

2014

State of Utah vs. Jeffrey Chrales Salt : Reply Brief of Ppellant

Utah Court of Appeals

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JUDGE Orme

CALENDARED Wed. Aug 20, 2014

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH

Plaintiff-Appellee,

vs.

JEFFREY CHARLES SALT,

Defendant-Appellant.

Case No. **20130071-CA**

APPELLANT IS NOT INCARCERATED

REPLY BRIEF OF APPELLANT

APPEAL FROM A CONVICTION AND SENTENCE FOR
ONE COUNT OF AGGRAVATED ASSAULT, A THIRD DEGREE FELONY
OFFENSE UNDER UTAH CODE ANN. §76-5-103(3)(1995)

HERSCHEL BULLEN (00482)
369 East 900 South, No. 302
Salt Lake City, Utah 84111
Telephone: (801) 583-1880
Facsimile: (801) 583-1882

Attorney for Appellant

KAREN KLUCZNIK, Esq.
Assistant Attorney General
Utah Attorney General's Office
Heber M. Wells Building
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0180
Facsimile: (801) 366-0167

Attorney for Appellee

FILED
UTAH APPELLATE COURTS

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KAREN KLUCZNIK, Esq.
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Utah Attorney General's Office
Heber M. Wells Building
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0180
Facsimile: (801) 366-0167

Attorney for Appellee

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POINT I

RESPONDING TO THE STATES POINT I, THIS COURT SHOULD DECIDE THE ISSUE OF WHETHER THE TRIAL COURT FAILED TO PROPERLY INSTRUCT REGARDING THE PROPER MENS REA FOR THIRD DEGREE FELONY AGGRAVATED ASSAULT.

The State takes the position that, because the defendant briefed a case, *State v. O'Bannon*, 2012 UT App. 71, 274 P.3d 992, which does not directly address the crime of aggravated assault, that this Court should simply avoid, ignore, and abstain from addressing the issues raised by *State v. O'Bannon* in relation to the charge of aggravated assault. Br. St. 25 – 26, 29 – 35. It argues that since the defendant makes no explicit argument that *O'Bannon* directly overrules prior case law, this Court should not consider it. Br. St. 29 – 30.

The State is incorrect in that regard. The *O'Bannon* case was decided very near the start of trial, but it had not been reported yet. The Court of Appeals ruled that at least in physical child abuse cases, a person must intend, not just to engage in the conduct, but intend to produce a particular result. It is the defendant's position that that rubric should be applied to the facts of this case with respect to the aggravated assault. This Court held that the State's argument and authorities failed to support the sort of "eggshell plaintiff" doctrine, as is applicable in tort law, in a criminal case. *O'Bannon*, ¶ 38. It held to be erroneous the instruction that the injurer takes his victim as he finds him regardless of his intent to cause a certain amount of harm: "... the State had the burden of proving that O'Bannon

intended his conduct to cause the victim serious physical injury or of proving that O'Bannon knew that his conduct was reasonably certain to cause the victim serious physical injury." Id., ¶ 23. The Court held this to be inconsistent with philosophy of the criminal code, which "...include "[f]orbidden and prevent[ing] the commission of offenses" and "[d]efining adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal. Utah Code Ann. § 76-1-104(1)-(2)." Id., ¶ 30; Br. Aplt. 28 – 29.

The State is entirely accurate that authorities hold that “the mental state required for assault is “‘intent, knowledge, or recklessness.’” Br. St. 30. That however does not negate the validity of the defendant's argument that instruction 38 (R.921) is erroneous, prejudicing the defendant in failing to require the jury to find that he acted with intent, or knowledge, or recklessness with respect to the result of his conduct, i.e., that he intended, knew, or was reckless with respect to the use of deadly force in causing the alleged victim serious bodily injury. The absence of language to that effect justified arresting judgment or granting his motion for new trial on the facts of this case.

The defendant does not disagree with the authority cited by the State, *State v. Howell*, 554 P.2d 1326 (Utah 1976), *State v. McElhaney*, 579 P.2d 328, 328-29 (Utah 1978); *State v. Potter*, 627 P.2d 75 (Utah 1981) insofar as they go. However

even the State concedes that where a second degree felony aggravated assault is charged under Utah Code Ann. § 76 – 5 – 103 (1) (a), specific intent is required. See Br. St. 32-33, citing *State v. Mangum*, 2013 UT App 292, 318 P.3d 250 (*per curiam*). Inasmuch as Mangum was convicted under the section for using a dangerous weapon, the defendant contends that the statements in the *Mangum* case regarding the section under which the defendant was convicted must be considered to be non-binding *dicta*.

