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Utah v. Epps : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Appellee, vs. JUSTIN EPPS, Defendants-Appellants.	Case No. 20120325-CA

BRIEF OF APPELLEE

On Appeal from the Fourth District Court,
Wasatch County, State of Utah
The Honorable Judge Derek P. Pullan

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STATEMENT OF JURISDICTION

This is an appeal from a conviction and sentence in the Fourth Judicial District Court of the State of Utah. This appeal is authorized by Utah Code Annotated § 77-18a-1(1)(a). This Court has jurisdiction over this appeal under Utah Code Annotated § 78A-4-103(2)(e), as this appeal is from a conviction after jury trial of the charge Violation of a Protective Order, a violation of Utah Code Annotated section 76-5-108, a class A misdemeanor.

ISSUE PRESENTED FOR REVIEW

Was sufficient evidence presented at trial to sustain a conviction?

Determinative law:

State v. Hirschi, 2007 UT App 255; *State v. White*, 2011 UT App 162

Standard of review:

Under Utah law on an appeal of a denial of a Motion for Directed Verdict an appellate court should "uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *State v. Hirschi*, 2007 UT App 255, ¶ 15.

Under Utah law on an appeal of a jury verdict based on the sufficiency of the evidence, an appellate "court's inquiry ends when there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *State v. White*, 2011 UT App 162, ¶ 8. Appellate Courts "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict [and] reverse only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that

reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Hirschi*, 2007 UT App 255, ¶ 15.

STATEMENT OF THE CASE

A. Summary of the Facts

On January 12, 2012, Deputy John Rogers was asked to serve the appellant with a restraining order. (*Trial Transcript*, at pg. 82.) Deputy Rogers, who has served paperwork thousands of times, initially remembered serving the order at 286 East Second South, the appellant's residence, on that date. (*Id*, at pg. 82, 87.) The paperwork filled out by Deputy Rogers reflects that the restraining order was served on Mr. Epps at 115 South Main Street, and after questioning remembered serving someone at that address on that date, but could not distinctly remember serving the appellant. (*Id*, at pg. 87-88, 93-94.) Deputy Rogers did fill out paperwork on the night in question, and on the following morning, clearly indicating that the individual served with the protective order in question was the appellant. (*Id*, at pg. 96-97.) The restraining order in question indicated that the restrained party, the appellant, was to stay away from the protected party's, Michelle Smith's, place of work and provided an address. (*Id*, at pg. 86.) The appellant had been to Michelle Smith's work, at the address listed, on multiple occasions prior to the issuance and service of the protective order. (*Id*, at pg. 105-106.)

On January 16, 2012, Michelle Burnham, Justin Epps former sister-in-law, who had known Mr. Epps for 18 years, was visited by Mr. Epps at her work. (*Id*, at pg. 99-101.) Ms. Burnham testified that her work address was "165 West 500 North in Heber," but when shown a copy of the protective order which listed her work address as 160 West 500 North, she agreed that the address listed in the protective order was the correct address for her work, that it was the address where Michelle Smith worked, and it was the address where the appellant approached

her on the date in question. (*Id*, at pg. 101.) Ms. Burnam was aware that her co-worker, Michelle Smith, had a restraining order against Mr. Epps, and therefore called law enforcement. (*Id*, at pg. 100.)

B. Summary of Proceedings

On January 25, 2012, the Wasatch County Attorney's Office filed an Information charging the appellant, Justin Epps, with one count of violating a restraining order (*U.C.A* § 76-5-108). On February 1, 2012, Mr. Epps was arraigned on these charges, and entered a plea of not guilty. Mr. Epps waived preliminary hearing on February 22, 2012, and the matter was set for jury trial. On April 2, 2012, a jury trial commenced in this matter.

