, although in material conflict with the State's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused.

Id. at 265-66 (quoting State v. Castillo, 457 P.2d 618, 620 (Utah 1960)).

Even recently the Court has discussed and reasserted the right to the affirmative defense instruction of extreme emotional distress when the Defendant requests that it be given. This Court stated:

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--either by the prosecution or by the defendant--that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant. See State v. Knoll, 712 P.2d 211, 214 (Utah 1985) ("[W]hen there is a basis in the evidence, whether the evidence is produced by the prosecution or by the defendant, which would provide some reasonable basis for the jury to conclude that a killing was done to protect the defendant from an imminent threat of death by another, an instruction on self-defense should be given the jury."); State v. Torres, 619 P.2d 694, 695 (Utah 1980) (stating that a party is "entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it").

We have applied this rule with respect to the affirmative defenses of imperfect self-defense manslaughter and extreme emotional distress manslaughter. See State v. Spillers, 2007 UT 13, ¶¶ 16, 23, 152 P.3d 315;

State v. Shumway, 2002 UT 124, ¶¶ 13, 14, 63 P.3d 94: For example, in Spillers, we held that a criminal defendant was entitled to a jury instruction on imperfect self-defense manslaughter because the evidence presented by the defendant could have been interpreted by the jury to establish imperfect self-defense. 2007 UT 13, ¶ 23. We also held that the defendant was entitled to a jury instruction on extreme emotional distress manslaughter because "a rational jury could, adopting Defendant's version of events, find that he was experiencing extreme emotional distress for which there was a reasonable explanation or excuse when he shot [the victim]." Id. ¶ 16.

State v. Low, 192 P.3d 867, 2008 UT 58 at ¶¶ 25-26.

The Utah Court of Appeals had itself reaffirmed this proposition in stating, "It is well established that a *"defendant is entitled to have the jury instructed on his theory of the crime if there is any basis in the evidence to support that theory."* State v. Lopez, 789 P.2d 39, 44-45 (Utah App.1990)(quoting State v. Brown, 607 P.2d 261, 265 (Utah 1980)(emphasis in original)).

Ms. White insists there is ample basis in the evidence developed thus far, and perhaps even additional evidence to be developed,<sup>3</sup> to support her theory of the affirmative defense that she suffered from extreme emotional distress for which there is a reasonable explanation or excuse at the time of the criminal events as alleged by the State in this matter.

Case law supports her position. The Utah Supreme Court has discussed the affirmative defense of extreme emotional distress and rather decidedly

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<sup>3</sup> Ms. White refers to the fact that the trial court indicated its willingness to allow the alleged victim to be deposed and the answers to the questions desired at the preliminary hearing (and others) obtained from Jon White. R. 713 at 15. Such questions would undoubtedly develop additional information in support of the type and depth of stressors placed on Ms. White. Due to the current posture of the case, however, such a deposition has yet to occur.

dispelled the errors contained in the Court of Appeals analysis and the trial court's Findings of Fact and Conclusions of Law. In State v. Shumway, 63 P.3d 94, 2002 UT 124, this Court ruled:

We conclude that defendant was entitled to an instruction under [extreme emotional distress] because a jury could conclude that [Shumway] caused the death of [the victim] "under the influence of extreme emotional distress for which there is a reasonable explanation or excuse." In holding that the defendant was entitled to an instruction under [extreme emotional distress], we do not suggest that [Shumway's] version of the events that took place is the only reasonable interpretation of the evidence. Most disturbing, of course, is the fact that the medical examiner testified that Christopher had been stabbed thirty-nine times. However, in State v. Standiford, 769 P.2d 254, 264, 266 (Utah 1988), we approved of the giving of instructions for manslaughter and self-defense based on the defendant's theory of the case where he had stabbed the victim 107 times. See also State v. Cloud, 722 P.2d 750, 753-55 (Utah 1986), in which we held that the defendant would be entitled to an instruction on extreme emotional distress manslaughter where the victim had been stabbed twenty-seven times and died of multiple critical wounds.

