

2002

Utah v. Jensen : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark L. Shurtleff; Utah Attorney General; Attorney for Appellee.

Heather Johnson; Ruby Bautista; L. Monte Sleight; Sale Lake Legal Defender Assoc.; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Utah v. Jensen*, No. 20020359 (Utah Court of Appeals, 2002).

https://digitalcommons.law.byu.edu/byu_ca2/3788

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
Plaintiff/Appellee, :
 :
v. :
 :
LAVAR T. JENSEN, : Case No. 20020359-CA
 :
Defendant/Appellant. :
 :

NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a conviction for Violation of a Protective Order, a Class A Misdemeanor, in violation of Utah Code Ann. § 76-5-108 (1999), in the Third Judicial District Court, State of Utah, the Honorable Joseph C. Fratto, Jr., Judge, presiding.

HEATHER JOHNSON (6934)
RUDY BAUTISTA (8636)
L. MONTE SLEIGHT (8510)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

Utah Court of Appeals
SEP

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
LAVAR T. JENSEN, : Case No. 20020359-CA
Defendant/Appellant. :

NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a conviction for Violation of a Protective Order, a Class A Misdemeanor, in violation of Utah Code Ann. § 76-5-108 (1999), in the Third Judicial District Court, State of Utah, the Honorable Joseph C. Fratto, Jr., Judge, presiding.

HEATHER JOHNSON (6934)
RUDY BAUTISTA (8636)
L. MONTE SLEIGHT (8510)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
NATURE OF THE PROCEEDINGS AND JURISDICTION	1
STATEMENT OF THE FIRST ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT	1
STATEMENT OF THE SECOND ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT	2
STATEMENT OF THE THIRD ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT	3
RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE	4
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS	9
SUMMARY OF THE ARGUMENTS	11
ARGUMENT	
I. MR. JENSEN’S CONVICTION MUST BE REVERSED BECAUSE HE WAS NEVER PROPERLY SERVED WITH THE PROTECTIVE ORDER	13
A. Proper Service is Necessary Under the Federal Due Process Provisions and the Applicable State Statutes	15
B. To Make a Prima Facie Showing of Service, the State Must Provide More Than Just the Protective Order	25
II. THE JURY SELECTION WAS UNCONSTITUTIONAL BECAUSE IT WAS TAINTED BY SEXUAL DISCRIMINATION	28

A. The Prosecutor Waived the Requirement of a Prima Facie Showing of Sexual Discrimination	34
B. The Prosecutor’s Explanation for her Strikes was not Gender-Neutral	37
C. The Trial Court’s Ruling that There was no Intentional Discrimination is Clearly Erroneous In Light of the Prosecutor’s Stereotyping	41
III. THE TRIAL COURT’S DECISION TO HOLD TRIAL WITHOUT A CRUCIAL DEFENSE WITNESS WAS AN ABUSE OF DISCRETION ...	43
CONCLUSION	50

Addendum A: Minutes of the “Sentence, Judgment, Commitment”

Addendum B: “Protective Orders,” Utah Code Ann. § 30-6-4.2 (Supp. 2002)

Addendum C: Utah R.Evid.901 (2002)

Addendum D: Utah R.Evid 902 (2002)

Addendum E: Protective Order

TABLE OF AUTHORITIES

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	4, 15, 45
U.S. Const. amend. VI	4, 46
U.S. Const. amend. XIV	4-5, 15, 45-46

FEDERAL CASES

<u>Batson v. Kentucky</u> , 476 U.S. 79 (1986)	3, 12, 29, 32-33, 36
<u>California v. Green</u> , 399 U.S. 149 (1970)	46
<u>Hernandez v. New York</u> , 500 U.S. 352 (1991)	12, 34-35
<u>Holland v. Illinois</u> , 493 U.S. 474 (1990)	29
<u>J.E.B. v. Alabama</u> , 511 U.S. 127 (1994)	29-34, 37-38, 41
<u>United States v. Johnson</u> , 941 F.2d 1102 (10th Cir. 1991)	21, 35

STATE STATUTES

Haw. Rev. Stat. § 586-6 (2002)	19
Utah Code Ann. § 30-6-4.2 (Supp. 2002)	5, 13, 16, 18-22, 24
Utah Code Ann. § 76-5-108 (1999)	1, 5, 11, 14, 18-22, 25, 28
Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2002)	1

STATE RULES

Utah R.App. 31 (1998)	21
Utah R.Civ. 5 (2002)	11, 16, 25-26
Utah R.Crim. 3 (2002)	25
Utah R.Evid. 901 (2002)	5, 11, 26-27
Utah R.Evid. 902 (2002)	5, 11, 26-27

STATE CASES

<u>Baumgart v. Utah Farm Bureau Ins. Co.</u> , 851 P.2d 647 (Utah Ct. App. 1993)	26
<u>Brandt v. Brandt</u> , 645 N.W.2d 327 (Mich Ct. App. 2002)	20
<u>Commonwealth v. Silva</u> , 727 N.E.2d 1150 (Mass. 2000)	20
<u>Commonwealth v. Tourscher</u> , 682 A.2d 1275 (Pa. Super. Ct. 1996)	39
<u>Cooke v. Cooke</u> , 2001 UT App 110, 22 P.3d 1249	2, 16
<u>Department of Registration of Dep't of Bus. Regulation v. Stone</u> , 587 P.2d 137 (Utah 1978)	16
<u>Harvey v. State</u> , 78 S.W.3d 368 (Tex. Crim. App. 2002)	20
<u>In re S.A.C.</u> , 498 N.E.2d 285 (Ill. Ct. App. 1986)	22-23
<u>In re Schwenke</u> , 865 P.2d 1350 (Utah 1993)	2
<u>Maddox v. State</u> , 708 So.2d 220, 224 (Ala. Ct. App.1997)	36, 39
<u>Murray City v. Culley</u> , No. 971672-CA, 1998 WL 1758314 (Utah Ct. App. 1998)	20-21
<u>Payne v. Gundy</u> , 468 S.E.2d 335 (W. Va. 1996)	36-37, 40

<u>People v. Coleby</u> , 34 P.3d 422 (Colo. 2001)	19
<u>People v. Gandy</u> , 878 P.2d 68 (Colo. Ct. App. 1996)	36, 40
<u>People v. Ramos</u> , 735 N.E.2d 1094 (Ill. Ct. App. 2000)	20
<u>People v. White</u> , 727 N.Y.S.2d 612 (2001)	20
<u>Reed v. Reed</u> , 806 P.2d 1182 (Utah 1991)	2
<u>Southland Const. v. Semnani</u> , 2001 UT 6, 20 P.3d 875	26, 28, 29
<u>State v. Bakalov</u> , 1999 UT 45, 979 P.2d 799	45
<u>State v. Bourgeois</u> , 786 So.2d 771 (La. Ct. App. 2001)	36, 39
<u>State v. Bowman</u> , 945 P.2d 153 (Utah Ct. App. 1997)	3, 33, 35, 38, 41
<u>State v. Call</u> , 508 S.E.2d 496 (N.C. 1998)	36
<u>State v. Cantu</u> , 778 P.2d 517 (Utah 1989)	33, 38, 41-42
<u>State v. Chavez</u> , 2002 UT App 9, 41 P.3d 1137	46, 49
<u>State v. Colwell</u> , 2000 UT 8, 994 P.2d 177	32, 35, 41
<u>State v. Cowdell</u> , 626 P.2d 487 (Utah 1981)	16
<u>State v. Donaghy</u> , 769 A.2d 10 (Vt. 2000)	36-37, 40
<u>State v. Garcia</u> , 965 P.2d 508 (Utah Ct. App. 1998)	45
<u>State v. Grate</u> , 947 P.2d 1161 (Utah Ct. App. 1997)	16
<u>State v. Hardy</u> , 2002 UT App 244, 452 Utah Adv. Rep. 3	18
<u>State v. Higginbotham</u> , 917 P.2d 545 (Utah 1996)	3, 33, 35
<u>State v. Kendrick</u> , 538 P.2d 313 (Utah 1975)	46-47
<u>State v. Litherland</u> , 2000 UT 76, 12 P.3d 92	32