The prosecution called three witnesses in its case in chief, Deputy Sheriff John Rogers, Michelle Burnham, and Michelle Smith. (*Id*, at pg. 80, 81-98, 98-107, 107-110.) The prosecution's first witness, Deputy Rogers, testified that as a deputy sheriff for Wasatch County, he had served thousands of subpoenas, and that on January 12, 2012, he was asked to serve a Justin Epps. (*Id*, at pg. 82.) Deputy Rogers said that he initially remembered serving Mr. Epps at the door of his house, located at 286 East Second South, on that date. (*Id*, at pg. 82, 87.) The paperwork filled out by Deputy Rogers reflects that the restraining order was served on Mr. Epps at 115 South Main Street, and after questioning remembered serving someone at that address on that date, but could not distinctly remember serving the appellant. (*Id*, at pg. 87-88, 93-94.) Deputy Rogers did fill out paperwork on the night in question, and on the following morning, clearly indicating that the individual served with the protective order in question was the appellant. (*Id*, at pg. 96-97.)

Deputy Rogers indicated that the restraining order that he served indicated that the restrained was to stay away from the protected party's place of work, but that the order only had

a street address, 160 West 500 North, without indicating a city or state. (*Id*, at pg. 86.) He also testified then when he serves restraining orders that he explains that the no contact at work clause "means you don't bother them at work." (*Id*, at pg. 90.)

While prosecution did not ask the standard questions relative to having Deputy Rogers identify the appellant in the court room, Deputy Rogers did state on the record, "if Mr. Epps weren't here and you asked me, . . ." and, "but to see his face right now, . . ." (*Id*, at pg. 97.)

The prosecution's second witness, Michelle Burnham, testified that she knew Justin Epps, that she had been married to his brother, and that she knew Michelle Smith as a co-worker. (*Id*, at pg. 99.) She further testified that on January 16, 2012, she worked at Rocky Mountain Care, which she initially described as being located at 165 West 500 North, in Heber. (*Id*, at pg. 100-101.) When shown a copy of the protective order which listed her work address as 160 West 500 North, she agreed that the address listed in the protective order was the correct address for her work, that it was the address where Michelle Smith worked, and it was the address where the appellant approached her on the date in question. (*Id*, at pg. 101.)

The prosecution's final witness, Michelle Smith, testified that Justin Epps was her ex-boyfriend, that she worked at the Rocky Mountain Care Center, and that she had obtained a restraining order against Mr. Epps. (*Id*, at pg. 108.) Ms. Smith testified that the appellant was aware that she worked at Rocky Mountain Care Center and had been there on prior occasions when she was working there. (*Id*, at pg.108.)

Mr. Epps exercised his constitutional right to not testify. (*Id*, at pg. 114.) The defense rested without presenting evidence. (*Id*, at pg. 116.)

At the conclusion of the trial, the defense moved the court for a directed verdict to dismiss the case for lack of jurisdiction and identification. (*Id*, at pg. 156-157.) Specifically, the

defense argued that there was no evidence presented that the crime occurred in Wasatch County, Utah, and that no witness identified the appellant for the record. (*Id*, at pg. 156.) The trial court denied the motion to dismiss based on lack of proof of jurisdiction as the jury could have inferred that the crime occurred in Wasatch County, Utah. (*Id*, at pg. 158.) The trial reserved ruling on the identification issue. (*Id*, at pg. 158.)

During deliberations, the jury asked two questions. First, the jury asked: "Does the law require that a person read the instruction of the protective order or can the person be negligent and rely on what the deputy sheriff said to him?" (*Id*, at pg. 158.) In the second question, the jury asked: "Can we infer that Justin Epps has full knowledge of the protection order because of prior servings." (*Id*, at pg. 161.) Later that afternoon, the jury found Mr. Epps guilty of violating a restraining order. (*Id*, at pg. 164.)

After the verdict, the trial court denied the defense motion for directed verdict to dismiss based on lack of identificaiton. (*Id*, at pg. 164.) The court found that there was "evidence in the record upon which a reasonable jury could find that the appellant, Justin Epps, is the same individual who is the client of the public defender in this case." (*Id*, at pg. 164.) Specifically, the court pointed to the testimony of Deputy Rogers who said that he remembered serving process on Justin Epps. (*Id*, at pg. 165.)