Shumway, 63 P.3d at ¶ 13.

Again, Shumway underscores the law that a defendant is entitled to present her theory to the jury if there is *any basis* in the evidence to support that claim. Here, in Ms. White's case, there is at least as much credibility in her claim of the affirmative defense (and Ms. White asserts much more so) than in the claims of extreme emotional distress that had been withheld from presentation in Shumway and the Standiford and Cloud opinions cited therein.

**b. The trial court erred in requiring a contemporaneous highly provocative triggering event.**

In Shumway, the Court, citing State v. Bishop, stated:



Turning first to consideration under [extreme emotional disturbance], we explained in State v. Bishop, 753 P.2d 439, 471 (Utah 1988), overruled on other grounds by State v. Menzies, 889 P.2d 393 (Utah 1994), that 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*. Id. However, an extreme emotional disturbance will not serve to reduce murder to manslaughter if the actor brought about his own mental disturbance. Gardner, 789 P.2d 282-83; § 76-5-203(3)(b)(ii).

State v. Shumway, 63 P.3d 94, ¶ 9 (Utah 2002)(citations in original)(emphasis added). All that is required to support the claim for the affirmative defense of extreme emotional disturbance/distress is *some external initiating circumstance* accompanied by extremely unusual and overwhelming stress and that a reasonable person under that stress would have an extreme emotional reaction to it. Bishop, 753 P.2d at 471.

Notably, since Bishop the statute has been amended and “extreme emotional *disturbance*” has been re-written to “extreme emotional *distress*.” Of course, a reasonable explanation or excuse is still required, but the change in term from “disturbance” to “distress” is itself significant. A “disturbance” may be best defined as a single event where “distress” more easily connotes a build-up over time. For example, Blacks Law Dictionary defines “disturbance” as “an act” or “a wrong” where “emotional distress” is defined as “a highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person’s conduct; emotional pain and suffering.” Blacks Law Dictionary,

8th edition, 511 & 563, respectively. Neither the Court of Appeals nor the trial court addressed or accounted for this amended language in assessing the perspective of Ms. White's circumstances.

In fact, the Court of Appeals opinion is misleading on this point and makes no distinction between "disturbance" and "distress" as it cites three "disturbance" cases to support its conclusion that extreme emotional "distress" requires a highly provocative and contemporaneous triggering event. The Court of Appeals cites to State v. Price, 909 P.2d 256 (Utah App. 1995); State v. Piansiaksone, 954 P.2d 861 (Utah 1998); and State v. Clayton, 658 P.2d 624 (Utah 1983); and holds 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. White, 2009 UT App 81, ¶¶ 24-25. There are significant differences in these three cases when compared to Ms. White's case before the Court that indicates the three cases do not support the appellate court's decision.

First, all three cases, contrary to the language used by the Court of Appeals, are extreme emotional *disturbance* cases predating the change in language and not extreme emotional *distress* cases. While the Court in Shumway cited to Bishop in essence re-affirming the language in Bishop to distress cases, the distress cases are inarguably broader in allowing stressors which occur over time rather than a single event as defined in Blacks Law Dictionary as quoted above. The distress cases decided by this Court have allowed reputation evidence and six or seven year old stressors as relevant evidence to determine the appropriateness of the instruction

on extreme emotional distress. This Court should reject the Court of Appeals holding that uses the two interchangeably and makes no distinction between the terms “disturbance” and “distress.”