O'Bannon considered the case law and affirmed the defendant's position in this case.

(*State v.*)*Gonzales* (2002 UT App 256, 56 P.3d 969) and (*State v.*)*Hamblin* (676 P.2d 376 (Utah 1983) do not support the application of the eggshell plaintiff doctrine in a criminal case. We agree that *Gonzales* and *Hamblin* are instructive in that these cases recognize a basis under Utah law for holding a defendant culpable for causing death even when other factors contributed to the victim's death. See generally *Hamblin*, 676 P.2d at 379; *Gonzales*, ¶¶ 20-21. In this case, however, Instruction No. 9A is not comparable to those issued in *Gonzales* and *Hamblin*. Instruction No. 9A advised the jury that it could find O'Bannon guilty of a specific result-based offense without determining that he had the requisite intent or knowledge that his conduct would cause that result. Thus, Instruction No. 9A improperly allowed the jury to find O'Bannon guilty without the required proof that he intentionally or knowingly caused the victim's serious physical injuries. In this case, however, Instruction No. 9A is not comparable to those issued in *Gonzales* and *Hamblin*. Instruction No. 9A advised the jury that it could find O'Bannon guilty of a specific result-based offense without determining that he had the requisite intent or knowledge that his conduct would cause that result. Thus, Instruction No. 9A improperly allowed the jury to find O'Bannon guilty without the required proof that he intentionally or knowingly caused the victim's serious physical injuries.

O'Bannon, 274 P.3d at ¶ 38. The defendant's contention is that this language is directly applicable to the instant matter.

The State is likewise incorrect in its assertion that the defendant can show no prejudice. See Br. St. 34-35. It should be remembered that it was the alleged victim who initiated the fight when she lunged out of her chair and hit the defendant in the eye. R.1129:85. She herself testified that she bit the defendant on the finger. R.1128:109. When she bit his finger and would not let go, R.1129:91, the defendant acted reasonably in self-defense, and the only reason he hit her head against the book shelf was to get her to release her bite. R.1129:92-94.

Accordingly, the jury should have been instructed that, to convict him of third degree aggravated assault, it had to find not only that he acted intentionally, knowingly or recklessly with regard to his conduct, but that he "intended, knew, or was reckless with respect to whether the force he used was deadly force, likely to cause serious bodily injury" and that "his desire" was "that [Janet] suffer bodily injury." Thus it was error to merely instruct the jury under a standard of recklessness in using "other means or force likely to produce death or serious bodily injury." Instruction 38 (R.921); see Br. Appt. p. 26 – 27. More was required under the circumstances of this case.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO REDUCE THE DEFENDANT'S CONVICTION.

The defendant's conviction for aggravated assault should have been reduced to a class A misdemeanor. The defendant fully set forth his position in Point II of his opening brief. Defendant's argues there that no meaningful distinction exists or existed at the time between an act that is intended or likely to cause serious bodily injury, but results only in substantial bodily injury, and an act that may have been intended to cause serious bodily injury but results only in substantial bodily injury. In either case the result is the same. Consequently, where such inherent ambiguity exists within the statutory framework, as it does here, there is good reason to apply the *Shondel* doctrine [*State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146 (1969)] doctrine and, the defendant contends, thereby reduce his conviction to a class A misdemeanor. See Br. Aplt., Point II, *passim*.

For a like reason, the defendant's position is that the rule of lenity applies, the rule of lenity being “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment,” *State v. Graham*, 2011 UT App. 332, ¶ 16, 263 P.3d 569 citing Black's Law Dictionary 1449 (9th ed. 2009).

If, as the defendant contends, the statutory scheme is ambiguous, the defendant should have been entitled to both the benefit of the *Shondel* doctrine and the rule of lenity. His conviction therefore should have been reduced to a class A misdemeanor. As the defendant's position is set forth at length in his opening brief, further exposition of his position is unnecessary. See Br. Aplt. p. 31-38.

POINT III.

THE TRIAL COURT ERRONEOUSLY REJECTED DEFENDANT'S ARGUMENT THAT THE AGGRAVATED KIDNAPPING ACQUITTAL IS IRRECONCILABLY INCONSISTENT WITH THE AGGRAVATED ASSAULT CONVICTION, WHICH IRRECONCILABLE CONFLICT REQUIRES REVERSAL AND REMAND.

The Defendant's claim is that the jury verdict of aggravated assault is irreconcilable and fatally inconsistent with the jury's acquittal of the aggravated kidnapping even though the victim testified as to all of the elements of that charge, including that Defendant had used a dangerous weapon and that he had acted with the intent to inflict bodily injury on or terrorize her. See Br. Aplt., p. 38-39.