<u>State v. McKinnon</u> , 2002 UT App 214, 51 P.3d 729	18
<u>State v. Merrill</u> , 928 P.2d 401 (Utah Ct. App. 1996)	34-35
<u>State v. Pharris</u> , 846 P.2d 454 (Utah Ct. App. 1993)	3, 32-33, 36, 38
<u>State v. Russell</u> , 917 P.2d 557 (Utah Ct. App. 1996)	32, 33
<u>State v. Shepherd</u> , 1999 UT App 305, 989 P.2d 503	32, 35
<u>State v. Small</u> , 809 S.W.2d 253 (Tex. Ct. App. 1991)	14, 22
<u>State v. Span</u> , 819 P.2d 329 (Utah 1991)	3, 41
<u>State v. Troyer</u> , 910 P.2d 1182 (Utah 1996)	47-48
<u>State v. Turner</u> , 879 S.W.2d 819 (Tenn. 1994)	36, 39
<u>State v. Yanez</u> , 2002 UT App 50, 42 P.3d 1248	19
<u>Strane v. State</u> , 16 P.3d 745 (Ala. Ct. App. 2001)	20
<u>Stichting Mayflower Mountain Fonds v. Jordenelle Special Services Dist.</u> , 2001 UT App 257, 47 P.3d 86	2

TREATISES AND OTHER AUTHORITIES

Bryan A. Garner, <u>A Dictionary of Modern Legal Usage</u> (2 nd ed. 1995)	13
Process, 62B Am Jur 2d § 106	15

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
LAVAR T. JENSEN, : Case No. 20020359-CA
Defendant/Appellant. :

NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a conviction for Violation of a Protective Order, a Class A Misdemeanor, in violation of Utah Code Ann. § 76-5-108 (1999), in the Third Judicial District Court, State of Utah, the Honorable Joseph C. Fratto, Jr., Judge, presiding.¹

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2002).

**STATEMENT OF THE FIRST ISSUE, STANDARD OF REVIEW, AND
PRESERVATION OF THE ARGUMENT**

Issue: Before a defendant may be convicted of violating a protective order, the State must show that the defendant was properly served with the order. Here, the State did not present sufficient evidence that Appellant Lavar T. Jensen was properly served. Is his

¹ A copy of the Minutes of the "Sentence, Judgment, Commitment" is attached in Addendum A.

conviction for violating a protective order sustainable?

Standard of Review: This issue presents a question of both law and fact. The question of whether Mr. Jensen was served with a protective order is a question of fact that this Court reviews with deference to the trial court's ruling.² However, whether the service was legally proper is a question of law reviewed for correctness.³

Preservation: This issue was preserved at R. 110 [84-98].

STATEMENT OF THE SECOND ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue: Under the United States Supreme Court case of Batson v. Kentucky and its jurisprudence, a prosecutor may not use a peremptory strike to dismiss a venire person on the basis of gender. In this case, the prosecutor removed two veniremen based on assumptions that she made about them because of their gender. Are these dismissals constitutional?

Standard of Review: "The trial court's [threshold] conclusion as to whether or not a prima facie case [of sexual discrimination] was established is a legal determination which

² See In re Schwenke, 865 P.2d 1350, 1354 (Utah 1993) ("Whether a person has been served with process is a question of fact."); Cooke v. Cooke, 2001 UT App 110, ¶7, 22 P.3d 1249 (question of whether husband was served with process in a divorce action is a question of fact).

³ See Stichting Mayflower Mountain Fonds v. Jordenelle Special Service Dist., 2001 UT App 257, ¶7, 47 P.3d 86 ("Whether service of process is proper presents a question of law that we review for correctness."); Reed v. Reed, 806 P.2d 1182, 1184 n.3 (Utah 1991) ("Although we have held that whether a person has been served with process is a question of fact . . . , whether a person is properly served is a question of law.")

[this Court] review[s] for correctness, according it no particular deference.”⁴ Any “factual findings of the trial court relevant to allegedly discriminatory peremptory challenges merit deference on appeal and will be set aside only if they are clearly erroneous.” Id. at 459. Ultimately, the trial court’s decision about whether purposeful discrimination was proved “turns on the credibility of the proponent of the strike and will not be set aside unless it is clearly erroneous.”⁵

Preservation: This issue was preserved at R. 110 [31-34].

STATEMENT OF THE THIRD ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue: A criminal defendant has the constitutional right to cross-examine the witnesses against him and to present evidence material to his defense. In this case, the defense depended on the cross-examination and impeachment of the alleged victim. However, she did not appear at trial and the court denied the defense counsel’s motion to continue. Was the denial an abuse of discretion?

Standard of Review: The denial of a motion for a continuance is reviewed under the

⁴ State v. Pharris, 846 P.2d 454, 459 (Utah Ct. App. 1993). See also Batson v. Kentucky, 476 U.S. 79, 96 (1986) (describing the legal standards for assessing a prima facie case); State v. Span, 819 P.2d 329, 340-42 (Utah 1991) (analyzing the legal cognizability of a minority group for purposes of assessing a prima facie case of racial discrimination).

⁵ State v. Higginbotham, 917 P.2d 545, 548 (Utah 1996). See also State v. Bowman, 945 P.2d 153, 155 (Utah Ct. App. 1997) (The trial court’s determination about whether purposeful racial discrimination has been proved “is a question of fact, [and] we will not reverse the decision of the trial court unless it is clearly erroneous.”)

abuse of discretion standard.⁶

Preservation: This issue was preserved at R. 110 [42-61].

**RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES,
AND RULES OF PROCEDURE**

The following constitutional provisions are relevant on appeal:

The Fifth Amendment to the United State Constitution, which provides, in pertinent part:

nor shall any person . . . be deprived of life, liberty, or property, without due process of law

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution, which provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

. . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

⁶ Salt Lake County v. Western Dairymen Co-op, Inc., 2002 UT 39, ¶16, 48 P.3d 910; Price Dev. Co., L.P. v. Orem City, 2000 UT 26, ¶9, 995 P.2d 1237; State v. Cabututan, 861 P.2d 408, 413 (Utah 1993).

U.S. Const. amend. XIV.

The following statutes are determinative on appeal:

Section 30-6-4.2 of the Utah Code, "Protective Orders," which is provided in Addendum B.

