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State of Utah v. Darren Berriel : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Respondent, vs. DARREN BERRIEL, Petitioner.	Case No: 20110926-SC

REPLY BRIEF OF PETITIONER UPON WRIT OF CERTIORARI

REVIEW FROM DECISION OF THE UTAH COURT OF APPEALS

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Oral Argument Requested

Appellant is currently incarcerated at the Utah County Jail

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory Provisions

Cases

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff / Respondent, vs. DARREN BERRIEL, Defendant / Petitioner.	Case No: 20110926-SC

REPLY BRIEF OF DEFENDANT / PETITIONER

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ARGUMENT

THE MAJORITY OF THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO INSTRUCT THE JURY ON DEFENSE OF A THIRD PERSON UNDER UTAH CODE § 76-2-402

A. Utah case law does not specify a minimum quantum of evidence required in order to entitle a defendant to a justification defense

In the first section of its brief the State quotes an out of jurisdiction case cited in Berriel's opening brief and asserts that the holding of that case is Berriel's position. Respondent's Brief at 10 ("Defendant argues that any evidence, no matter how weak, justifies his entitlement to an instruction on defense of another."). It seems the State suggests that Berriel has asked this Court to find that any evidence meets that minimum requirement, but that is not and has never been Berriel's position. Rather, Berriel asserts that, as clearly established in the case law, the minimum required showing is low and

need not convince a court that the justification applies. Rather, Berriel asserts that the evidence need only create the possibility that a reasonable person could believe the State would be unable to prove beyond a reasonable doubt that the justification did not apply.

Unfortunately, the case law on this matter can tend to confuse the requirements entitling a defendant to a justification instruction. It can be confusing because the language used in cases finding a rational basis for a justification instruction tends to emphasize how little evidence is needed, while the language used in cases finding no rational basis tends to emphasize that the evidence must be substantial. Obviously, Berriel's opening brief emphasizes citations that demonstrate what evidence will satisfy the minimum threshold requirements. *See State v. Spillers*, 2007 UT 13, 152 P.3d 315; *State v. Garcia*, 2001 UT App 19, 19 P.3d 1123. While the State's brief emphasizes *State v. Maestas*, 564 P.2d 1386 (Utah 1977) and *State v. Castillo*, 457 P.2d 618 (Utah 1969) which focus on evidence which did not satisfy the minimum threshold. Because the facts of the cases cited by the State are not thoroughly covered in its brief, Berriel believes it is helpful to consider the facts, rather than simply the lines cited, and compare them with the facts in this case in order to demonstrate why there was no substantial evidence in those case and why there is substantial evidence in this case.

In *Maestas* the defendant and victim were in prison and the defendant struck the victim in the face. The evidence presented by the defendant in support of his self defense theory was that "'jumpy' because he believed someone was trying to harm him". He based that fear on an earlier unspecified incident, and because he had been stabbed in prison before, and because "he heard a fellow prisoner call, 'Watch Out!'" just as the

victim "came from behind striking him ever so slightly with some papers just as a fellow inmate sounded a warning." *Maestas*, 564 P.2d 1386, 1387, 1390.[1]

The "'evidence so slight' standard" (Respondent's Brief at 12) arises from factual circumstances markedly different than those in this case. There is no doubt that the evidence presented in this case supporting Berriel's justification theory is more *substantial* than the evidence presented in *Maestas*. The defendant in *Maestas* did not present any evidence about what "unlawful force" he believed he was defending himself from. He said he was jumpy because he had been stabbed before and because prison is a scary place to be, but he did not say what specific threat he was afraid of. He could not say whom he thought was going to harm him or what harm he was afraid of. When this Court found "the question of self-defense was all theory without substantive evidence to support it" it was because the defendant did not present any evidence of any threat whatsoever.

Berriel on the other hand did present evidence about what unlawful force he believed he was defending Rachel from. The evidence demonstrated repeated examples of forced used by Luis against Rachel giving support to the theory that Berriel was reasonably responding to Rachel's cries for help against more of the same. The testimony demonstrated not only that Luis had physically abused Rachel in the past but also that Luis was abused her when she called for help. This evidence is clearly more substantial than the jumpiness claimed in *Maestas*.