Mr. Epps was sentenced at a hearing held May 23, 2012. The trial court sentenced Mr. Epps to serve one year in the county jail, and to pay a $2,500 fine. Execution of that sentence was stayed, and Mr. Epps was placed on supervised probation for two years, was ordered to serve thirty days of home confinement on electronic monitoring, and was ordered to pay a $500 fine and a $33 courtroom security fee.

On April 23, 2012, Mr. Epps filed a Notice of Appeal, and on May 23, 2012 he filed a timely First Amended Notice of Appeal.

SUMMARY OF ARGUMENT

This Court should find that the trial court correctly denied the appellant's Motion for Directed Verdict as there is no requirement under Utah Law to identify the appellant in court, that the appellant was adequately identified in court, and that the appellant was clearly identified by every witness in the case.

This Court should find that the appellant failed to marshal the evidence presented at trial that supported the jury's verdict, and therefore deny the appellant's appeal.

This Court should find that there was sufficient evidence presented at trial to uphold the jury's verdict. There was sufficient evidence to support reasonable inferences that the appellant had been properly served with the protective order. There was sufficient evidence to support a finding that the appellant knew the address that he was ordered to stay away from was the address he entered on the date in question. There was sufficient evidence that the individual who was served with and violated the protective order was Justin Epps, and that he was the individual in court at trial. There was sufficient evidence to support reasonable inferences that the appellant knew that the protective order required that he stay away from the address he entered on the date in question.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THE APPELLANTS MOTION FOR DIRECTED VERDICT

Under Utah law there is no requirement of an in-court identification of the appellant. In fact, under Utah law a appellant may be identified and convicted without even being present. *State v. Demartinis*, 2008 UT App 261.

Under Utah law on an appeal of a denial of a Motion for Directed Verdict an appellate court should "uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *State v. Hirschi*, 2007 UT App 255, ¶ 15 (quoting *State v. Montoya*, 2004 UT 5, ¶ 29).

In the current case, the defense moved the court for a directed verdict to dismiss the case for lack of jurisdiction and in-court identification. (*Trial Transcript*, at pg. 156-157.)

A. The trial court was correct in deny appellant's motion for directed verdict based on lack of jurisdiction.

In their oral Motion for Directed Verdict the appellant argued that there was no evidence presented that the crime occurred in Wasatch County, Utah. (*Id*, at pg. 156.)

The trial court denied the motion to dismiss based on lack of proof of jurisdiction stating;

> "there is evidence in the record upon which a reasonable jury could infer jurisdiction, specifically Mr. Epps is ordered to appear at a hearing January 17th, 2012, at 9:00 a.m. at 1361 South Highway 40, Heber, Utah 84032. The petitioner's home address bears a Heber City residence. She testified that she has worked at the care center for the past three years. And I'm satisfied that a jury could find, a reasonable jury could find that the Heber City referred to is in Wasatch County, State of Utah." (*Id*, at pg. 158.)

The trial court goes at some length to lay out what actual evidence there was to support jurisdiction, and states that the only thing the jury would have to "infer" is that "the Heber City referred to is in Wasatch County, State of Utah," and not the Heber that is located in Arizona that defense counsel was arguing for. (*Id*, at pg. 157-158.)

B. The trial court was correct in denying the appellant's motion for directed verdict based on lack of identification.

The trial court denied the motion for directed verdict based on lack of identification stating;

> "There is evidence in the record upon which a reasonable jury could find that the defendant, Justin Epps, is the same individual who is the client of the public defender in this case. Deputy John Rogers testified that he remembered serving process upon the defendant Justin Epps. He was asked repeatedly whether or not he had served the defendant Justin Epps and in each case he indicated "yes." I'm not persuaded that the evidence is so lacking that a reasonable jury could not draw that inference and for that reason I will deny the motion to dismiss." (*Id*, at pg. 164-165.)