Section 76-5-108 of the Utah Code, "Violation of Protective Orders," which provides:

(1) Any person who is the respondent or defendant subject to a protective order or ex parte protective order issued under Title 30, Chapter 6, Cohabitant Abuse Act, or Title 78, Chapter 3a, Juvenile Court Act of 1996, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protective order as described in Section 30-6-12, who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

(2) Violation of an order as described in Subsection (1) is a domestic violence offense under Section 77-36-1 and subject to increased penalties in accordance with Section 77-36-1.1.

Utah Code Ann. § 76-5-108 (1999).

The following rules of evidence are relevant on appeal:

Rule 901 of the Utah Rules of Evidence, which is provided in Addendum C.

Rule 902 of the Utah Rules of Evidence, which is provided in Addendum D.

STATEMENT OF THE CASE

On May 25, 1999 a hearing on a petition for a protective order was held before Judge William W. Barrett of the Third District Court. R. 112 [1, 4]. The petitioner,

Jolynne Thomas, and the respondent, Mr. Jensen both attended the hearing. Id. at 1. Ms. Thomas was represented by counsel, but Mr. Jensen was not. Id. Judge Barrett granted the petition and issued a protective order. Id. at 1-4.

The protective order consists of several pages of numbered paragraphs with blanks beside them.⁷ Some paragraphs are checked, and others are not. Id. The checked paragraphs prohibit the “Respondent” from, among other things, abusing the “Petitioner,” communicating with the “Petitioner,” or visiting the “Petitioner’s” home or workplace. Id. at 2. The document is signed by Judge Barrett and is stamped as “filed.” Id. at 1, 4. On the last page, the following statement appears:

By this signature, Respondent approves the form, and accepts service[] of this Protective Order and waives the right to be personally served.

Id. at 5. This is followed by a cursive signature reading “Lavar Jensen,” and an instruction to “Serve Respondent at: 6985 So. Pine Mt. Dr. 84121.” Id. There is no notary, witness signature, or certificate of delivery or service.

More than two years later, on June 21, 2001, Mr. Jensen was charged with violating the protective order. R. 3-5. He pled not guilty to the charge. R. 10. A jury trial was scheduled for October 16, 2001, and a venire assembled on that date. R. 110 [3-4].

After voir dire, the prosecutor used all three of her peremptory strikes to eliminate men. R. 57-58. The defense counsel objected on the basis that the strikes appeared to be a pretext for sexual discrimination. R. 110 [31]. The trial court asked the prosecutor to

⁷ Id. at 1-5. The protective order is attached as addendum E.

explain the strikes. Id. at 32. She replied:

I didn't even initially realize that all three of them were men, all three of my challenges were men until [the defense counsel] pointed it out. *I have on my notations that the three struck were part of the protective order, and logically I assumed that usually they would be on defendant's side, since more [] likely than not men are the respondents to protective orders, other than women.* Those were my reasoning. I also struck – I don't have his name here – the first male, because he was an engineer, I – my reason being someone that – I would want someone that's less analytical.

Id. (emphasis added). In response, the defense counsel argued that this explanation was inherently sexually discriminatory because the prosecutor had assumed that all men who indicated involvement with protective orders were perpetrators of violence. Id. at 33-34. Also, the prosecutor had assumed that the women involved with protective orders were not.⁸ Because of this, the defense counsel argued, the strikes should not be allowed. R. 57-58, 110 [33-34].

The trial court disagreed and allowed the strikes. Id. at 34. Then the jury was impaneled. Id.

Before the examination of witnesses started, the defense counsel noticed that Ms. Thomas, the alleged victim, was not in the courtroom. Id. at 42. The defense counsel immediately made a motion for a continuance on the basis that Ms. Thomas' testimony was crucial to the defense. Id. at 42-43. The defense counsel explained that Ms. Thomas' testimony would show that Mr. Jensen did not know a protective order was in place:

The most important [portion of Ms. Thomas' testimony] is that in 1999 she

⁸ During voir dire the venire persons had been asked whether they had ever been involved with a protective order, but they had not been asked how they had been involved. Id. at 23.

informed several people that she had the protective order dismissed. That is the crucial bit of evidence, because with that in mind the defendant had a reasonable basis to believe that the protective order had been dismissed, which would then be he had not committed any crime

Id. at 52. The defense counsel also pointed out that Mr. Jensen had a constitutional right to present a defense and to confront Ms. Thomas, and that these rights were violated by her absence. Id. at 43, 55, 57.

The trial court asked the prosecutor whether Ms. Thomas had been subpoenaed. Id. at 48. The prosecutor answered that she had. Id.

After listening to further argument from both sides, the trial court denied the defense counsel's motion for a continuance. Id. at 58. The court also opined that the defense would not be impaired by Ms. Thomas' absence because the defense was not expected to discredit the statements of a witness who did not appear:

[W]hat you have here is an attempt to impeach a witness, but there is no witness. It's impeaching someone who's not a witness. That's not accommodated by the rules. . . .

Id. at 57-58. With that, the trial proceeded.

After each side presented its case, the defense counsel made a motion for a directed verdict on the basis that the State had not shown that Mr. Jensen was properly served with the protective order. Id. at 84. A certified copy of the Protective Order had been entered into evidence, but the Order did not have an authenticated signature from Mr. Jensen or proof that he had been served. Id.

The State responded that the signature of a "Lavar Jensen" appeared at the end of

the order, and that for prima facie purposes, this is enough. Id. at 91.

The trial court agreed with the State. Id. at 92-93. The trial court opined that the protective order was a self-authenticating document under Rule 902 of the Utah Rules of Evidence, and that it was sufficient for prima facie purposes. Id. at 93.

The case was submitted to the jury and Mr. Jensen was convicted of violating a protective order. R. 79. He filed a timely notice of appeal. R. 98-99.

STATEMENT OF THE FACTS

Mr. Jensen and Ms. Thomas began a romantic relationship in 1997. R. 110 [106]. Two years later, Ms. Thomas petitioned the Third District Court for a protective order against Mr. Jensen. R. 112 [4]. The order was issued, and it prohibited Mr. Jensen from contacting Ms. Thomas or from visiting her residence or place of employment. Id. at 1-2. However, there is nothing to show that Mr. Jensen was ever properly served with the order. R. 112 [1-5].

After the order was issued, Mr. Jensen and Ms. Thomas continued their relationship. R. 110 [106]. They even entertained their friends together. At Christmas, they held a party at Mr. Jensen's house. Id. at 107-08, 110. During the party, one of Mr. Jensen's friends, Brandon Monthey, pulled Mr. Jensen aside and expressed concern about Ms. Thomas' presence. Id. at 110. Mr. Monthly told Mr. Jensen that he could "get in trouble if there was a protective order on him and [Ms. Thomas] was at his house." Id. However, Ms. Thomas overheard the conversation and told Mr. Monthey not to worry

because the order “had been lifted.” Id.

Mr. Jensen’s and Ms. Thomas’ relationship continued for the next two years. Id. at 114. Mr. Jensen’s sister, Laurie Wagers, testified of this and cited some examples. Id. She testified that in December, 2000 or January, 2001 the couple went to the restaurant where Ms. Wagers worked. Id. The couple not only ate together, but held hands throughout the evening. Id.