Second, all three of these cases were analyzed as post trial cases rather than our current posture of interlocutory review for Ms. White’s matter. This difference in the posture of the case is significant as the cases themselves each indicate. Price explains that a jury verdict is reviewed for sufficiency and that all evidence and all inferences are viewed in the light most favorable to the verdict of the jury. 909 P.2d at 262. In Price the appellate court found in support of the verdict that his claim for the extreme emotional disturbance was devoid of any evidence to show he was frustrated for having his feeling hurt. *Id.* at 263. Cf. Piansiaksone, 954 P.2d at 871 (this Court in support of the verdict found no basis in the evidence to support the view that Piansiaksone killed as a result of extreme emotional disturbance); and Clayton, 658 P.2d at 626 (this Court in support of the verdict held evidence offered no rational basis to conclude passion preponderated over malice to satisfy the requirement of extreme emotional disturbance).

Because of the interlocutory review and pre-trial nature of Ms. White’s case, there is, of course no jury verdict and the prosecution surely is not entitled to have the facts viewed in the light most favorable to their theory of the case. Rather, the contrary is true. This Court has long held that whenever considering a defense requests for such a jury instruction, the court necessarily “view[s] the evidence and the inferences that can be drawn from it in the light most favorable

to the defense.” Spillers II, 152 P.3d at ¶ 10 (quoting State v. Crick, 675 P.2d 527, 539 (Utah 1983). The Court also has clarified, correcting the appellate court ruling, that

a defendant in a criminal case bears no burden of persuasion. “The ultimate burden of proving the defendant's guilt beyond a reasonable doubt remains on the state, whether defendant offers any evidence in an effort to prove affirmative defenses or not.” ... Accordingly, a defendant is not required to use particular language or key words in his testimony to identify his mental state as extreme emotional distress before a jury may consider that defense in a criminal trial. As long as the evidence presented at trial supports a defendant's theory of the crime and provides a rational basis for a verdict on the lesser included offense, a defendant is entitled to the jury instruction if he requests it.

Id. at ¶ 19 (citations omitted).

Spillers II also instructs that the extreme emotional distress request for instruction is to be considered the same as an instruction on a lesser included offense and that the instruction “must be given if (i) the statutory elements of greater and lesser included offenses overlap ... and (ii) the evidence provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” Spillers II, 152 P.3d at ¶ 12.

**c. Distress need not be and rarely is an isolated event.**

The facts in Shumway inarguably provide the necessary clarification and direction that “distress” as contrasted with “disturbance” need not and perhaps rarely is an isolated event. Moreover, the initiating circumstance (heretofore

called a “trigger”) was not as highly provocative and violent an initiating event as described by the State.

In Shumway the Court described that initiating circumstances as follows:

One interpretation of the evidence supports the necessity for a manslaughter instruction under subsection (3)(a)(i). Brookes [the defendant] disclosed to police that on the morning of the altercation Christopher was irritated at him for beating Christopher at video games. As the boys went to bed, Christopher went to the kitchen and retrieved a knife that he began to throw in the air and catch. Christopher then lunged at Brookes and began poking him with the knife. The boys wrestled over control of the knife and in his anger, Brookes stabbed Christopher. Brookes also suffered stab wounds to his hand. There was evidence that Christopher had a reputation for being a “hothead” and losing his temper, while Brookes was known to be cooperative and peaceful. Other evidence supported the argument that Brookes had been bullied and pushed around by his peers since he was in the third grade, and that all of this “came out on Chris” when the boys fought over the knife.

Id. at ¶ 10. The facts revealed that Shumway was 15 years old at the time of the murder; third graders are 8 or 9 years of age so this particular—and determined to be a relevant—distress factor relied on by the Court in Shumway was six or seven years old. Similarly the Court spoke of reputation evidence which by practical definition cannot be created from a single event but must necessarily be ascertained over time. This recognition alone supports the importance of a distress versus disturbance analysis.

This Court recognized in Shumway that circumstances which may have occurred years prior to the offense could certainly contribute to the defendant’s mental state at the time of the offense, and likewise could be considered by a jury in determining whether the defendant acted under the influence of “extreme

emotional distress for which there was a reasonable explanation or excuse.” The Court reversed the murder conviction In Shumway because the jury was not instructed appropriately and was not allowed to determine the reasonableness of the defendant’s acts under those stressors.