The State cites no Utah authority for its assertion essentially that inconsistent verdicts have no meaning. Br. St. p. 51-52. It cites sister states and the United States Supreme Court for the proposition that "compromise" verdicts, and verdicts where the jury may have weighed the evidence differently, simply portend that the jury weighed the evidence for each count from a different perspective, or applied

lenity, or were simply mistaken. *Id.* citing *United States v. Powell*, 469 U.S. 57, 64-65 (1984).

The problem in the case at bar is that the jury verdicts are irreconcilably inconsistent. See *United States v. Powell*, at 469 U.S. 57, 64-65 (1984). If the verdicts are irreconcilable, as they are here, the case must be reversed and remanded. If verdicts are both inconsistent and irreconcilable the jury's verdicts must be overturned and the case remanded for appropriate action in light of the circumstances. *Holbrook v. Master Prot. Corp.*, 883 P.2d 295, 299-300 (Utah Ct. App. 1994) citing *Alzado v. Blinder, Robinson & Co.*, 752 P.2d 544, 554 (Colo. 1988).

In attempting to reconcile the inconsistent verdicts in this case, as was argued in defendant's opening brief, this Court would have to completely ignore instruction number 34, R. 922. With respect to the elements of aggravated kidnapping, instruction number 34 instructed that in order to convict, the jury must find Mr. Salt guilty of detaining or restraining Janet Guinn against her will. Such detention and restraint is a fact to which she testified in detail, unequivocally, and without any particular disagreement in the defendant's testimony. Br. Aplt. p. 38-40. She testified that in the process of attempting to leave, he grabbed her head and gave her two sharp twists and told her he could not let her leave (R.1128:106); she was on the ground on her back and he was holding her down (R.1128:110);

and that she told him this was “stupid” and to let her go, and he said “no” that he could not let her go because she had ruined everything (R.1128:113). Id. In the course of that detention, she further testified that he either possessed, used, or threatened to use a dangerous weapon, a piece of pottery he used to hit her on the head (R.1128:110); he struck her in the forehead with a lead pipe, causing bleeding (R.1128: 114-116); he said he had a gun, R1128:119; he injured her sufficiently to cause her to go in and out of consciousness and she received stitches and 65 staples to her head, R1128:131,200-04, and that he acted with the intent to inflict bodily injury or terrorize her (which must have consisted of the aforementioned incidents involved in the milieu of their struggle). The defendant was acquitted of this count of aggravated kidnapping. R.939. Aggravated kidnapping is defined in salient part as follows:

- (1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601.

Utah Code Ann. § 76-5-302. According to the alleged victim’s testimony the defendant threatened or used a dangerous weapon. Such an acquittal is consequently entirely inconsistent and irreconcilable with a conviction of aggravated assault.

On the other hand, the offense of aggravated assault, as set forth in instruction 38, required the jury to find as elements 4 and 5 that Mr. Salt

committed an act with unlawful force or violence that caused bodily injury to Janet Guinn or created a substantial risk of bodily injury to Janet Guinn and that he did so by using a dangerous weapon or other means of force likely to produce death or serious bodily injury. R.926.

Mr. Salt contends that the evidence was insufficient to convict him, but also that it is irreconcilably inconsistent for the jury to have acquitted him of the aggravated kidnapping, but convict him of the aggravated assault. This is demonstrated by the verdict, of using, possessing, or threatening the use of a dangerous weapon and of having the intent to inflict bodily injury or terrorize Ms. Guinn. The absence of such evidence serves at the same time to negate the element of aggravated assault, namely that he used a dangerous weapon and that he acted with the goal of causing her bodily injury. Mr. Salt contends that lack of proof of these elements rendered irreconcilable the acquittal of aggravated kidnapping with the conviction for aggravated assault, requiring that the court grant judgment of acquittal or a new trial.

POINT IV

THE TRIAL COURT ERRONEOUSLY RULED THAT THE DEFINITION OF "COHABITANT" IS CONSTITUTIONAL.

The defendant has thoroughly briefed this issue in its opening brief. See Br. Aplt. Point IV. The State contends that Defendant's overbreadth challenge fails because the challenged definition does not reach any constitutionally protected

conduct. Defendant's vagueness challenge fails because, when considered in light of the statute's purpose, the statute as a whole, and relevant case law, the challenged definition gives adequate notice to ordinary people concerning what behavior is covered. Br. St. p. 55.