Similar testimony was given by Jeremy Johnson, Ms. Thomas’ neighbor. Mr. Johnson moved into the duplex next to Ms. Thomas’ house in March, 2001. Id. at 82. He testified that Mr. Jensen visited Ms. Thomas several times and that they seemed to be dating. Id. at 80. He even saw Mr. Jensen watering Ms. Thomas’ back lawn and digging holes for her new sprinkling system. Id. at 81-82.

Then, on May 29, 2001, Mr. Johnson was on his front porch having a cigarette. Id. at 76. He saw Mr. Jensen arrive and knock on Ms. Thomas’ door. Id. at 77. Ms. Thomas did not answer, and so Mr. Jensen walked over to Mr. Johnson’s porch and began chatting with him. Id. at 78. A few minutes later, Ms. Thomas emerged from her house, got in her car, and drove away. Id.

That same day, Ms. Thomas visited a nearby police station. Id. at 68. She appeared to be upset and reported that she had been involved in an “incident” with her boyfriend. Id. at 67. An officer searched the records to determine whether there was a protective order against Mr. Jensen. Id. He found one in place. Id. Mr. Jensen was charged with Violation of a Protection Order and arrested. R. 3-6.

SUMMARY OF THE ARGUMENTS

The principal argument in this case is that Mr. Jensen's conviction should be reversed because the State did not make a prima facie showing that Mr. Jensen was served with the protective order that he is accused of violating. A showing of proper service is essential to a conviction for violating a protective order, Utah Code Ann. § 76-5-108(1) (1999), and without this showing, a conviction cannot stand.

Proper service could have been shown by a certificate of mailing or delivery, Utah R.Civ. 5 (2002), or by testimony from the server that service was completed. Utah R. Evid. 901(b)(1) (2002). Also, Mr. Jensen's signature on the document would have been sufficient if it was authenticated by notary, Utah R.Evid. 902(1) (2002), or by the testimony of a handwriting analyzer. Utah R.Evid. 901(b) (2) & (3) (2002).

But the State submitted none of this evidence. Instead, it simply submitted the protective order itself, with an attached page showing a signature reading "Lavar Jensen." R. 112 [5]. This signature is not authenticated, and it could have been written by anybody. Also, there is nothing to show that Mr. Jensen received the order, read the order, or even saw the order. And there is nothing to show that the contents of the order were explained to him.

In these circumstances, Mr. Jensen's conviction cannot be sustained and should be reversed on the grounds that the State failed to make the required prima facie showing of proper service.

Alternatively, Mr. Jensen's conviction should be reversed and this case should be

remanded for a new trial. There are two bases for this: 1) the prosecutor sexually discriminated against two veniremen during the jury selection; and 2) the trial court effectively denied Mr. Jensen his constitutional rights by holding trial without a crucial witness.

First, the prosecutor violated the holdings of Batson v. Kentucky, 476 U.S. 79 (1986) and its jurisprudence by sexually discriminating against two veniremen. These men, along with several other men and women, had indicated during voir dire that they had experienced some involvement with protective orders. R. 110 [24]. The trial court did not ask for details, and nobody knew whether these venire persons were petitioners, respondents, or witnesses in protective order cases. Id. However, during the jury selection, the prosecutor removed two men, explaining: “logically I assumed that usually they would be on defendant’s side, since more [] likely than not men are the respondents to protective orders” R. 110 [32]. This demonstrates that the prosecutor applied a sexual stereotype in dismissing these two men, and this violates the equal protection clause of the federal constitution. And so, a reversal and retrial is necessary in this case.

Second, the trial court’s decision to hold trial without a crucial witness was an abuse of discretion. This witness, Ms. Thomas, was the alleged victim. Her testimony, and the impeachment of her expected statements, would have established that she told Mr. Jensen and several other people that the protective order had been dismissed. R. 110 [52]. Also, it would have established that she continued her relationship with Mr. Jensen for two years after petitioning for a protective order against him. It would also show that

she had made conflicting statements to police officers about alleged assaults. Id. at 52-54. Ultimately, it would have established that Mr. Jensen did not knowingly or intentionally violate a protective order. The trial court's decision to hold trial without Ms. Thomas violated Mr. Jensen's right to due process and his right to confront the witnesses against him. So, Mr. Jensen's conviction should be reversed and this case remanded for a new trial.

ARGUMENT

I. MR. JENSEN'S CONVICTION MUST BE REVERSED BECAUSE HE WAS NEVER PROPERLY SERVED WITH THE PROTECTIVE ORDER

The crime of violating a protective order does not have much in common with other types of crimes. This is because other types of crimes are either inherently evil or commonly required for the operation of an orderly society.⁹ But the violation of a protective order is neither. Instead, it is disobedience to an individualized court order that prohibits actions which are otherwise perfectly legal. For example, it may prohibit a person from writing or telephoning another person, visiting that person's residence or place of employment, or carrying a weapon. Utah Code Ann. § 30-6-4.2 (Supp. 2002). It may also impose guidelines on child visitation, the payment of child support, or the use of an automobile. Id. Without a protective order, all of these things are left to an individual's

⁹ In other words, most crimes are either *malum in se* ("evil in itself; something inherently and universally considered evil,") or *malum prohibitum* ("wrong merely because it is proscribed; made unlawful by statute.") Bryan A. Garner, A Dictionary of Modern Legal Usage at 545 (2nd ed. 1995).

choice.

Because a protective order imposes restrictions on normal actions, proper service of the order is critical. Utah Code Ann. § 76-5-108(1) (1999). After all, a person will not obey such an order if he does not know about it. Being served notifies him that the order has been issued by a judge and that it is legally binding. He can read the order and understand all of its provisions and prohibitions. He can note the addresses that he is ordered to avoid and avoid them. He can determine how long the order will stand. He can go to an attorney for advice. He can prepare a defense, ask for a modification, or counter-petition. In short, he will not ignorantly commit a crime if he is given proper notice of the protective order.

These practical considerations are reason enough for requiring service of a protective order. In fact, at least one jurisdiction has required service on this very basis.¹⁰ But here in Utah, we have even more reasons for requiring proper service. Namely, we have two sets of laws, federal due process and Utah statutory law, that require service.

The following two subsections thoroughly explore the issue of proper service. The first subsection examines the laws that require proper service, and the second lists the methods of proper service. Ultimately, both subsections will demonstrate that the State failed to make the required prima facie showing of proper service, and that Mr. Jensen's

¹⁰ See Small v. State, 809 S.W.2d 253, 256-57 (Tex. Ct. App. 1991) (court reversed conviction where "there is no evidence in this record that the appellant agreed to a protective order, attended any hearing or in any way participated, that he was ever served with a copy of the protective order, or that he in any way received notice, formal or informal, of the issuance or existence of the court order in question prior to his coming into the [prohibited] home.")

conviction must be reversed.

A. Proper Service is Necessary Under the Federal Due Process Provisions and the Applicable State Statutes

Both the federal due process provisions and the applicable state statutes require proper service of protective orders. However, the due process provisions provide for a better understanding of the underlying principal for the service requirement, and so these provisions will be examined first.