This Court also recently reviewed and upheld the Court of Appeals decision in State v. Spillers, 2005 UT App. 283, 116 P.3d 985, aff’d 152 P.3d 315 (Utah 2007). There the State had appealed the Court of Appeal’s decision claiming that court erred in reversing the conviction because of the trial court’s failure to give an extreme emotional distress instruction. The State claimed, as the State does here, that Spillers did not merit the instruction.

[T]he State's assertion rests on its own conclusion that Defendant acted “rationally” throughout the encounter; however, the question of whether Defendant acted “rationally” is a question of fact properly belonging to the jury. While a jury could adopt the State's version of events and convict Defendant of murder, a jury could also believe Defendant's interpretation of the evidence and conclude that he was not acting rationally, but rather was under extreme emotional distress as a result of Jackson's attack and convict on the lesser offense of manslaughter.

Second, the State contends that Defendant did not present evidence that he was in fact experiencing “extreme emotional distress.” Rather, the State maintains that Defendant merely testified that he felt nervous and that the blow to his head left him feeling cloudy, dazed, uncomfortable, and scared-terms not indicative, in the State's view, of extreme emotional distress.

State v. Spillers [II], 152 P.3d 315, 2007 UT 13, ¶¶ 18-19.<sup>4</sup> The trial court’s conclusions, similar to the State’s position in Spillers II, rests on the conclusion

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<sup>4</sup> The trial court’s findings and conclusions made the same error as the State did here in Spillers II thereby usurping the fact finding duties of the jury and negating

that defendant acted rationally. As the Court stated there, whether Ms. White acted rationally here is a question of fact properly presented to the jury.

In contrast, and demonstrating the trial court's error here, the Supreme Court in Spillers II characterized those facts as follows:

Like Shumway this case could be interpreted to support Defendant's contention that he experienced extreme emotional distress and was therefore entitled to a manslaughter instruction. Defendant testified that he and Jackson were arguing prior to the altercation and that Jackson was upset with him, accusing him of snitching to drug enforcement officers. The tone of the conversation made Defendant nervous. Defendant stated that Jackson retrieved a firearm and struck Defendant on the back of the head. Defendant testified that the blow left him cloudy, dazed, uncomfortable, and scared. According to the nurse's testimony, the blow may have resulted in a two-inch hematoma that was present on Defendant's head the day after the shooting. Defendant testified that after being struck, he turned to face Jackson, who was cocking his arm back to strike Defendant again. At that point, Defendant shot Jackson three times, although at trial he testified that he remembered firing only a single shot. Further, witnesses testified that Jackson had a reputation for violence. Thus, a rational jury could, adopting Defendant's version of events, find that he was experiencing extreme emotional distress for which there was a reasonable explanation or excuse when he shot Jackson.

Id. at ¶ 16. This case, like Shumway, relies on the initiating incident only as the starting point for the analysis allowing the jury to determine the reasonableness, if any, to the claimed affirmative defense. Again, a reputation is acquired over time, permitting something less than a single highly provocative triggering event to justify granting the defense. The trial court's opinion to the contrary is erroneous

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her right to present her affirmative defense of extreme emotional distress.  
Addendum C at 5.

as is the Court of Appeals decision affirming that ruling. R. 652; Addendum C at 5.

The defense of extreme emotional distress is more completely defined in the statute, in pertinent part, as follows:

Utah Code Ann. § 76-5-403(4):

(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;

.....

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

Utah Code Ann. § 76-5-203(4)(emphasis added).

The trial court's conclusion misunderstands the statute as applied to Ms. White. Its conclusion fatally omitted a critical subjective component to the defense, to wit: the reasonableness of the explanation or excuse "***shall be*** determined from the viewpoint of a reasonable person ***under the then existing circumstances.***" Likewise, the trial court's conclusion does not take the analysis far enough. Its second conclusion failed to employ the subjective component of the statutory defense. See R. 651-52; Addendum C at 4-5.