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[1] Conflicting evidence was presented that the assault occurred "in response to [the victim's] request for payment of money owed him by defendant." *Maestas*, at 1387.

Maestas would have been a very different case if the defendant had testified that in the past the victim had repeatedly abused the defendant by striking him, giving him black eyes, slamming him against the wall, throwing him across the room, and shoving his face into a car door. See R. 143: 132-33 (Luis smacked Rachel open handed in the face, Luis shoved Rachel into the open car door causing a scar, Luis shoved Rachel into the bedroom wall); 143: 179 (Luis threw Rachel across the room); 144: 260 (Rachel was seen at school with black eyes). This Court would not likely have found there was no evidence supporting the self-defense theory if the defendant had testified that within fifteen minutes of the assault or less the defendant had been beaten by the victim to a degree that he called out for help, begging his friends to come protect him. If the two factual scenarios were more similar then the State's use of the "'evidence so slight' standard" here might be more persuasive. But, because of the clear factual distinctions between this case and *Maestas* the State's dependence upon it is weak.

The same is true for *Castillo*. There the defendant went to his ex-wife's home and was met at the door by her brother. The defendant claimed the brother was holding a stick, and the defendant was armed with a knife to defend himself because he claimed he had seen the stick at the home before. *Castillo*, 457 P.2d 618, 619. The defendant testified that the brother "hit him from behind with the stick and knocked him to the floor; then [the brother] came at him with the knife..." *Castillo*, at 619. The defendant then had "no further recollection" of how he came to be on top of the brother or how the brother came to be stabbed. *Id.* The defendant requested an instruction for self-defense

under the theory that while he was trying to defend himself from the brother the victim, the ex-wife, was stabbed accidentally. *Id.*, at 620.

The parties agreed that "a defendant is entitled to have a jury instructed on his theory of the case, if there be any substantial evidence to justify giving such an instruction." *Id.*, at 620. However, because there was no evidence, only conjecture, that the use of force against the wife occurred while he was defending himself the Court upheld the trial court's refusal to give the instruction. There was no evidence because the defendant said he didn't know remember how or why he used force. The defendant merely wanted to argue that she must have gotten hurt while he was struggling with the brother though he did not remember whether or not that was the case.

In *Castillo* the defendant's request was "all theory and no evidence, all shadow and no substance" because the reason for the actual use of force was not explained by any evidence and the jury would be asked to imagine the evidence supporting the theory for themselves. The facts in *Castillo* are very different from the facts in this case. If the evidence in support of Berriel's request had been limited to evidence of the prior violence between Luis and Rachel, and evidence that Berriel confronted Luis, then this case would be more like *Castillo* and *Maestas*, and the State's reliance of the "evidence so slight" standard would be more persuasive. But there is much more evidence to support Berriel's theory; much more substance to create the shadow.

Thus, the State's reliance upon these two cases and the 'evidence so slight' standard, as opposed to the "any reasonable basis" standard (*State v. Torres*, 691 P.2d 694, 695 (Utah 1980)), is misplaced and unhelpful. Rather, Berriel asserts this Court

should focus more upon the cases argued in his initial brief and the significant amount of facts which show there was reason to believe Berriel may have reasonably believed Rachel was in danger of an imminent use of unlawful force from Luis.

This point is even clearer when the evidence presented is viewed in the proper light. Berriel now reasserts that this Court should explicitly endorse the rule argued in his initial brief that when considering a defendant's request for a justification defense courts should view the evidence in the light most favorable to the defendant. After reading the State's brief (Respondent's Brief at 13 ("The State acknowledges that logically this standard may apply in determining among conflicting reasonable inferences whether a defendant is entitled to the instruction.")), and further examining Utah's case law on a defendant's right to present a defense, Berriel believes that this rule, although not explicitly endorsed by this Court in earlier decisions, is a logical extension of the rule found in *State v. Crick*, 675 P.2d 527, 532 (Utah 1983) ("In determining whether there is a 'rational basis' for acquitting the defendant of the offense charged and convicting him of a lesser included offense, the court must, of course, view the evidence and the inferences that can be drawn from it in the light most favorable to the defense."). The same principles requiring that a court view the evidence in the light most favorable to a defendant when a lesser-included offense is requested should apply in cases where a justification defense is requested.