The reason that the due process provisions of the Fifth and Fourteenth Amendments apply to protective orders is because such orders deprive respondents of their freedoms of movement and association. These freedoms are protected rights. U.S. Const. amend. V & XIV, § 1. They cannot be taken by the government unless the government follows specific procedures designed to promote fairness and justice. Id.

One of these procedures is proper service. Proper service informs parties what action is being taken and why. It gives them information about the grounds for the action and it provides them with an opportunity to respond. In simple terms, it tells the parties what is happening and gives them time to decide what to do about it. Process, 62B Am Jur 2d § 106.

With this in mind, the drafters of Utah procedural rules have issued a blanket requirement for proper service of nearly all legal papers:

Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every

pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

Utah R.Civ. 5(a)(1) (2002). Under this rule, courts have upheld the requirement of proper service in almost every situation.¹¹ And, Utah courts have held that certain information must be communicated to the person being served. For instance, the charges must be stated, the grounds of an action or order must be communicated, State v. Cowdell, 626 P.2d 487, 488 (Utah 1981), and any legal consequence cannot reach beyond the scope of the information served. Department of Registration of Dep't of Bus. Regulation v. Stone, 587 P.2d 137, 139 (Utah 1978).

Protective orders are not an exception to the service requirement. If anything, there is a greater reason for proper service of protective orders than for service of other types of papers. This is because, without service, respondents may be completely unaware of the order or its contents or the consequences of a violation. Such orders are often issued ex parte, Utah Code Ann. § 30-6-4.2 (Supp. 2002), and the threshold showings required to obtain them are fairly low. Id. Additionally, respondents usually do not have the benefit of counsel. In many ways, respondents are unusually vulnerable to infringements upon their rights.

Nobody denies that the interests of those seeking protective orders justifies special

¹¹ See e.g. Cooke v. Cooke, 2001 UT App 110, ¶13, 22 P.3d 1249 (petition for divorce must be served); State v. Grate, 947 P.2d 1161, 1167 (Utah Ct. App. 1997) (orders to show cause must be served).

handling within the court system. In fact, this circumstance is probably unavoidable.

Those suffering from abuse need protective orders quickly and do not have the time or expertise to proceed with complicated, time-consuming legal filings and appearances. Ex parte orders, lenient threshold showings for cause, and immediate losses of freedom or property belonging to the respondents are all, more or less, “necessary evils” of protective order actions.

On the other hand, this does not mean that the requirement of proper service is dispensable. Proper service may be accomplished without compromising the goals of simplicity and expediency for petitioners. Service of the order is something that happens after the order is obtained, and after the petitioner has followed the appropriate steps. And so there is no justification for doing away with it. Indeed, proper service actually promotes the respondents’ adherence to the orders, which is precisely the goal of issuing a protective order in the first place.

Put another way, due process requires proper service of all protective orders, whether they are issued ex parte, pursuant to a traditional hearing, or even in the respondent’s presence. This is because the respondent must have a written document to refer to, so that he or she can remember who and what to avoid, and what actions to take, and for how long. Further, possession of the written document acts as a forceful impetus to obey the order, and this is something to be desired. All in all, due process requires proper service and there is no reason to ignore this.

The second set of laws requiring proper service of protective orders centers around

two statutes: Utah Code section 30-6-4.2, which provides for the issuance of protective order, and Utah Code section 76-5-108, which makes the violation of that order a crime. Both statutes specifically provide that a defendant must be properly served with the protection order. The pertinent portion of section 30-6-4.2 reads:

A court may grant [specified] relief . . . whether or not the respondent appears Following [the issuance of the order], the court shall: (a) *as soon as possible, deliver the order to the county sheriff for service of process*; (b) make reasonable efforts to ensure that the order for protection is understood by the petitioner, and the respondent, if present. . . .

Utah Code Ann. § 30-6-4.2(3)-(4) (Supp. 2002) (emphasis added). The pertinent portion of section 76-5-108 reads:

Any person who is the respondent or defendant subject to a protective order or ex parte protective order . . . who intentionally or knowingly violates that order *after having been properly served*, is guilty of a class A misdemeanor

Utah Code Ann. § 76-5-108(1) (1999) (emphasis added).

The clear and unambiguous language of these statutes requires service of the protective order in all circumstances. Because of this, we needn't analyze them further. As this Court has repeatedly held, it is inappropriate to pedantically analyze statutory language that is already clear on its face:

[The] primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language We need look beyond the plain language only if we find some ambiguity. . . . When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction.¹²

¹² State v. Hardy, 2002 UT App 244, ¶10, 452 Utah Adv. Rep. 3 (quotations omitted). See also State v. McKinnon, 2002 UT App 214, ¶6, 51 P.3d 729 (“To discern the legislature’s intent

Furthermore, even if this Court looks beyond the plain language, it will find that proper service is emphatically required. When sections 30-6-4.3 and 76-5-108 were passed and later modified¹³ the legislature had a broad variety of language from other jurisdictions to consider. And much of this language is more liberal than the language chosen by the Utah drafters. For instance, the Hawaiian statute reads:

Any [protective] order issued under this chapter shall either be personally served upon the respondent, or served by certified mail, unless the respondent was present at the hearing in which case the respondent shall be deemed to have notice of the order.

Haw. Rev. Stat. § 586-6 (2002). Likewise, the Colorado statute indicates that violation of a restraining order is committed:

“after [the respondent] has been personally served with any such order or otherwise has acquired from the court actual knowledge of the contents of any such order.”

People v. Coleby, 34 P.3d 422, 424 (Colo. 2001) (quoting C.R.S. § 18-6-803.5(1) (1997)).

Some state statutes do not even mention service or notice. Instead, they incorporate this idea into the intent element of the crime of violating a protective order.

and purpose, we look first to the ‘best evidence of a statute’s meaning, the plain language of the act.’”); State v. Yanez, 2002 UT App 50, ¶13, 42 P.3d 1248 (“Generally, ‘our primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language . . . We need look beyond the plain language only if we find some ambiguity.’” (quotations omitted)).

¹³ Section 30-6-4.3 was passed in 1995 and modified in 1996, 1997, and 2001. Utah Code Ann. § 30-6-4.3, History (Supp. 2001). Section 76-5-108 was passed in 1979 and modified in 1984, 1991, 1993, 1995, 1996, and 1999. Utah Code Ann. § 76-5-108, History (1999).

The Massachusetts statute does this. The courts there may find a defendant guilty of violating a protective order if the “the defendant had knowledge of the order.”

Commonwealth v. Silva, 727 N.E.2d 1150, 1153 (Mass. 2000). And in Texas, the violation of a protective order is committed if one who is subject to an order “knowingly or intentionally” threatens violence or commits acts of violence. Harvey v. State, 78 S.W.3d 368, 369 (Tex. Crim. App. 2002) Likewise, the Illinois statute allows for conviction merely for “knowingly” violating an order. People v. Ramos, 735 N.E.2d 1094, 1098 (Ill. Ct. App. 2000).