The correct inquiry is not simply asking "would a reasonable person have done what defendant did?" Rather, the reasonableness standard evaluates the defendant's excuse or explanation for the behavior; the circumstances as they



existed for the defendant. The reasonableness requirement evaluates the defendant's excuse, not her actions. The proper inquiry demands that "the reasonableness of the explanation or excuse should be determined from the viewpoint of the average, reasonable person *under the then-existing circumstances.*" State v. Bishop, 753 P.2d 439, 471 (Utah 1988)(emphasis added). This determination "should be made by viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been, and assessing from that standpoint whether the explanation or excuse for his emotional disturbance was reasonable, so as to entitle him to a reduction of the crime charged from murder in the second degree to manslaughter in the first degree." People v. Casassa, 404 N.E.2d 1310, 1316 (N.Y. 1980).

Notably, Casassa was rejected by the Court of Appeals as unhelpful because the language of the subjective nature of the statute in Casassa required the determination of reasonableness to be made under the circumstances *as the defendant believed them to be* as compared to our current statute which requires the reasonableness viewpoint analysis to occur *under the then existing circumstances*. This distinction, however, is not sufficiently persuasive to reject the authority, nor the subjective perspective, as the appellate court's distinction is a distinction in degree and not the subjective nature of the viewpoint.

Even the objective reasonableness component of the extreme emotional distress defense does not ask the jury whether a reasonable person would behave

in such a way. Indeed, the Court recognized that the State unsuccessfully made this flawed argument in Shumway, urging that “no reasonable person...teased by a good friend playing with a knife during a sleepover, would have become so enraged or experience such an extreme emotional disturbance as to cause him to kill that person by cutting his throat and stabbing him thirty-nine times.”

Shumway, 63 P.3d at ¶ 12. As a New York court explained, “[i]t should be stressed that the issue...is not whether the defendant's act of killing his wife was a reasonable response under the circumstances for, clearly, it was not. Rather, the issue is the reasonableness of the explanation offered for the defendant's extreme emotional reaction." People v. Liebman, 583 N.Y.S.2d 234, 241 (N.Y.A.D. 1 Dept. 1992).

**d. Cumulative effects from stressors permissibly justify the defense of extreme emotional distress.**

In a recognized landmark case addressing extreme emotional distress, a New York court illuminated the long history leading to the recognition of the cumulative effect of events in these cases:

An action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore. The differences between the present New York statute and its predecessor and its ancient Maine analogue can be explained by the tremendous advances made in psychology since 1881 and a willingness on the part of the courts, legislators, and the public to reduce the level of responsibility imposed on those whose capacity has been diminished by mental trauma. It is consistent with modern criminological

thought to reduce the defendant's criminal liability upon proof of mitigating circumstances which render his conduct less blameworthy.

People v. Patterson, 347 N.E.2d 898, 908 (N.Y. 1976).

Another court listed several examples of cases where extreme emotional distress was determined to be a result of cumulative effects:

[I]n every case we have read there has been some connection between the victim and the slayer precipitating or aggravating an emotional response in the defendant. See, e.g., Elliott, supra (defendant, who shot his brother, was acting under an extreme emotional disturbance caused by combination of child-custody problems, the inability to maintain a recently purchased home, and an overwhelming fear of his brother); Ratliff v. Commonwealth, 567 S.W.2d 307 (Ky.1978) (defendant believed victim was a conspirator against her); People v. Cassasa, 49 N.Y.2d 668, 427 N.Y.S.2d 769, 404 N.E.2d 1310 (1980), cert. denied 449 U.S. 842, 101 S.Ct. 122, 66 L.Ed.2d 50 (1980) (victim rejected defendant as a suitor)

State v. Trieb, 315 N.W.2d 649, 659 (N.D. 1982).