It seems obvious that where the cohabitation statute references language which brings within its embrace a party who "resides or has resided in the same residency as the other party," § 78B-7-102(2) (West Supp. 2008); id. § 77-36-1(1) (defining "cohabitant" as having "same meaning as in Section 78B-7-102"), that the party is engaged in the sort of "intimate human relationship" referred to in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), cited by the State. Br. St. p. 58. "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty." Id. 468 U.S. 617-18. This is precisely the sort of proscription against intrusion which invalidates the definitional section of the cohabitant abuse statute wherein it refers to "resides or has resided in the same residency as the other party." § 78B-7-102(2), supra. As the United States Supreme Court recognized in *Roberts*,

(B)ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly

personal relationships a substantial measure of sanctuary from unjustified interference by the State. Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family -- marriage; the raising and education of children; and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.

Id, 468 U.S. 618-20 (Emphasis added; internal citations omitted).

The “resides or resided together” language of the cohabitant abuse statute is of the very essence of the sort of personal affiliations that exemplify considerations which secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships from which the First Amendment secures “a substantial measure of sanctuary from unjustified interference by the State.” *Id.* 618. Consequently, it is unconstitutional in its overbreadth because “(1) the statute ‘reaches a substantial amount of constitutionally protected conduct’ even if the statute also has a legitimate application” and “(2) the statute is not ‘readily subject to a narrowing construction.’” *Provo City Corp. v. Thompson*, 2004 UT 14, ¶10, 86 P.3d 735(citations omitted); *Br. St.* p. 58.

This principle has nothing to do with the perpetration of “violent crime,” as the State asserts. *Br. St.* p. 59-60. It has to do with the right of individuals to associate under the First Amendment, as reflected in *Roberts*. The fact that at some distant time, an act of violence occurs between parties who have resided together at one point hardly vitiates the basic principle that two persons may freely associate without fear that that association will be subject to reprisal by the State for some act between them at an unrelated later time.

Regarding the issue of unconstitutional vagueness, it could not be more evident that the statute provides the opportunity for the State to engage in arbitrary and discriminatory enforcement. See *Br. Aplt.* p. 40-45. As this Court has stated,

A statute can be "unconstitutional either on its face or as applied to the facts of a given case." When asserting an as-applied challenge, the party claims that, under the facts of his particular case, "the statute was applied . . . in an unconstitutional manner." *Id.* In contrast, "when asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may be adversely impacted by the statute in question." In making a facial challenge, the challenger asserts that the statute is so constitutionally flawed that "no set of circumstances exists under which the [statute] would be valid."

State v. Ansari, 2004 UT App 326, ¶ 27, 100 P.3d 231, 239 (internal citations omitted), cited by the State, Br. St. 56, 61, 65. The defendant has discussed the facial versus "no set of circumstances" issues and standards in his opening brief and will not repeat it here. Br. Aplt. p. 40-45. Suffice it to say that the definitions of the cohabitant abuse statute are sufficiently vague and indefinite both on their face and in application as to render the cohabitant abuse statute unconstitutionally vague and overbroad. Neither on the face of the statute, nor as it is applied to the defendant, nothing gives a reasonable understanding to the defendant or any ordinary person that his contemplated conduct or association is proscribed.

More to the point of the issue, the statute should be facially invalidated as overbroad because it inhibits the exercise of First Amendment freedom of association rights where the impermissible applications of the law are substantial "judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849, 1857, 144 L. Ed. 2d 67 (1999).

POINT V

FAILING TO REQUEST AN ADDITIONAL ELEMENT ALLOWING THE JURY TO CONSIDER MS. GUINN'S PRIOR ASSAULT AND ACT OF VIOLENCE TOWARD THE DEFENDANT IN THE SELF-DEFENSE JURY INSTRUCTION AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL

The State asserts that since the self-defense jury instruction in this case informed the jury that the factors there were “non-exclusive,” its failure to specifically include the alleged victim’s acts of prior violence toward the defendant as a factor did not preclude the jury from considering the prior violence toward him in determining the reasonableness of his conduct. Consequently, the State argues, the defendant cannot show either that counsel’s decision not to challenge the instruction constituted deficient performance or that he was prejudiced by counsel’s decision. Br. St. 65-66. This fails to attach the importance that the prior violent acts deserve to the defendant’s justifiable acts of self-defense.