Another approach taken by some states is to avoid making violating a protective order a crime by prosecuting violators under the general criminal contempt statutes.¹⁴

These are only a few examples of how the legislature may have chosen to handle the Utah protective order statutes. Yet, it chose instead in both sections 30-6-4.2 and 76-5-109 to use clear language requiring proper service of all protective orders, regardless of the circumstances. At this point, to construe the statutes otherwise is to ignore basic rules of statutory construction and convolute an otherwise clear directive.

A holding reflecting this is needed. So far, there has been scant interpretation of the “proper service” portions of sections 30-6-4.2 and 76-5-109. One exception is Murray City v. Culley, but that is an unpublished opinion that was sparsely briefed and issued nearly half a decade ago. In Culley, it was opined that service is probably not an element

¹⁴ Strane v. State, 16 P.3d 745, 747 (Ala. Ct. App. 2001); Brandt v. Brandt, 645 N.W.2d 327, 330-31 (Mich. Ct. App. 2002); People v. White, 727 N.Y.S.2d 612, 613-14 (2001).

of the crime of violating a protective order. Murray City v. Culley, No. 971672-CA, 1998 WL 1758314, at *1 (Utah Ct. App. 1998). Instead, the case reads, service is merely one way of showing that the defendant knowingly or intentionally violated the order. Id. In support of this opinion a Texas case and an Illinois case are cited. Id. at *2. At the conclusion of the opinion, this Court noted that, even if service is required, the defendant waived the issue in that case. Id.

Murray City v. Culley is not binding law. It is unpublished and it was issued at a time when unpublished opinions were not binding precedent.¹⁵ Also, the service issue was not thoroughly briefed in that case. The appellant merely asserted that service was an element of the offense of violation of a protective order, and made cursory due process and statutory interpretation arguments.¹⁶ Without full consideration of the issue, the resulting opinion cannot stand as binding precedent.

At any rate, to the extent that the opinion is considered binding it should be overruled. It contravenes the plain language of sections 30-6-4.2 and 76-5-109 and it does not take into account the legislature's intentional use of the words "proper service" as opposed to broader "knowledge" or "constructive notice" type of language.

Additionally, the cases relied upon in the opinion are not persuasive in this jurisdiction. These cases are from Texas and Illinois, and neither state has a statute that is

¹⁵ Under Rule 31 of the 1998 Utah Rules of Appellate Procedure, unpublished opinions "will not stand as precedent" Utah R.App. 31 (1998).

¹⁶ Murray City v. Culley Aplt. Br., No. 971672-CA.

similar to Utah's. In fact, the Texas statute does not mention service or notice at all. It simply states that:

A person commits an offense if, in violation of a [protective] order . . . the person knowingly or intentionally . . . goes to or near any of the following places as specifically described in the protective order [including] the residence or place of employment or business or a member of the family or household.

Small, 809 S.W.2d at 255 (quoting Tex. Penal Code Ann. § 25.08 (Vernon Supp. 1991)).

This statute uses broad language and requires only that the defendant act knowingly or intentionally in committing the offense. An interpretation of this statute cannot be used as a pattern for the law in our jurisdiction, where two statutes specifically require proper service of a protective order.¹⁷

Likewise, the Illinois case is not persuasive authority. The Illinois statutes interpreted in that case do not mention notice or service. They provide only that any petition for a protection order shall name the respondent and give his address, and that a summons shall be issued to the respondent. In re S.A.C., 498 N.E.2d 285, 286 (Ill. Ct. App. 1986). And, even with this broad language, the Illinois Court of Appeals found that some level of notice was required:

where a court order affects the legal right of a person to associate with others, in this case a 14-year-old girl, fundamental fairness requires that such an order not be entered before the person to be subjected to the order

¹⁷ See Utah Code Ann. § 30-6-4.2(4)(a) (Supp. 2002) (requiring service of process immediately after a hearing on a petition for a protective order, regardless of whether the respondent attended the hearing); Utah Code Ann. § 76-5-109(1) (1999) (providing that a defendant may not be convicted of violating a protective order unless he has been properly served with the order).

has a reasonable opportunity to present evidence and be heard on the matter.

Id. at 287 (quotations omitted). And so, not only is the Illinois case unpersuasive because that state's statute differs from the Utah statutes, it does not even stand for the proposition that notice is not an element of the crime of violating a protective order.

Lastly, the Culley opinion does not forward sound policy. Actual service of a protective order provides the respondent with notice of its contents, and this notice is absolutely necessary. Besides informing the respondent that certain actions are now a crime for him or her, service of the order promotes adherence to it. A tangible copy gives an order the feeling of legitimacy. A respondent will be able to see that the order is court-issued, and he or she may read what conduct is prohibited, and know when the order will end. This is better for the respondent, petitioner, and society at large.

At any rate, in this case the requirement of proper service was unquestioned. This requirement was recognized by the trial court, which specifically stated that service was an element of the crime. R. 110 [86]. And the jury instruction included proper service as an element of the crime in the jury instructions. R. 64. Even the prosecutor did not question whether service was required in this case. Id. at 91, 99. And so, the requirement of proper service should not now be questioned on appeal. The only question should be whether the State made a prima facie case of service.

With regard to that question, the record shows that the State did not make a prima facie showing of proper service. The State presented no evidence that Mr. Jensen was

served with the protective order, it presented only the protective order itself. R. 112.

There is no notarized or witnessed signature from Mr. Jensen, no certificate of delivery or service, Id. at 5, and the State presented no witness testifying that he served Mr. Jensen with the order. Instead, there is only a final page with a statement that reads:

By this signature, Respondent approves the form, and accepts service[] of this Protective Order and waives the right to be personally served.

Id. This is followed by a cursive signature reading “Lavar Jensen,” and an instruction to “Serve Respondent at: 6985 So. Pine Mt. Dr. 84121.” Id. Nothing else appears.

This is not enough to show service. In the first place, there is nothing to show that the signature is Mr. Jensen’s. Without a notarization or other authentication, it cannot be assumed that Mr. Jensen is the person who signed the document. Anyone could have signed it. Second, even if the signature is Mr. Jensen’s, it is not clear whether service or waiver of service was being attempted. The signed paragraph mentions both, but does not show that either occurred. R. 112 [5]. Third, without proof of service, it cannot be assumed that Mr. Jensen received a copy of the order, which is the whole point of the service requirement. Lastly, nothing in the order shows that the order was shown to Mr. Jensen, or that it was explained to him, as required by statute.¹⁸

Of course, the order does indicate that the parties stipulated to the provisions of the “Petitioner’s Verified Petition for Protective Order.” However, the Petition is a different

¹⁸ Under Utah Code Ann. § 30-6-4.2(4)(b) (Supp. 2002) the trial court should “make reasonable efforts to ensure that the order for protection is understood by the petitioner, and the respondent, if present.”

document from the protective order itself. It may have had different allegations or even different proposed restrictions. It is the protective order itself that must be explained to the respondent and served upon him. And that was not done in this case.

In short, nothing on the last page of the protective order meets the State's requirement of a prima facie showing of service.

B. To Make a Prima Facie Showing of Service, the State Must Provide More Than Just the Protective Order

Providing a certified copy of the protective order is the first step towards showing proper service, but this alone is not enough. The State must provide further evidence to show that Mr. Jensen was served with the order. Utah Code Ann. § 76-5-108(1) (1999).