The trial court ruled that Deputy John Rogers testified that he remembered serving process upon appellant Justin Epps. Deputy Rogers testified to serving Justin Epps with civil paperwork on at least two occasions, (*Id*, at pg. 93,) one of which was the protective order in question. While testifying about that service, Deputy Rogers said the following;

> "I remember serving – again, without the jog, if Mr. Epps weren't here and you asked me, I'd say I served somebody there. To be honest with you I remember served somebody there. To be honest with you I remember serving somebody with this here. I'd say I wouldn't have put Justin's name if I didn't do it, but to see his face right now, I couldn't say that I saw, you know, that that recollects. That was three months ago, you know, on the side of the road." (*Id*, at pg. 97.)

Deputy Rogers then went on to describe the paperwork that accompanied his return of service, when it was filled out, and why he felt certain that it was Justin Epps that he served that night. (*Id*, at pg. 96-97.)

In addition to the specific, in-court identification of the appellant by Deputy Rogers, the other two witnesses, Michelle Burnham and Michelle Smith, without identifying the appellant as being present in court, did identify the subject of their testimony as Justin Epps by describing their relationships with him, (*Id*, at pg. 99 and 108), their relative belief that Justin Epps was the subject of a protective order, (*Id*, at pg. 100-103 and 108-109), that Justin Epps had actual knowledge of Ms. Smith's place of work, (*Id*, at pg. 105-106 and 108), and that Justin Epps was the individual that came to the place of work on the date in question. (*Id*, at pg. 100). Ms. Burnham also testified that the appellant approached her on the date in question to ask her to be a witness on his behalf in a hearing scheduled for the next morning, although she said that there

was discussion of both a custody hearing and a protective order hearing. (*Trial Transcript*, at pg. 102-103.) Although this testimony is clearly not proof beyond a reasonable doubt by itself, when taken in conjunction with the testimony that has been argued above, it clearly supports a finding that the appellant knew about a protective order, and a hearing on that order that was scheduled for the same date as the protective order hearing in question. (*Id*, at pg. 158.) This testimony taken in conjunction with Deputy Rogers in-court identification is "some evidence" from which a jury could "reasonably infer" that the individual testifies about by Ms. Burnham is the same individual identified in court by Deputy Rogers.

This Court should find that there is "some evidence" to support both jurisdiction and identification. The State believes that the trial courts findings relative to jurisdiction more that adequately state the State's own position on jurisdiction, and would ask this Court to adopt those findings.

As to the issue of identification, the appellant has not specifically argued why the Court should overturn the trial court's ruling on Motion for Directed Verdict, (See *Appellant's Opening Brief*, pg. 9-10), but in the oral motion made to the trial court, defense counsel argued that "the record does not indicate the witness has identified the defendant . . ." (*Trial Transcript*, at pg. 156.) Defense counsel goes on to argue that this identification on the record is more than just "stylistic or television lawyering," and argues that it is "a necessary element" for a conviction. (*Id.*)

The State would argue that in-court identification of a defendant is not "a necessary element" required for a reasonable jury to find a defendant guilty. The State would concede that it would have been preferable for trial counsel to have made the usual identification on the record, but would argue that that lapse in judgment should not invalidate the finding of a jury. If

a judge and/or jury can find a defendant guilty in absentia when the defendant is voluntarily absent based on testimony that identifies the defendant and his behavior by name only, then the same finding can be supported even if the defendant is seated at the defense table.

In this case, as in the case of any trial in absentia, all of the witnesses testified as to their knowledge of the appellant and his actions prior to and during the date in question, identifying the appellant as Justin Epps by name, providing a factual basis upon which a jury found the appellant guilty beyond a reasonable doubt. If this case is overturned based on the lack of an in-court identification of the defendant, than no verdict made in absentia can ever be upheld.

However, this Court does not need to decide this case on that issue as Deputy Rogers did make an in-court identification, however nontraditional, stating that the appellant, Justin Epps, was in court that day. That testimony is "some evidence . . . from which a reasonable jury could find" identification of the facts alleged.

This Court should find that the trial courts denial of the appellant's Motion for Directed Verdict was without error as there was multiple fact brought into the record supporting jurisdiction, that the appellant was identified in court, and that there was substantial testimony supporting a verdict of guilty against the appellant, Justin Epps, whether he be present or not.