The Elliott matter, noted above, is particularly instructive as therein the court stated the following as very similar evidence to Ms. White's case was introduced about the claimed defense that had been denied the defendant.

The defendant offered into evidence the testimony of a psychiatrist who interviewed the defendant about eleven months after the shooting. The psychiatrist testified that the defendant, at the time of the shooting, was acting under the influence of an *extreme emotional disturbance caused by a combination of child custody problems, the inability to maintain a recently purchased home and an overwhelming fear of his brother*. The psychiatrist placed particular emphasis on the history of conflict between the two brothers, noting that the defendant referred to his brother as a "ranger killer." The defendant told the psychiatrist that at one time his brother pulled him from a bus and chased him with a tire iron. The defendant stated that this incident was so frightening that it caused him to leave the area for a couple of years. The psychiatrist believed that this incident compounded by many other extenuating circumstances resulted in the defendant's overwhelming fear of his brother. And he testified that

these circumstances taken together constituted a reasonable explanation of the defendant's extreme emotional disturbance.

State v. Elliott, 177 Conn. 1, 2, 411 A.2d 3, 8 (1979)(emphasis added). The court there found that the jury should have been instructed on the correct subjective perspective and reversed the conviction remanding for a new trial. Id. at 10.

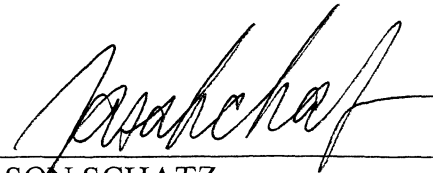
Accordingly, as Ms. White has urged, our courts have recognized that there are factors or events that may have occurred long before the offense which are relevant and therefore appropriately must be considered by a jury in determining whether an accused has acted under the influence of “extreme emotional distress for which there is a reasonable explanation or excuse.” The initiating event need not be a violent or tumultuous event. All that is required is that there be “some external initiating circumstance” bringing out the distress accompanied by extremely unusual and overwhelming stress such that a reasonable person under that stress as viewed under the then existing circumstances would have an extreme emotional reaction to it. This determination in this case is a question for the jury to decide.

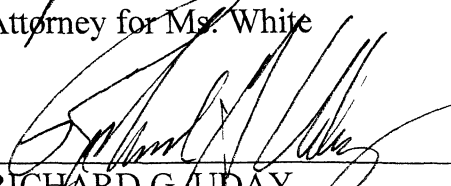
### **CONCLUSION**

The Court of Appeals incorrectly ruled that that Ms. White was required to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to an affirmative defense of extreme emotional distress. Ms. White is entitled to her theory of the defense if any evidence supports it from which the

jury could return such a verdict. While there are other theories and interpretations form the evidence, our case posture is pretrial and there are ample reasons to conclude that a decision finding that Ms. White acted under extreme emotional distress is possible and she should be permitted to make that argument and be entitled to present her affirmative defense. The Court of Appeals decision sweeps too broadly and forecloses too many from the affirmative defense of extreme emotional distress and should be overturned by this Court.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
JASON SCHATZ  
Attorney for Ms. White

  
\_\_\_\_\_  
RICHARD G. UDAY  
Attorney for Ms. White

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of September, 2009, I have caused one original and nine true and correct copies of the foregoing BRIEF OF APPELLANT to be filed with the Clerk of the Utah Supreme Court and two additional copies to be mailed first class to the following:

The Office of the Attorney General  
Attn: J. Frederic Voros, Jr., Esq.  
Attorneys for Appellee  
160 East 300 South, Sixth Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

  
\_\_\_\_\_  
JASON SCHATZ

I delivered the number of copies to the Utah Supreme Court and the Assistant Attorney General J. Frederic, Jr., as indicated above this \_\_\_\_ day of September, 2009.