B. Berriel was entitled to a defense-of-another instruction because a reasonable person could believe Berriel may have been acting in defense of a third person

The State's brief cites the majority's recitation of the facts to support the claim that the evidence was "too slight" to create a reasonable belief that force was justified to defend Rachel emphasizing the confrontation occurred "at least fifteen minutes after Rachel had called" and that "[t]here was *no evidence*" observed by Berriel that Luis "had threatened, touched, harmed, or even approached Rachel in any way…" Respondent's Brief at 16 (citing *Berriel*, at ¶ 5). That conclusion is based on the facts supporting the State's position, but the question of whether Berriel was entitled to the instruction must be determined by reference to the facts which support the instruction, not those which would rebut it. The State and the court of appeals should have reiterated the facts presented by Berriel in support of the defense and then shown, if possible, that those facts could not create a reasonable belief force was justified. Instead and incorrectly, the court and the State have focused on the facts which the State should have argued to the jury if the instruction was granted.

For example, the decision notes "from the point at which he emerged from the car, Luis's attention was directed entirely at Berriel, who was coming at him with a knife" in support of the conclusion that Rachel was not being threatened at the time Berriel attacked Luis. *Berriel*, at ¶ 5. That sentence has a footnote that displays the majority's incorrect view of the facts. "While there was a conflict in the evidence as to whether Luis or Berriel was the *first* to run toward the other, there was no dispute that Berriel ran toward Luis with a knife in his hand." *Berriel*, fn. 6 (emphasis in original). The problem is that the majority relied upon conflicting evidence against Berriel instead of focusing on the evidence in his favor. The court continues, "during Luis's encounter

with Berriel, Rachel was at least fifteen feet away and out of the path of the confrontation." The majority concludes "[o]n these facts, a jury could not have reasonably have concluded that Luis posed a present or imminent threat of unlawful force to Rachel." *Berriel*, at ¶ 5. On *those* facts alone jury may not have been able to find a reasonable doubt that justification did not apply. However, *those* facts were not the only facts the jury could consider, and *those* facts are not the facts which should have determined whether or not Berriel was entitled to the instruction. It appears the majority looked at all the evidence and decided that Rachel was not at risk of an imminent threat and then recited the facts that supported that conclusion. Unfortunately, that method is not the correct method for appellate review, nor the correct method for the trial court to deny the instruction in the first place.

Another important point ignored by the State in its brief and by the majority in its decision is that Rachel need not have been in actual danger in order to justify Berriel's use of force in her defense. The State repeatedly has said Rachel was not in danger when Berriel used force against Luis and therefore the trial court's denial was proper (R. 144: 304 ("We don't have any evidence that she was in imminent harm"); Respondent's Brief at 8 ("...no evidence showed that Rachel was at risk of imminent harm"); Respondent's Brief at 30 ("The plain fact is that Rachel was not at risk of imminent harm"). The majority also takes the position that Berriel was not entitled to the instruction because Rachel was not in imminent danger. *Berriel*, at ¶ 5 ("...a jury could not reasonably have concluded that Luis posed a present or imminent threat or unlawful force to Rachel.").

However, the law does not require that someone who seeks to raise a justification defense show that the person they sought to defend was actually at risk of harm. Rather, the law only requires that the person perceive what would appear to a reasonable person to be an imminent threat. The threat of imminent harm may be actual or merely apparent, so long as it is reasonably apparent. *See State v. Baroni*, 10 P.2d 622, 623 (Utah 1932) (defendant had right self-defense as appeared reasonably necessary to him and is limited only by what reasonably appears to be necessary at the time viewed from his standpoint); *State v. Turner*, 79 P.2d 46, 51 (Utah 1938) ("There is, however, no right to kill another unless there exists necessity *or apparent necessity* in order to prevent great bodily harm or loss of life." *emphasis added*). This principle applied to this case makes Berriel's claims of error below even more clear because he was not required to show some evidence that Rachel was in danger of an actual threat of harm. He only had to show some evidence that a person in his position would reasonably believe she was in danger. Based on the evidence presented there was some basis upon which the jury could have found a reasonable doubt that Berriel reasonably believed Rachel was in danger of an imminent harm.