II. THE APPELLANT DID NOT MEET ITS BURDEN TO MARSHAL THE EVIDENCE PRESENTED AT TRIAL THAT SUPPORTED THE VERDICT OF THE JURY

Under Utah law, because appellant raises "a challenge to the jury's factual finding, [the defendant] must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *State v. White*, 2011 UT App 162, ¶ 7 (quoting *State v. Boyd*, 2001 UT 30, ¶ 13, 25 P.3d 985). Where

"Defendant's argument is not . . . adequately supported, [the Court should] decline to reach the merits of this issue." *Layton City v. Tatton*, 2011 UT App 334, ¶ 9.

Utah Code Ann. § 76-5-108, states in relevant part that: "Any person who is the respondent or defendant subject to a . . . ex parte protective order, . . . who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor." Therefore, the elements that a jury found to have been proven beyond a reasonable doubt are as follows: [1] That the appellant, Justin Epps, [2] In the State of Utah, [3] On or about January 16, 2012, [4] Was the respondent or defendant subject to a protective order issued under Utah Code Section 78B-7-1, [5] And having been properly served therewith, [6] Intentionally or knowingly, and [7] Violated that order. In his opening brief, the appellant only argues against the jury's verdict as to element five [5], having been properly served therewith, and element six [6], intentionally or knowingly. (See *Appellant's Opening Brief*, pg. 10-11.)

As to the appellant's argument that there was insufficient evidence to support a verdict that he had been properly served with the protective order the appellant only cites to four (4) pages of the transcript, and only states that Deputy Rogers served thousands of subpoenas, that he initially testified that her served the appellant at his residence, that when confronted with a return of service with a different address the he responded "I don't remember serving him at that address," that he would sometimes review and sign a return of service form after serving a restraining order, that he had served Justin Epps on prior occasions, and that Deputy Rogers did not identify the appellant in the courtroom for the record. (*Id.*)

Appellant did not refer at all to thirteen (13) pages of Deputy Rogers testimony, seventeen (17) pages in all. All seventeen pages of Deputy Rogers testimony refer to only one element of the case, the service of the protective order on the appellant. During the remainder of

the testimony of Deputy Rogers evidence is given as to the officer's refreshed recollection, his in-court identification of the appellant, the paperwork process by which he verifies his service of the appellant, and the timing of filling out that paperwork. All of this is evidence of the proper service of the protective order on the appellant which the appellant has not marshaled. The State would ask the Court to deny appellant's appeal on this ground as the appellant has failed to marshal the plentiful evidence that supports the jury's verdict.[1]

Defense counsel also argues that there was insufficient evidence to support a verdict that the appellant acted intentionally or knowingly. To support his claim he argues the following facts: One, there was a protective order in effect that prohibited Justin Epps from contacting Michelle Smith, from going to her residence and from going to her work; Two, the work address did not give the name of the business or the city and state; Three, Michelle Burman initially testified that the business where she and Ms. Smith worked was located at a slightly different address than that listed in the protective order; Four, that Ms. Burnham failed to identify the appellant in the court room as the person she saw at her workplace on the date in question; Five, Deputy Rogers testified that when he serves protective orders he explains that the no contact at work clause "means you don't bother them at work;" and Six, that Michelle Smith was not at work on the date in question. The appellant relies on these six (6) pieces of evidence, one of which, the first, only supports the State's case, to argue, "these independent facts create reasonable doubt as to whether Mr. Epps knowingly and intentionally violated the restraining order," arguing the five (5) grounds stated on page twelve (12) of the *Appellant's Opening Brief.*

This argument misstates the burden of marshaling, and the standard of review based on a sufficiency of the evidence argument. Mr. Epps argues that six (6) facts taken out of context of

[1] While the State will be arguing in sections that both precede and follow this section on marshaling the evidence, facts adduced at trial that the defendant has not presented to the Court, the State would ask the Court to decide the issue on marshaling without referring to evidence presented by the State that fulfill the marshaling requirement.

twenty-seven (27) pages of testimony create reasonable doubt. However, a jury has already found that those facts did not create reasonable doubt, and it is now Mr. Epps burden to marshal all of the evidence that supports their finding and show how the evidence in favor of the verdict is insufficient. The appellant has simply not marshaled the evidence.

