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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff and Appellee,	:	
v.	:	
LACEY ANN JOHNSON,	:	Case No. 20140310–CA
Defendant and Appellant.	:	
	:	Appellant is not incarcerated.

REPLY BRIEF

Appeal from convictions for second-degree felony retaliation against a witness, victim, or informant; one class A misdemeanor count of uttering a threat of violence; and one count of assault, all with the in-concert enhancements, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Vernice Trease presiding.

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INTRODUCTION

As the State correctly concedes Lacey Johnson was erroneously convicted of one count of uttering a threat of violence, and both in-concert enhancements to the counts of threat of violence and retaliation. SB.11-12. As those erroneous convictions lack any legal basis whatsoever they must be reversed and dismissed with prejudice.

The only remaining issue is whether there is sufficient circumstantial evidence from which to conclude, from a reasonable inference and beyond a reasonable doubt, that Lacey "direct[ed a] threat or action" at Jay, exclusively "as retaliation or retribution." Utah Code § 76-8-508.3(2)(b)(ii). There is no question that the answer is no.

The State agrees this jury could make a "reasonable inference that the attack was because Jay had provoked" Lacey; and it acknowledges that its theory of guilt is "not necessarily mutually exclusive" to Lacey's theory of innocence, as Lacey "could very well have assaulted Jay as pay back for his calling the cops and for the things he said to her that night." SB.18,19. Yet, while the State claims the jury could simply choose which

reasonable alternative to believe (SB.18), decades of Utah cases belie that claim. Indeed, our courts reverse in this situation, where the State's evidence "did not preclude the reasonable alternative hypothesis presented by the defense," as "'reasonable minds must necessarily entertain a reasonable doubt as to a defendant's guilt.'" *State v. Buck*, 2009 UT App 2, ¶14, 200 P.3d 674 (quoting *State v. Hill*, 727 P.2d 221, 222 (Utah 1986)). Thus, and for the reasons set forth in this brief, the opening brief, and the state's brief, Lacey's conviction for retaliation should be summarily reversed and vacated.

I. THE STATE CORRECTLY CONCEDES THAT LACEY'S THREE CONVICTIONS FOR ONE COUNT OF THREAT OF VIOLENCE AND TWO IN-CONCERT ENHANCEMENTS, MUST ALL BE REVERSED AND VACATED WITH PREJUDICE.

The State correctly concedes Lacey was erroneously convicted of three charges. It was error to enter a conviction and sentence in this case for the count of uttering a threat of violence, which was enhanced to a class-A-misdemeanor through the in-concert enhancement, where neither of those offenses were ever submitted to a jury. *See* OB.14-23;SB.10-12. The State does not dispute that double jeopardy prevents Lacey's retrial on those charges (OB.23-24), thus this Court should remand with an order that the enhanced conviction and sentence be reversed and vacated with prejudice.

Similarly, the State correctly concedes the error in entering the conviction and enhanced sentence for in-concert retaliation, where the enhancement does not statutorily apply to the offense of retaliation. *See* OB.24-30; SB.12. This Court

should therefore remand with an order to reverse and vacate the enhanced conviction for retaliation as well.

II. LACEY'S CONVICTION FOR RETALIATION MUST ALSO BE VACATED WHERE AS THE STATE ACKNOWLEDGES, WITH JAY'S INDEPENDENT THREATS AND ACTIONS, THE EVIDENCE FAILED TO EXCLUDE THE REASONABLE INFERENCE THAT LACEY DID NOT DIRECT A THREAT OR ACTION SOLELY AS RETALIATION.

The State acknowledges the circumstantial evidence in this case made it reasonable to infer that Lacey kicked Jay high in the back of his thigh under his buttocks, in response to his violent threats and insults that he hurled at Lacey. SB.17-19. Where the State concedes that its evidence did not preclude this reasonable hypothesis of innocence, this Court must reverse her conviction for retaliation. *See* OB.31-36; *see* also SB.19 (citing *Buck*, 2009 UT App 2, ¶13); *see also State v. John*, 586 P.2d 410, 411-12 (Utah 1978) ("the evidence must exclude every reasonable hypothesis other than the defendant's guilt").

A retaliation conviction requires proof beyond a reasonable doubt that the defendant "direct[] the threat or action . . . as retaliation or retribution against the witness, victim, or informant." Utah Code §§ 76-8-508.3(2)(b),(i),(ii); *see* OB.31-43. The State relied on circumstantial evidence for Lacey's mens rea for retaliation charge; but where that circumstantial evidence did not exclude the reasonable inference that Lacey acted in

response to Jay's independent provocation and not solely as retaliation, it was error to send the State's retaliation charge to the jury.[1]

Indeed, the evidence in this case made it reasonable, if not significantly more likely that Lacey reacted to Jay's intervening and vicious provocation, rather than acting with the exclusive mens rea for retaliation. OB.38-39;OB.34-35 (Jay told Lacey, "if she tried using a [T]aser on" him, that he would "shove it down her throat," Jay also told Lacey "[w]hy don't you get high and pass out on another one of your babies, bitch," knowing it would "affect her");OB.42-43 ("The only reasonable inference from this evidence is that her acts were defensive and not retaliatory");OB.42-43 ("To say that in this case, Lacey acted with the conscious objective to retaliate against Jay for his role in an official proceeding, and not merely in defense of Jay's harassment, "require[s] speculative leaps over yawning gaps in the evidence.").