C. The majority's conclusion is unsupported by the evidence viewed in a light most favorable to Berriel

1. The undisputed fact of prior violence and the possibility of ongoing or future violence should be considered when determining whether or not a threat is imminent.

The State's brief titles the first sub-section of Section C "The mere possibility of ongoing or future violence, in the absence of an imminent threat, does not justify an

immediate, violent response." Respondent's Brief at 24. While that statement may be true in some circumstances its use of the word 'mere' distracts from the jury's responsibility to consider whether a 'mere' possibility in this case is a reasonable possibility. As argued in the opening brief, in order to decide whether or not one reasonably believes a threat is imminent, the legislature directs the finder of fact to consider several factors. Utah Code § 76-2-402(5).

The State's brief attempts to attack Berriel's use of those statutory factors and urges the Court to find that the factors could not support reasonable belief that the use of force was justified. Respondent's Brief at 24-27. The State suggests that Berriel has "bootstrapped" "Luis's mistreatment of Rachel into his having a general violent character, invoking an unwarranted statutory factor in support of imminence." Respondent's Brief at 25. The State argues that because the evidence demonstrated that Luis's prior repeated violence was only directed at Rachel, and no one else, and because Luis was not recently a gang member, the statutory factor of "prior violent acts or violent propensities" was "unwarranted". Respondent's Brief at 24-26. Berriel asserts that this position should be difficult for the State to defend.

The statutory factor the State argues is bootstrapped is "the other's prior violent acts or violent propensities..." UTAH CODE § 76-2-402(5)(d). This is distinguished from "any patterns of abuse or violence in the parties' relationship." UTAH CODE § 76-2-402(5)(e). In Petitioner's initial brief Berriel does assert that this Court should find that both of these statutory factors weigh in favor of finding imminence because Berriel "knew about Luis' violent character and his history of violence toward Rachel..."

Petitioner's Brief at 31. The State's point is that having a violent character generally is a distinct consideration from there being a pattern of abuse in a particular relationship. That point is certainly true. There are likely many examples with a history of violence between two people and yet one of them need not have violent character or have violent propensities. Or there may cases where an individual has been involved with violent acts in the past but never been violent with the third person. This however, is not one of those cases.

While it is arguably true that Luis may not have recently been involved in gang activity and there was "no evidence that showed Luis was violent outside his relationship with Rachel" (Respondent's Brief at 25 (*but see* R. 144: 260-72 (Luis shows up looking for Berriel, "raging" because Rachel had spent the night with Berriel)) evidence not only showed Luis had engaged in multiple violent acts in the past but also that most if not all of his violent acts involved his relationship with Rachel. The State seems to be suggesting that a person does not have "violent propensities" or does not engaged in "other violent acts" if he is only violent with the person he is in a relationship with. UTAH CODE § 76-2-402(5). Common sense suggests that both factors are present because Berriel knew not only that Luis had been violent in the past ("prior violent acts"), but that he had been violent with Rachel in the past ("patterns of abuse… in the… relationship").

Contrary to the State's position that there was an "absence of any 'immediacy of the danger'" (Respondent's Brief at 26) the evidence of the desperate and hysterical phone call from Rachel was evidence of immediate danger that the jury should have considered. While the State and the majority are persuaded that the phone call was

evidence only of violence in the "very recent past" but not evidence of immediate danger, the fact is that a reasonable jury, following the statute, could have concluded that the call combined with the prior violent history, the fact that Rachel was still in Luis's presence shortly after the call, and Luis' statement that Berriel should 'stay out of it', all created a reasonable belief that Rachel was in danger of imminent abuse from Luis.

The State's position, over and over, seems to be that Rachel, the third person in this case, was not at imminent risk of harm from unlawful force. Again and again the State argues that these facts, taken as a whole, show that Rachel was not in danger so Berriel was not entitled to use force to defend her. But that argument is what the State's attorney's should have argued to the jury, it is not an argument that this Court, nor the court of appeals or the trial court, should find persuasive because it focuses on a weighing of the facts instead of the legal requirement.