Specifically, the trial court made specific findings as to how jurisdiction was supported by the evidence, all of which counter the appellant's argument that the incomplete address listed in the protective order prohibited the appellant from intentionally or knowingly violating that order. The appellant must marshal that evidence in order for the Court to hear this argument, and the appellant did not.

Appellant also argues that Michelle Burnham's initial mis-recollection of her work address provided Mr. Epps with insufficient notice of the protected business. However, the defendant did not marshal the evidence where Ms. Burnham testified that the address in the protective order was the correct address for her and the protected party's place of work. (*Trial Transcript*, at pg. 101.) The appellant is required to marshal that evidence for the Court so that they may appropriately weight that evidence which supported the verdict. As the appellant did not marshal that evidence, the Court should deny the appeal on this ground.

Appellant argues that Mr. Epps could have relied on could have relied on Deputy Roger's explanation of the protective order and that Mr. Epps could have intended something other than violation of the order when he entered the protected business. A jury found otherwise based on other evidence, including the actual protective order which describes the prohibited behavior in which the appellant engaged. It is the appellant's duty on appeal to provide that information to the Court and it has not done so.

Because the appellant has not marshaled the evidence as required by Utah law, this Court should deny the appellant's appeal without hearing the merits.

III. SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT THE JURY'S VERDICT

Under Utah law "the burden on the defendant in bringing a sufficiency claim is high." *State v. White*, 2011 UT App 162, ¶ 8. "The court's inquiry ends when there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *State v. White*, 2011 UT App 162, ¶ 8 (quoting *State v. Gardner*, 2007 UT 70, ¶ 26). Appellate Courts "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict [and] reverse only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Hirschi*, 2007 UT App 255, ¶ 15.

In this case, as was stated above, the appellant only argues against the jury's verdict as to element five [5], having been properly served therewith, and element six [6], intentionally or knowingly. (See *Appellant's Opening Brief*, pg. 10-11.)

A. The jury's verdict should stand as to the issue of proper service of the protective order.

As was argued above, in regard to the issue of proper service of the protective order, the appellant argued only the following facts against a proper service: First, Deputy Rogers served thousands of subpoenas; Second, that he initially testified that he served the appellant at his residence; Third, that when confronted with a return of service with a different address the he responded "I don't remember serving him at that address;" Third, that he would sometimes review and sign a return of service form after serving a restraining order; Fourth, that he had

served Justin Epps on prior occasions; and Fifth, that Deputy Rogers did not identify the appellant in the courtroom for the record. (*Id.*)

Appellant leaves out the following evidence that supports the jury's verdict. That the Deputy Rogers testified that the return of service, which was signed hours after the appellant was served with the protective order was reviewed and signed by himself, Deputy John Rogers. (*Trial Transcript*, pg 83-84 and 94-97.) While Deputy Rogers did testify initially that he did not remember serving the defendant at the Main Street address that was listed on the return of service, (*Id*, at pg. 87-88), that he did remember serving someone paperwork at that address on that day assisted by Heber City police personnel. (*Id*, at pg. 90-91.) Later upon further re-direct and further re-cross examination, Deputy Rogers testified that based on the paperwork, seeing the defendant in the court room that day, and being confronted with a different description of the night in question than he originally remembered, that he did have an independent recollection of serving the defendant the protective order on Main Street consistent with the return of service. (*Id*, at pg. 93-94 and 96-97).

Although the State argues below, that Deputy Rogers did testify as to an independent recollection that he served the appellant with the protective order, it is not required under the sufficiency standard that is before the Court. Deputy Rogers did testify on several occasions that he served someone at the date and time listed on the return of service, and that he reviewed and signed that return of service within hours of the event, and that the return of service indicates that Deputy Rogers served the appellant, Justin Epps, with the protective order on the date in question. (*Id*, at pg. 83-84 and 94-97.) This is "some evidence" from which a reasonable jury could make "reasonable inferences" to support their verdict.