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## ADDENDA

## ADDENDUM A



Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,

v.

Brenda Christine WHITE, Defendant and Appellant.

No. 20071008-CA.

March 26, 2009.

\*648 Jason A. Schatz, Salt Lake City, for Appellant.

Mark L. Shurtleff, atty. gen., and J. Frederic Voros Jr., asst. atty. gen., Salt Lake City, for Appellee.

Before Judges BENCH, ORME, and DAVIS.

OPINION

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 \*649 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.<sup>FN1</sup>

FN1. 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.

¶ 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 \*650 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 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\*651 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*, 49 N.Y.2d 668, 427 N.Y.S.2d 769, 404 N.E.2d 1310 (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,<sup>FN2</sup> it retained the \*652 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).

FN2. *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.

¶ 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 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, 152 P.3d 315 (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, 63 P.3d 94. 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, 152 P.3d 315. 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, 63 P.3d 94. Likewise, in *Spillers*, the defendant killed the victim immediately after an argument escalated and the victim brandished a gun, \*653 threatened the defendant, struck the defendant, and attempted to strike him again. See 2007 UT 13, ¶¶ 3, 16, 152 P.3d 315. 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. Piansiakson*, 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,<sup>FN3</sup> 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 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.

FN3. 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.”).

¶ 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 \*654 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.<sup>FN4</sup>

FN4. As we find these issues to be dispositive, we do not address Defendant's other claim of error.

#### 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.

¶ 31 WE CONCUR: GREGORY K. ORME and JAMES Z. DAVIS, Judges.

## ADDENDUM B

RECEIVED JUL 8 0 2009

IN THE SUPREME COURT OF THE STATE OF UTAH

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FILED  
UTAH APPELLATE COURTS

JUL 28 2009

State of Utah,

Plaintiff and Respondent,

v.

Case No. 20090322-SC

Brenda Christine White,

Defendant and Petitioner.

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ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on April 27, 2009.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issue:

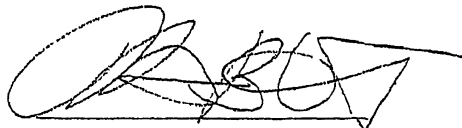
Whether the Court of Appeals erred in holding Petitioner was required to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to an affirmative defense of extreme disturbance.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

For The Court:

Dated

7-28-09



Matthew B. Durrant  
Associate Chief Justice

## ADDENDUM C

LOHRA L. MILLER  
District Attorney for Salt Lake County  
ALICIA H. COOK, Bar No. 8851  
STEPHEN L. NELSON, Bar No. 9547  
Deputy District Attorneys  
111 East Broadway Suite 400  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900

FILED DISTRICT COURT  
Third Judicial District

DEC 10 2007

SALT LAKE COUNTY  
By WCC Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

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

THE STATE OF UTAH,  Plaintiff,  -vs-  BRENDA CHRISTINE WHITE  Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER Regarding Defendant's Motion in Limine re Extreme Emotional Distress  Case No. 061902834  Hon. WILLIAM W. BARRETT
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This matter came before the Court on October 19<sup>th</sup>, 2007, for a hearing regarding the Defendant's Motion in Limine concerning the defense of Extreme Emotional Distress. The Defendant was present and represented by counsel, Jason Schatz. The State was represented by Alicia H. Cook and Stephen L. Nelson. The Court has received and reviewed Defendant's Motion in Limine re Extreme Emotional Distress and supporting memorandum, and the State's Reply. The Court heard oral argument from both parties concerning the motion on October 19<sup>th</sup>, 2007.

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

## FINDINGS OF FACT

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

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

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



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

### CONCLUSIONS OF LAW

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

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


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


## ORDER

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

Dated this 10 day of Dec., 2007.

By the Court:

  
WILLIAM W. BARRETT  
Third District Court Judge



Approved as to form:

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Jason Schatz  
Counsel for Defendant