The State's argument to the trial court was that although there was conflicting testimony about Rachel being harmed that day (R.144: 278-79) because Berriel did not catch "Luis in the act or just about to commit the act" the threat to Rachel was not imminent (R.144: 280). The State's argument to the court of appeals was that "an actor does not exhibit a reasonable belief that the use of force is necessary to protect himself or another when he could not have reasonably believed the he or another were subject to attack at the moment-not some prior moment-he exercised the force." Appellee's Brief at 22. The State admitted that this fact pattern "may well have justified intervention if Defendant had been present during any of the abuse... [b]ut by the time Defendant

arrived no danger described by the term 'imminent' justified otherwise unlawful action." Appellee's Brief at 28.

And now, the State's argument to this Court focuses on the facts showing there was not an imminent threat to Rachel, and ignores the only relevant facts, those that may arguably support a reasonable belief that force was necessary. But the case law is very clear, no matter what the evidence is against a finding of justification, if there is some evidence which would support it, which could create a reasonable doubt as to whether the force was justified, even if that evidence is self-serving and in direct conflict with evidence put on by the State, then the justification instruction must be given. *See Castillo*, 457 P.2d 618, 620. The case law is also very clear that the court should liberally construe the requirements in favor of instructing the jury on the defendant's chosen defense. *See Spillers*, 2007 UT 13, ¶ 10.

The State's brief claims Berriel, "while paying lip service to the correct standard", asks this Court to find "that the quantum of evidence legally sufficient to justify a defense-of-another instruction is vanishingly small…" Respondent's Brief at 12. However, Berriel's position neither enlarges or diminishes the required showing but instead focuses on what evidence should be considered when determining what is "some evidence" or "any reasonable basis in the evidence." From this Court's perspective (as well as the trial court and court of appeals) it should not matter whatsoever that it may have been 15 minutes from the time of the call for help to the time of the confrontation, or that when Berriel confronted Luis Rachel may have been up to 15 feet away. It shouldn't matter because those are facts which should be pointed out by the State to the

jury, who is ultimately responsible to determine reasonableness and imminence. The only facts that should matter are those that were raised by Berriel when he asked for the justification instruction. The Court should consider whether a reasonable person who knew a friend had been repeatedly abused by her boyfriend, who called screaming and crying for help, for protection, could believe the friend was in imminent risk of harm. The question for this Court is not was Rachel actually in danger at the moment Berriel used force, the question is not whether there were reasons to believe the threat had passed. The question is whether there were reasons for Berriel believe Rachel was in danger and needed help, and clearly there were reasons, and the *jury* is the entity charged with deciding whether those reasons were good enough, not the trial court and not the majority of the court of appeals.

This point is exactly why this case is different from *Maestas* and *Castillo*, because in those cases the evidence did not give an explanation of why the defendant may have thought the use of force was justified, not even a bad explanation. Those defendants merely theorized what the jury could think happened in the absence of any evidence to show that it did happened. Here, the evidence shows the Berriel believed he needed to act to prevent Luis from abusing Rachel any further. Whether that explanation, when compared to the rest of the facts, is a good one is for the jury to decide.

2. The amount of time between Rachel's call and the assault is central to both the majority's decision and the State's argument regarding imminence

The second subsection of Section C of the State's brief argues the amount of time is not central to the majority's decision because it "was not rigidly focused on the

precise time period between the call and the confrontation, but more properly on the lack of imminence of any danger at the time of the confrontation." Respondent's Brief at 28-29. The State goes on to say "it would not have mattered that Rachel might have called Defendant twenty, fifteen, or even ten minutes before the confrontation" because "there was no evidence that Rachel was at imminent risk of harm when the confrontation developed." Respondent's Brief at 29. This argument misconstrues the majority's decision and the argument begins to break down when taken to its logical conclusion. Berriel asserts that it certainly would have mattered to the majority if the time between the call and the confrontation were shorter, that is precisely why the court went out of its way to make that otherwise unnecessary, and arguably unsupported factual finding.

If the time between the phone call and the confrontation had been five minutes the majority's decision makes less sense. If the time had been one minute it makes no sense at all. As pointed out by Judge Thorne in dissent because there was no clear evidence when and from where the call was made the jury could have believed Berriel acted in Rachel's defense much sooner than fifteen minutes. That potentially quite short period of time does not give rise to the inference that the threat had ended. The inference that the threat had ended is the foundation of the majority's decision and the State's position. *Berriel*, fn. 2,3 (Thorne, dissent).