Although Deputy Rogers' testimony, regarding his independent recollection that the person he served was the appellant, is vague at times, although he contradicts himself at other times, and even considering that his final statement of an independent recollection of serving the defendant, as found on pages 96 through 97 of the transcript, is hesitant, a jury did rely on his testimony and found the defendant was served beyond a reasonable doubt. For this Court to find otherwise, this Court would have to find that his vagueness and hesitancy so "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Hirschi*, 2007 UT App 255, ¶ 15. The State would argue that his testimony as to an independent recollection, when combined with his testimony that he reviewed and personally signed his return of service hours after the events that were testified is "some evidence" from which "reasonable inferences" can be made that support the jury's verdict that the defendant was properly served.

One additional piece of evidence that the Court may look to to uphold the jury's verdict as to the service of the appellant, is that Ms. Burnham testified that the appellant approached her on the date in question to ask her to be a witness on his behalf in a hearing scheduled for the next morning, although she said that there was discussion of both a custody hearing and a protective order hearing. (*Trial Transcript*, at pg. 102-103.) Although this testimony is clearly not proof beyond a reasonable doubt by itself, when taken in conjunction with the testimony that has been argued above, it clearly supports a finding that the appellant knew about a protective order, and a hearing on that order that was scheduled for the same date as the protective order hearing in question. (*Id*, at pg. 158.)

B. The jury's verdict should stand as to the issue of the appellant acting intentionally or knowingly.

Defense counsel also argues that there was insufficient evidence to support a verdict that the appellant acted intentionally or knowingly. To support his claim he argues the following facts: One, there was a protective order in effect that prohibited Justin Epps from contacting Michelle Smith, from going to her residence and from going to her work; Two, the work address did not give the name of the business or the city and state; Three, Michelle Burnham initially testified that the business where she and Ms. Smith worked was located at a slightly different address than that listed in the protective order; Four, that Ms. Burnham failed to identify the appellant in the court room as the person she saw at her workplace on the date in question; Five, Deputy Rogers testified that when he serves protective orders he explains that the no contact at work clause "means you don't bother them at work;" and Six, that Michelle Smith was not at work on the date in question. (See *Appellant's Opening Brief*, at pg. 11-12.)

The State will break these down into three classes. The first class deals with facts one (1) through three (3) which deal with the sufficiency of the notice to defendant as per the protective order. The second class is the failure to identify the defendant as the person who sat at the defense table. The third class is that Deputy Rogers' statements to the appellant may have provided a reasonable grounds for a misinterpretation of the protective order.

i. The jury's verdict should stand as to the issue of sufficiency of the notice to defendant as per the protective order.

This Court should find that there was sufficient evidence presented to support the contention that the appellant was on notice that he was barred by the protective order to enter the protected parties place of work. The parties agree, or at least the appellant does not contest, that there was a protective order on behalf of Michelle Smith, that Ms. Smith was the appellant's ex-

girlfriend, that the order includes a clause that states the appellant should "stay away" from the Ms. Smith's workplace, and that the workplace address is listed as 160 West 500 North. (*Trial Transcript*, at pg. 85-86, 101, 104-105, and 108.) Additionally, the record reflects that the appellant knew where Ms. Smith worked and had been there on prior occasions. (*Id*, at pg. 105-106 and 108). Although Ms. Burnham testified that her work address was "165 West 500 North in Heber," when shown a copy of the protective order which listed her work address as 160 West 500 North, she agreed that the address listed in the protective order was the correct address for her work, that it was the address where Michelle Smith worked, and it was the address where the appellant approached her on the date in question. (*Id*, at pg. 101.) Based on this evidence, when taken in light of the argument supporting proper service of the protective order on the appellant, this Court should find that there is "some evidence" from which a jury could draw "reasonable inferences" to support their verdict that the defendant was on notice that he was barred by the protective order to enter Ms. Smith's place of work.

ii. The jury's verdict should stand as to the issue of the identification of the defendant.