Under rule 5 of the Utah Rules of Civil Procedure,¹⁹ service may be made either by mailing or delivery:

Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in

¹⁹ Rule 5 is applicable to criminal proceedings under rule 3 of the Utah Rules of Criminal Procedure. Rule 3 reads:

Whenever service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party *shall be made in the manner provided in civil actions.*

Utah R.Crim. 3(b) (2002) (emphasis added).

charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(B) Service by mail is complete upon mailing. . . .

Utah R.Civ. 5(b) (2002). Under this Rule, Utah courts have observed that a prima facie showing of service is made by a "sheriff's return of service," Southland Const. v. Semnani, 2001 UT 6, ¶2, 20 P.3d 875, or by a certificate of mailing.²⁰ These documents must have the correct name and address of the person served, plus an assertion that service was completed, or they are not valid.²¹ Another way to show service is to present testimony from the server that service was completed.²² Also, in circumstances where a legal document is signed, the signature must be authenticated either by notary²³ or by the testimony of a handwriting analyzer.²⁴

In this case, we have none of that. We have only a page with cursive writing

²⁰ See Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 647, 652 (Utah Ct. App. 1993) (holding that proper notice given when document mailed to the correct name and address and accompanied by an appropriate certificate of mailing.)

²¹ Southland Const., 2001 UT 6, ¶2; Baumgart, 851 P.2d at 652.

²² Rule 901 of the Utah Rules of Evidence provides that testimony from a knowledgeable witness may be presented to authenticate evidence. Utah R. Evid. 901(b)(1) (2002).

²³ Utah R. Evid. 902 (1) (2002).

²⁴ The authenticity of handwriting may be attested to either by a non-expert person who is familiar with the subject's handwriting or by an expert who compares the handwriting with authenticated specimens. Utah R. Evid. 901(b)(2) & (3) (2002).

reading “Lavar Jensen,” and below that the address of “6985 So. Pine Mt. Dr. 84121.”

There is no certificate of service, testimony from the server, notary, or testimony from a handwriting analyzer. In these circumstances, the signature page cannot be considered either authenticated²⁵ or self-authenticating.²⁶ And so, the State has not met its

²⁵ Rule 901 of the Utah Rules of Evidence indicates that evidence must be authenticated:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Utah R. Evid. 901(a) (2002). The rule then lists several methods of authenticating evidence. Utah R. Evid. 901 (2002). Some of these methods are not explored in this section. However, since it is unlikely that the signature could be authenticated by any of these means, an exhaustive exploration is unnecessary.

²⁶ Rule 902 of the Utah Rules of Evidence indicates that some evidence, such as public documents or certified copies of public records, may be self-authenticated:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution. . . .

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

Utah R.Evid. 902 (2002) (emphasis in original).

In this case, although the protective order is certified copy, Mr. Jensen’s signature on the last page is not notarized as required in subsection (1). And so, that page of the order cannot be used to make a prima facie showing of service.

requirement of making a prima-facie showing that Mr. Jensen was served.

Case law supports this. One supporting case is Southland Construction v. Semnani. In that case the Utah Supreme Court evaluated the validity of a service of summons. Southland Const., 2001 UT 6, ¶2. The affidavit of service said only that the server had left a copy of the summons “for the defendant with John Doe (John Doe (refused ID.)) a person of suitable age and discretion there residing at 4346 S. Mulholland St., Salt Lake City his/her usual place of abode.” Id. There was nothing else. Id. The address mentioned was not alleged to be the defendant’s, and there was no assertion that the defendant was served. Id. at ¶3. And so, a prima facie showing of service was not made. Id. at ¶5.

Here, the State’s showing of service is just as inadequate. The signature reading “Lavar Jensen” could have been written by anybody. There is no assurance that Mr. Jensen wrote the signature, read the protective order, or even saw the protective order. Also, the address given is not alleged to be Mr. Jensen’s residence, workplace, or any other place associated with him. And the document does not show he was served there or anywhere else. As in Southland Construction, this showing is wholly inadequate.

In sum, the State’s failure to make a prima facie showing of service undermines Mr. Jensen’s conviction, and it must be reversed as a matter of law.

II. THE JURY SELECTION WAS UNCONSTITUTIONAL BECAUSE IT WAS TAINTED BY SEXUAL DISCRIMINATION

The equal protection provision of the federal constitution prohibits the prosecutor

from using peremptory challenges to remove venire persons on the basis of gender. However, in this case the prosecutor did just that; she applied a sexual stereotype in deciding to remove two men, Mr. Steven Smith and Mr. Gary Neilson, from the venire.

During voir dire, these men had raised their hands when the court asked the question: “Have any of you been involved in a domestic violence dispute either as a victim, a witness, or a defendant?” R. 110 [24]. As these men raised their hands, several other men and women raised their hands. However, the court asked for no further detail. Id. Then, during the jury selection, the prosecutor removed Mr. Smith and Mr. Neilson. R. 57. By way of explanation, the prosecutor said “logically I assumed that usually they would be on defendant’s side, since more than likely than not men are the respondents to protective orders” R. 110 [32]. The prosecutor’s assumption that these men were respondents to protective orders, rather than petitioners or even witnesses, is an illegal sexual stereotype. And the application of this stereotype tainted the jury selection.

The law governing this issue centers around Batson v. Kentucky, issued in 1986. In that case, the United States Supreme Court emphasized that the jury selection process should not be hindered by the evils of social discrimination that undermined the fabric of our society in the past. Batson then went on to prohibit discrimination against African American venire persons. Batson v. Kentucky, 476 U.S. 79, 89 (1986). This holding was readily extended to protect members of all cognizable racial minority groups in Holland v. Illinois, 493 U.S. 474, 476-77 (1990).

In J.E.B. v. Alabama, the Court examined the issue of gender discrimination in

jury selection. In that case the State of Alabama filed a paternity suit against a man on behalf of a mother and her minor child. J.E.B. v. Alabama, 511 U.S. 127, 129 (1994). The venire consisted of thirty-six people, twelve men and twenty-four women. Id. The State used nine of its ten peremptory strikes to remove men and the defendant used all but one of his strikes to remove women. Id. The resulting jury consisted entirely of women. Id. The defendant was found to be the father of the child and was ordered to pay child support. Id. He appealed, claiming that the prosecutor unconstitutionally discriminated against men in exercising his peremptory challenges. Id. at 129-30.

The United States Supreme Court agreed. The Court declared:

[t]oday we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

Id. at 130-31.

Attempting to justify the strikes, the State drew the Court's attention to the fact that the case involved a paternity action filed on behalf of a child born out of wedlock. Id. at 137-38. The State argued that it was reasonable to strike virtually all of the men from the jury because, historically, male jurors had been disposed to accept the arguments of a man while female jurors were disposed to accept the arguments of the mother. Id. The Court flatly rejected this argument, declaring, "[w]e shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" Id. at 138 (citation omitted). The Court emphasized:

When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."²⁷

Addressing concern that its holding would severely cripple the important role of peremptory challenges in impaneling fair, impartial juries, the Court added that its holding "does not imply the elimination of all peremptory challenges." Id. at 143. On the contrary, "[p]arties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias." Id.