Consider if the scenario were a bit different. Imagine Rachel and Luis were on one side of an opaque fence, and Berriel was on the other. Berriel hears Rachel scream out to him for help, crying that Luis was hurting her again. The information Berriel knows about the past is the same so Berriel reacts immediately and climbs the fence.

Within moments of the cries he discovers Luis and Rachel but Luis is not in the act of striking Rachel. But as soon as Berriel arrives over the fence Luis rushes toward him and the attack occurs. By the State's logic, in this scenario, because Berriel was not "present during any of the abuse" (Respondent's Brief at 23), a jury must find there is rational basis Berriel "reasonably believe[d] that force [wa]s necessary to defend… a third person against such other's imminent use of unlawful force." UTAH CODE § 76-2-402(1). Clearly that isn't the case and Berriel asserts that a reasonable jury may well find such a reasonable doubt in that scenario.

The State is wrong, as demonstrated by this scenario. The amount of time is relevant. It was crucial to the majority, and it is crucial to the State's position. And so the majority's erroneous finding of fifteen minutes changes everything.

3. The fact that Berriel could not reasonably reassess the threat to Rachel because he was confronted by Luis is relevant to the reasonableness of Berriel's actions and the apparent imminence of the threat to Rachel

The third subsection of Section C in the State's brief is titled "Defendant's claim that Luis prevented him at the confrontation from reassessing the imminence of any threat is specious on its face." Respondent's Brief at 29. However, rather than being specious the record demonstrates that is exactly what happened. Unfortunately the State's brief does not really address the points raised in Berriel's initial brief or in Judge Thorne's dissent, instead the State again simply claims that Rachel was not at risk of imminent harm because by the time the force was used "Rachel stood on the sideline, fifteen feet from the encounter, as Luis moved, not toward Rachel, but away from her to engage Defendant." Respondent's Brief at 30. But rather than "viewing the evidence in a

light most favorable to Defendant" as it claims to, the State continues to omit the facts which support Berriel's theory. Respondent's Brief at 30. That the use of force eventually occurred about fifteen feet from where Rachel ended up does not change the fact that when Luis and Rachel arrived, and when Berriel acted to protect her, she and Luis were in the car together and then Luis immediately exited the car and came at Berriel so he would "stay out of it." R. 143: 266.

Berriel believes that Judge Thorne's dissent on this point is quite persuasive. Rather than rehash the points raised in the initial brief Berriel will only briefly reemphasize that points. After describing the facts that led to Berriel going to Rachel's house Judge Thorne writes

> A reasonable jury could easily conclude from this testimony that, at the time Berriel spoke with Rachel on the phone, she was in imminent danger and the use of reasonable force in her defense at that moment would have been justified under the statute. The question before us is whether Berriel continued to have a reasonable belief that she *remained* in imminent danger a short time later, when Luis and Rachel arrived home and the altercation between Luis and Berriel occurred.... In my view, once Berriel had a reasonable basis to believe that Rachel was in imminent danger due to her phone call, his actions in her defense were potentially justifiable under Utah Code section 76-2-402 *until* such time as Berriel had reason to believe that the danger to Rachel had passed...

Berriel, 2011 UT App 317, ¶¶ 22-23 (Thorne, dissent, emphasis in original). It seems clear that the first point is legitimate, there was a reasonable basis for Berriel to believe Rachel was in danger at the time of the call. It is also reasonable that Berriel believed she

would remain in danger for some amount of time so, as the record shows he responded immediately and went to her aid. Finally, if at the time came into contact with Rachel and Luis after the call, which according to the record could have been a very short time after the call, Rachel was in Luis' immediate presence until Luis and Berriel stepped to each other, the jury could find that Berriel still reasonably believed Rachel was in danger.