The State points to other instructions given the jury which focused on the State’s burden of proof. Br. St. p. 67-68. But it fails to recognize, as was pointed out by the defendant in his opening brief, that the particular factor which counsel failed to include in Instruction 21, was a very key and critical element. “By failing to request a very crucial element of self-defense, defense counsel allowed the State a free pass in its burden to prove the defendant guilty. It has been held that when obvious defenses are ignored in lieu of those which are ostensibly weaker, the presumption of effective assistance of counsel may be overcome. See, e.g., *Gray*

v. *Greer*, 800 F.2d 644, 646 (C.A.7 1986). Br. Aplt. p. 48. One cannot merely say that since the State bears the heavy burden of proof, and the defendant no burden, that leaving out a critical guidepost for the jury to consider is harmless error, where self-defense is the defendant's entire defense. Omitting the crucial element of prior violence was a failure of substantial proportion. It is very likely that the jury, because it was not informed of this critical factor, did not consider it.

The State makes much of the fact that other factors, which might not have been helpful to the defendant, were also omitted. Br. St. p. 69. How this argument is helpful to the analysis of this issue is not explained. The fact of the matter is, counsel failed to include a key statutory element which the jury could and should have considered, i.e., the alleged victim's prior violence. See Utah Code Ann. § 76-2-402. The alleged victim's prior assaultive behavior was essential to establishing self-defense, and counsel's failure to request this element was both negligent and prejudicial. This was conduct which fell below the standard of practice required of defense counsel, failed to bring to bear the skill and expertise required of counsel, and was therefore deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As has been amply set forth in the defendant's opening brief, it was highly prejudicial. Br. Aplt. p 46-49.

The reasonable likelihood of a different outcome is sufficiently high to undermine confidence in the verdict. See *State v. King*, 2010 UT App 396, ¶ 23, 248 P.3d 984. In this regard, it should be borne in mind precisely what the standard is:

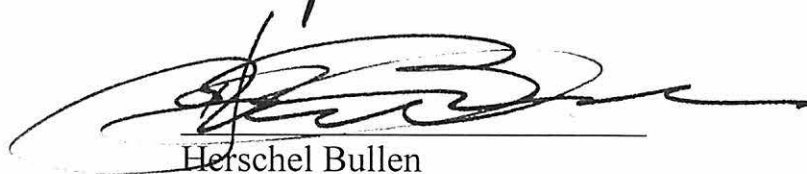
(T)houghtful reflection suggests that confidence in the outcome may be undermined at some point substantially short of the "more probable than not" portion of the spectrum.

State v. Knight, 734 P.2d 913, 920 (Utah 1987). The likelihood of a different result was far short of "more probable than not" in this particular case. Counsel's error created a reasonable likelihood of a different outcome sufficiently high to undermine confidence in the verdict and require reversal and a new trial.

CONCLUSION

For the foregoing reasons the defendant respectfully requests that this Court reverse his conviction and remand for a new trial.

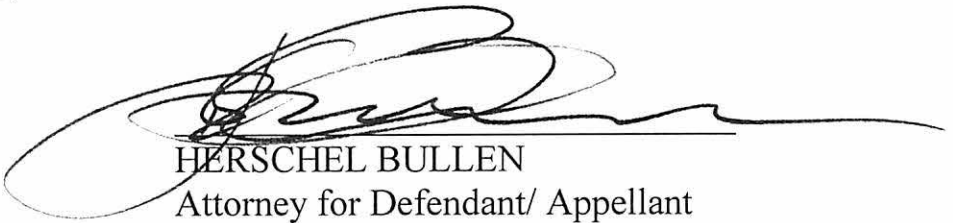
SUBMITTED this 29 day of April, 2014.

A handwritten signature in black ink, appearing to read 'Herschel Bullen', written over a horizontal line.

Herschel Bullen
Attorney for Defendant/Appellant

CERTIFICATE OF RULE 24 COMPLIANCE

Appellant certifies pursuant to Rule 24(f)(1)(C) Utah R. App. P. that the foregoing Brief on appeal contains 4,185 words in compliance with Rule 24(f)(1)(A) Utah R. App. P.

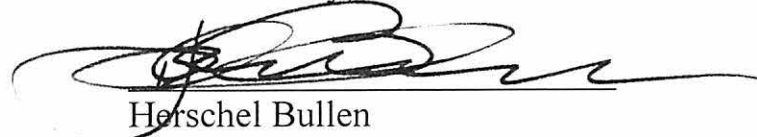


HERSCHEL BULLEN
Attorney for Defendant/ Appellant

CERTIFICATE OF SERVICE

I, Herschel Bullen, hereby certify that this 30th day of April, 2014, I have caused to be served United States Postal Service, postage pre-paid, an original and 7 copies of the foregoing to the Utah Court of Appeals and a searchable pdf CD, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 2 copies along with a searchable pdf CD to:

KAREN KLUCZNIK, Esq.
Assistant Attorney General
Utah Attorney General's Office
Heber M. Wells Building
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114-0854



Herschel Bullen