The State suggests the jury could simply accept "the reasonable inference" that Lacey "was mad at Jay and his wife for calling police on her and her dog, and that she then assaulted Jay as payback." SB.17; *see also* SB.18-19 (claiming nonetheless that "the existence of competing reasonable inferences still requires that the trial court submit the case to the jury." SB.18-19 (citing *Buck*, 2009 UT App 2, ¶13); SB.19 (claiming no "settled Utah law" requires "that the State had to prove retaliation was her sole motivation"). The State's claim contravenes settled Utah law, where it also acknowledges

[1] The State relied on circumstantial evidence to infer this element. *See* OB.32-36 (marshaling the circumstantial evidence); 36-43 (arguing the inferences drawn therefrom are insufficient to prove specific intent to retaliate); *see also* SB.17-20 (discussing the reasonableness of inferences to prove this element).

"the jury could also draw a *reasonable inference* that the attack was because Jay had provoked her with the death of her child." SB.18 (emphasis added); *see also* SB.19 (claiming "the two inferences . . . are not necessarily mutually exclusive. Defendant could very well have assaulted Jay as pay back for his calling the cops and for the things he said to her that night.").

However, our cases instruct that where "the evidence and inferences *did not preclude the reasonable alternative hypothesis presented by the defense*" that "evidence is so insubstantial or inconclusive that reasonable minds must necessarily entertain a reasonable doubt as to a defendant's guilt.'" *Buck*, 2009 UT App 2, ¶14 (quotation omitted) (emphasis added). This is true because, "[a] guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." *State v. Shumway*, 2002 UT 124, ¶18, 63 P.3d 94 (alteration original); *see also* OB.32-42 (Court cannot make "speculative leaps across gaps in the evidence.").

That our Courts reverse in this situation was recently reaffirmed in *State v. Gallegos*. 2015 UT App 78. There the Court reversed the denial of a motion for a directed verdict where the evidence was similarly insufficient to prove the defendant's mens rea beyond mere speculation. The City argued in that case, that there was "sufficient evidence to support a reasonable inference" of the defendant's guilt. *Id.*¶10. This Court agreed, but noted this was not the end of the inquiry on appeal, where the City's claim was based on "no more than speculation." *Id.* The Court reaffirmed, "'[w]hen the evidence supports more than one possible conclusion, none more likely than the other,

the choice of one possibility over another can be no more than speculation.'" *Id.* (quoting *State v. Cristobal*, 2010 UT App 228, ¶16, 238 P.3d 1096).

Gallegos is only the most recent in a panoply of cases requiring that where a case is "dependent solely upon circumstantial evidence" those "circumstances must be such as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged that every circumstance constituting a necessary link in the chain of evidence must be consistent with the defendant's guilt and inconsistent with his innocence." *State v. Crawford*, 201 P. 1030, 1033 (Utah 1921); *see also State v. Erwin*, 120 P.2d 285, 302 (1941) ("where the proof of a necessary fact is dependent solely upon circumstantial evidence, such circumstances must be such as to reasonably exclude every reasonable hypothesis other than the existence of such fact and be consistent with its existence and inconsistent with its non–existence."); *State v. Romero*, 554 P.2d 216, 219 (Utah 1976) ("When the only proof of presumed facts consists of circumstantial evidence, the circumstances must reasonably preclude every reasonable hypothesis of defendant's innocence.").[2]

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[2] *State v. Thompson* does not help the State. *See* SB.20 (citing 2005 UT App 502 (mem)). The State argues it stands for the proposition that evidence was sufficient even "where the evidence showed Thompson could have multiple reasons for retaliating against the victim." SB.20. That was not the holding in *Thompson*, where the defense was that *no* evidence showed his guilt, not that there was also a reasonable hypothesis of Thompson's innocence. *See* 2005 UT App 502 ("Thompson argues that there was no evidence that he intentionally or knowingly struck the victim in retaliation for her role in the pending cases," thus the jury simply made that reasonable inference of guilt). Moreover, *Thompson* involved a charge of tampering with a witness, which does not require the element of retaliation that Lacey challenges here, that of proof the actor direct a threat or action, "as retaliation or retribution." Utah Code § 76-8-508.3(2)(b)(ii).

Indeed, to find Lacey guilty of retaliation here would "require[] not just one level of inference but two," if not more. *Gallegos*, 2015 UT App 78, ¶10 (citation omitted). First, that Lacey ever actually intended to somehow retaliate against Jay specifically. And then that even though Jay approached her, at her house, at night, where he violently threatened her, that she did not react to him but was only motivated to the desire to retaliate. However, "[w]hile inferences drawn from facts in evidence are appropriate, inferences drawn from inferences are not." *Id.* (citations omitted). And where the evidence failed to "exclude every reasonable hypothesis other than the defendant's guilt" it was error to send this case to the jury. *John*, 586 P.2d at 411-12.

The State's evidence was insufficient to prove its charged offense beyond a reasonable doubt. It was therefore plain and obvious error to send the retaliation charge to the jury. OB.43-44. Alternatively, for the same reasons, defense counsel was ineffective for failing to object, in any way, to the insufficiency of the evidence of retaliation, which prejudiced Lacey via an invalid conviction and sentence. OB.44-45. Under either standard, this Court must vacate Lacey's conviction for retaliation.

CONCLUSION

For the reasons set forth in this and the Opening Brief, Lacey's enhanced convictions for threat of violence and retaliation must be vacated, and because the evidence is insufficient to uphold her retaliation conviction, it too must be vacated.

SUBMITTED this 16th day of April, 2014.

JOANNA E. LANDAU
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOANNA E. LANDAU, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 16th day of April, 2015.

JOANNA E. LANDAU

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 1802 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

JOANNA E. LANDAU

DELIVERED this 17 day of April, 2015.