D. The trial court's error was not harmless and it should be presumed prejudicial

"A criminal defendant is entitled to have a jury instructed on his theory of the case if there is any substantial evidence to justify such an instruction." *State v. McCumber,* 622 P.2d 353, 359 (Utah 1980) (abrogated and distinguished on other grounds). "Where, however, the requested instruction is denied, no prejudicial error occurs if it appears that the giving of the requested instruction would not have affected the outcome of the trial." *Id.* "Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." *State v. Spillers,* 2007 UT 13, ¶ 24, 152 P.3d 315 (quoting *State v. Evans,* 2001 UT 22, ¶ 20, 20 P.3d 888). "[W]hen an element of the crime... is in dispute, and the evidence is consistent with both the defendant's and the State's theory of the case, failing to instruct on [the defendant's theory] presumptively affects the outcome of the trial ... and our confidence in the verdict is undermined." *Spillers,* 2007 UT 13, ¶ 24 (quoting *State v. Knight,* 2003 UT App 354, ¶ 17, 79 P.3d 969).

While the holdings in *Spillers* and *Knight* apply specifically to a failure to instruct a jury on a theory based on a lesser included offense Berriel asserts that the reasoning

behind the presumptive prejudice in a denied lesser-included offense case should also apply in the case of a denied affirmative defense. These two situations are very similar and it follows that a similar presumption should attend them both. *See Spillers*, 2007 UT 13, ¶ 12 fn. 1 ("the standards applied when a defendant is entitled to have the jury instructed on an affirmative defense or on a lesser included offense are indistinguishable.").

"[L]ooking at the evidence in the light most favorable to the defendant," because the "clear weight of the evidence does not run contrary" to Berriel's claim, but supports both the State's and Berriel's theory of the case, this Court should conclude that there was a rational basis to instruct the jury on defense of a third person and the trial court's failure to do so "presumptively affect[ed] the outcome of the trial" undermining confidence in the verdict. *Knight* at ¶ 17. The trial court's error is therefore harmful and requires reversal.

The State's brief argues "even if very slight evidence entitled a defendant to an instruction on his theory of the case, substantial evidence opposing that theory would render any error in failing to instruct the jury harmless." Respondent's Brief at 31. The State goes on to argue that the discussion of harmlessness in *State v. Kell*, 2002 UT 106, 61 P.3d 1019 and *State v. Evans*, 2001 UT 22, 20 P.3d 888 should persuade this Court find the error in this case was harmless. As argued above, Berriel believes that this error should be presumed prejudicial but if the Court disagrees, even under a non-presumptive harmfulness standard a more thorough recitation of these cases will demonstrate the

factual distinctions between this case and facts in *Kell* and *Evans* making the State's claim for harmlessness here very weak.

In *Kell* Justice Durham and Justice Howe held that "any evidence, even the uncorroborated testimony of the defendant, entitles a defendant to an instruction on his theory of the case" but found that because the defendant's self-defense testimony "was clearly against the weight of the evidence" and the Court's "confidence in the verdict is not affected" the error was harmless. *Kell*, 2002 UT 106, ¶ 18 fn. 5. The defendant testified he killed the victim because he had threatened to make an example of the defendant to the other inmates of the victim's power at the prison. *Kell*, at ¶ 8. The defendant said he heard the victim tell another inmate on the day of the killing "Yeah man …it's on. You know it," and he testified he suffered from extreme emotional distress because of the threats and the conditions at the prison. *Kell*, at ¶ 8.

In contrast, the State's uncontested evidence showed that the defendant and his accomplices arranged through a forged medical request to be in the same area of the prison as the victim; that they made a key to remove the defendant's handcuffs just prior to the attack; that the victim made no threatening gestures toward the defendant at the time of the killing; that the defendant arranged to have a shank with him on his way to the medical facility; that the defendant removed his handcuffs and that the victim was restrained in handcuffs in while being stabbed initially from behind, that the attack lasted more than two and one half minutes and that the defendant "after walking away, returned twice to inflict more wounds, until [the victim] lay motionless on the floor…" and bled to death. *Id.*, at ¶¶ 3-6.

What sets the instant case apart from *Kell* is that there State put on a strong case that the killing was premeditated, that it was planned with accomplices who arranged to have access to the victim, and that the attack continued long after the victim had been incapacitated. Here the State's case shows no similar evidence that would have countered Berriel's claims at justification the way the evidence did in *Kell*. Berriel's theory is not "clearly against the weight of the evidence" or completely uncorroborated. *Kell*, at ¶ 18 fn. 5. There was no evidence that Berriel's friends were in on a plan or that Berriel planned to attack Luis at all. In fact many of them did not even know what was going on until after Berriel told them he had stabbed Luis. Everyone's testimony supported the idea that Berriel was going to the movies, got a terrified call from Rachel, and went directly to her aid.