This Court should find that there was sufficient evidence presented to support the identification of the appellant as the individual who committed the charged offense based on the argument provided in the argument supporting the trial courts denial of the motion for directed verdict.

iii. The jury's verdict should stand as to the issue of the appellant acting intentionally and knowingly independent of any incorrect advice that may have been given by law enforcement.

This Court should find that there was sufficient evidence present to support the jury's finding of and intentional or knowing act independent of incorrect advice that may have been given by Deputy Rogers. Appellant argues that testimony from Deputy Rogers that he may have

misinformed the appellant as to the meaning of the "stay away from" order creates reasonable doubt. (See *Appellant's Opening Brief*, at pg. 11-12.) This again misstates the standard of review, which only requires "some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *State v. White*, 2011 UT App 162, ¶ 8 (quoting *State v. Gardner*, 2007 UT 70, ¶ 26). In this case, the jury heard the testimony relative to Deputy Rogers' misadvise and heard argument as to why that advice should cause them doubt. (*Trial Transcript*, at pg. 141-145.) With these facts and this argument, the jury found the appellant guilty, beyond a reasonable doubt, based on other significant pieces of evidence that the appellant has not marshaled.

First, the protective order clearly states that the defendant is to "stay away from" the protected addresses. (*Id*, at pg. 86.) The State has argued above the grounds for the jury to find that the protective order was served, and that the address provided were sufficient. In addition to the clear language of the order, which the State would argue is sufficient to uphold the jury's finding as it is clearly "some evidence" from which a jury could draw "reasonable inferences" to support their conclusion that the defendant intended to or knowingly acted contrary to the order, there is also evidence that the appellant read and understood the order. Ms. Burnham testified that the defendant appeared at her work on the date in question requesting that she testify on his behalf the next morning, a date that was clearly contained within the order. (*Id*, at pg. 102-103.) Looking at this fact in conjunction with the clear language of the order provides grounds to support the verdict, which is all that is required at this stage of proceedings.

Based on the other facts presented at trial, that were not marshaled by the appellant in his brief, this Court should find that there was "some evidence, including reasonable inferences,

from which findings of all the requisite elements of the crime can reasonably be made." *State v. White*, 2011 UT App 162, ¶ 8 (quoting *State v. Gardner*, 2007 UT 70, ¶ 26).

The fact that the jury asked two questions while deliberating that suggested they were struggling with the issue of the protective order should not be considered when analyzing this case under a sufficiency of the evidence framework. The fact is that after asking those questions, the jury did find, beyond a reasonable doubt, that the defendant was guilty. Therefore, their deliberations should not be considered, unless the appellant argues that there was some error by the trial court, or some impropriety in deliberations, which it has not.

This Court should find that there is "some evidence" from which a jury could draw "reasonable inferences" to support their verdict as to the two contested elements in this case, and thereby deny the appellant's appeal on this ground.

CONCLUSION

This Court should find that the trial court correctly denied the appellant's Motion for Directed Verdict as there is no requirement under Utah Law to identify the appellant in court, that the appellant was adequately identified in court, and that the appellant was clearly identified by every witness in the case.

This Court should find that the appellant failed to marshal the evidence presented at trial that supported the jury's verdict, and therefore deny the appellant's appeal.

This Court should find that there was sufficient evidence presented at trial to uphold the jury's verdict. There was sufficient evidence to support reasonable inferences that the appellant had been properly served with the protective order. There was sufficient evidence to support a finding that the appellant knew the address that he was ordered to stay away from was the address he entered on the date in question. There was sufficient evidence that the individual who

was served with and violated the protective order was Justin Epps, and that he was the individual in court at trial. There was sufficient evidence to support reasonable inferences that the appellant knew that the protective order required that he stay away from the address he entered on the date in question.

Dated this 20 day of November, 2012.

MCKAY G KING
DEPUTY WASATCH COUNTY ATTORNEY
Attorneys for State of Utah

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 2d day of November, 2012.

J. Edward Jones

MCKAY G KING