Evans is very similar to *Kell* in that, although the defendant's testimony entitled him to a justification instruction, the significant evidence which contradicted his theory made any error harmless. In *Evans* the defendant was driving a vehicle that was pulled over, but when shots were fired from a second vehicle he drove off. The defendant was then followed by a police officer in an unmarked car with "wig-wag headlights" and a siren. *Evans*, 2001 UT 22, ¶¶ 3-7. Approximately four shots were fired from the car as it drove away. The defendant slowed the car to a stop and the officer saw the defendant point a rifle out the driver's window and pull the trigger but it did not fire. *Evans*, at ¶¶ 7-8.

At trial the defendant testified he had borrowed the gun to go target shooting, that he pulled over because he saw someone "flashing their brights at him." *Id.*, at ¶ 12. He

said after he stopped he saw a stranger walking towards them with a gun in his belt and he responded by grabbing the gun and shooting because the person walking toward them had the gun raised. *Id.*, at ¶ 12. He said he drove off after the person returned fire. *Id.* He testified he did not look back as he drove away and told his passenger to shoot at anyone who followed them but when the passenger refused the defendant attempted to shoot but it was empty. He testified he could not see out his back window because of several large speakers and he did not know he had shot a police officer until he was arrested. *Id.*, at 13.

The State presented evidence from several passengers who were in the car during the offense. They testified that they were with the defendant when he purchased the gun, that he had said if her were pulled over he would shoot because he did not want to go to prison, that they saw red and blue lights at the initial police stop, and that before he stopped the defendant said "we're getting pulled over." *Evans*, at ¶ 9. Other witnesses, passers-by and officers showed "that defendant had to have known that he was being pulled over by an officer." *Id.*, at ¶ 21.

At trial the court refused to instruct the jury on a lesser included charge of attempted manslaughter and on appeal the defendant claimed he was entitled to the instruction because his testimony "provided a rational basis for the jury to acquit him of attempted aggravated murder and convict him of attempted manslaughter." *Id.*, at ¶ 19. This Court agreed but held the error harmless because the defendant's testimony, that he did not know the person he shot was an officer, was contradicted by every other witness, and even his testimony failed to explain how he saw the officer holding a gun in front of the police vehicle but did not see the flashing lights on the vehicle. *Id.*, at ¶ 22.

Like *Kell*, in *Evans* the evidence supporting the defendant's requested theory came solely from his testimony and directly contradicted all the other evidence presented. In fact the defendant's own words prior to the incident demonstrated that his intent was to shoot at an officer if he were to be pulled over. Like *Kell* the defendant's theory on the lesser-included offense was so at odds with the rest of the evidence that a reasonable jury could not have believed that it was true.

But the evidence *Kell* and *Evans* is not like the evidence this case. This Court is not in the position where it must try to determine whether or not the jury would have been overwhelmed by the factual inconsistencies between the evidence supporting Berriel's justification theory and the evidence the State argues shows there was no imminent threat. Instead the jury would have been asked, given that there was not much controversy about what happened (i.e. Rachel called crying for help, Luis had repeatedly beaten her in the past, Berriel found Rachel in Luis' presence), could Berriel have reasonably believed it was necessary to use force to protect Rachel. So, unlike *Kell* and *Evans*, pointing to the facts in the case will not lead to the conclusion that the trial court's error was harmless. Instead, like *Spillers*, because the facts support both the State and Berriel's theory, the trial court's error should be presumed prejudicial.

CONCLUSION AND PRECISE RELIEF SOUGHT

Because the trial court's erroneously denied the defense of another instruction, and because that error was harmful, Berriel asks this Court to reverse the decision of the Utah Court of Appeals, and remand this case for a new trial.

RESPECTFULLY SUBMITTED THIS 13th day of July, 2012.

DOUGLAS J. THOMPSON
Counsel for Petitioner

CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing Reply Brief of Petitioner/Defendant postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 13th day of July, 2012.

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