Finally, the Court advised that, to avoid pretextual strikes, trial courts should conduct a thorough voir dire so that parties will have a firm basis upon which to exercise

²⁷ Id. at 140 (emphasis added) (quoting Powers v. Ohio, 499 U.S. 400, 412-13 (1991)). Significantly, the Court also noted:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization. . . . The generalization advanced by Alabama in support of its asserted right to discriminate on the basis of gender is, at the least, overbroad, and serves only to perpetuate the same 'outmoded notions of the relative capabilities of men and women, that we have invalidated in other contexts.' . . . The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

Id. at 139 n.11 (citations omitted).

their peremptory strikes. Id. at 143-44. The Court observed, “[i]f conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise.” Id. at 143.

The Utah Supreme Court recently recognized that J.E.B. v. Alabama prohibits Utah prosecutors from purposefully discriminating against venire persons on the basis of their gender.²⁸ Likewise, this Court holds that striking potential jurors solely on the basis of their gender violates the principal of equal protection. State v. Shepherd, 1999 UT App 305, ¶28, 989 P.2d 503.

When sexual discrimination occurs, a showing of harmfulness is not required. The conviction must simply be reversed. Sexual discrimination is a structural error that affects the entire trial from beginning to end, and it can never be considered harmless. State v. Russell, 917 P.2d 557, 560 (Utah Ct. App. 1996). This reasoning is consistent with Batson v. Kentucky, which indicated that a showing of purposeful racial discrimination, unrebutted by a race-neutral explanation, requires the reversal of the defendant’s conviction.²⁹

²⁸ State v. Litherland, 2000 UT 76, ¶23 n.9, 12 P.3d 92; State v. Colwell, 2000 UT 8, ¶14, 994 P.2d 177.

²⁹ Batson, 476 U.S. at 100. See also State v. Pharris, 846 P.2d 454, 459 (Utah Ct. App. 1993) (Parties’ stipulation that a showing of harm is not required where purposeful discrimination is shown is “consistent with the directive in Batson that if a court finds unrebutted, purposeful discrimination, ‘precedents require that [a] petitioner’s conviction be reversed.’”)

In this case, the prosecutor removed two men from the jury because she assumed that they were respondents to protective orders. R. 110 [32]. This assumption was based solely on their gender. Id. Nothing else supported her assumption. The men had not indicated that they were respondents, and they did not otherwise imply that they had been respondents rather than petitioners or witnesses. The prosecutor's sex-based assumption that they were respondents is an illegal stereotype that requires reversal of Mr. Jensen's conviction.

This is soundly demonstrated by the application of the Batson test for racial or sexual discrimination.³⁰ The test has three parts. Under the first part of the test, the party alleging discrimination must proffer a prima facie showing of intentional discrimination. J.E.B., 511 U.S. at 144-45. Once a prima facie showing has been proffered, "[t]he burden then shifts to the challenged party to show the existence of a [gender] neutral reason for the challenge." State v. Cantu, 778 P.2d 517, 518 (Utah 1989). If the prosecutor's explanation is discriminatory on its face, the challenged peremptory strike violates the equal protection principal and the trial court must disallow the strike as a matter of law.³¹

³⁰ J.E.B., 511 U.S. at 144-45; Batson, 476 U.S. at 96-99.

³¹ See Batson, 476 U.S. at 98 ("The prosecutor therefore *must* articulate a neutral explanation related to the particular case to be tried. The trial court *then* will have the duty to determine if the defendant has established purposeful discrimination.") (emphasis added) (footnotes omitted); State v. Bowman, 945 P.2d 153, 155-56 (Utah Ct. App. 1997) (Once a race neutral explanation is proffered, the trial court must determine whether the explanation is a pretext for racial discrimination. This determination rests on the credibility of the proponent of the strike, and this Court "will not reverse the decision of the trial court unless it is clearly erroneous."); State v. Higginbotham, 917 P.2d 545, 548 (Utah 1996) (Because the final step requires the trial court to evaluate the credibility of the proponent of the strike, who has already proffered a race neutral explanation, the court's determination "will not be set aside unless it is

On the other hand, the prosecutor's explanation is gender-neutral, the trial court must proceed to determine whether purposeful sexual discrimination has tainted the jury selection process. Pharris, 846 P.2d at 464.

This test is applied to the facts of this case in the sections below.

A. The Prosecutor Waived the Requirement of a Prima Facie Showing of Sexual Discrimination

Under the first part of the test, Mr. Jensen's defense counsel was required to make a prima facie showing of intentional discrimination. J.E.B., 511 U.S. at 144-45. However, this requirement was waived by the prosecutor in this case. She did not wait for a prima facie showing before explaining her reasons for striking Mr. Smith and Mr. Neilson, R. 110 [32], and she never complained that a prima facie showing had not been made. R. 110 [31-32]. She did not even inform the court that a prima facie showing was required. Id. In these circumstances, the prima facie showing is deemed waived.

The case law is unequivocal on this point. Under the United States Supreme Court case of Hernandez v. New York, the requirement of a prima facie showing is waived once the prosecutor explains the strike and the trial court rules on the ultimate issue of sexual discrimination:

Once a prosecutor has offered a race-neutral explanation for the peremptory

clearly erroneous."); State v. Merrill, 928 P.2d 401, 403 (Utah Ct. App. 1996) ("'[U]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' . . . [When the explanation is race neutral] the inquiry, as to whether Batson was violated, proceeds to step three.") (citations omitted).

challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

Hernandez v. New York, 500 U.S. 352, 359 (1991). This principal is readily accepted by the lower federal courts, including the Tenth Circuit, United States v. Johnson, 941 F.2d 1102, 1108 (10th Cir. 1991), and by the Utah state courts.³² In adopting the principal, the Utah Supreme Court explained that a prosecutor must actually challenge the sufficiency of the prima facie case to preserve it for appellate review:

Where the proponent of the peremptory challenge fails to contest the sufficiency of the prima facie case at trial and merely provides a rebuttal explanation for the challenge, the issue of whether a prima facie case was established is waived.

Higginbotham, 917 P.2d at 547.

In this case, the prosecutor did not challenge the sufficiency of the prima facie showing and so the issue is waived.

However, even if this issue was not waived, the record shows that there is a prima facie case of sexual discrimination. The elements of a prima facie case were enunciated by this Court in State v. Shepherd:

In Utah, the elements necessary to establish a prima facie case include: “(1) as complete a record as possible, (2) a showing that persons excluded belong to a cognizable group . . . and (3) a showing that there exists ‘a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.’”³³

³² Colwell, 2000 UT 8, ¶18; Bowman, 945 P.2d at 155 n.2; Merrill, 928 P.2d at 403.

³³ State v. Shepherd, 1999 UT App 305, ¶29, 989 P.2d 503 (quoting State v. Alvarez, 872 P.2d 450, 456 (Utah 1994)).

In this case, those elements appear. The prosecutor used one hundred percent of her strikes to eliminate men.³⁴ And the defendant that she was prosecuting, Mr. Jensen, is a man who was charged with violating a protective order obtained by Ms. Thomas, a woman. Further, there was no apparent reason for Mr. Smith's and Mr. Neilsen's dismissals. They did not say anything that would make them clearly undesirable from a prosecutorial point of view, and they did not appear to be incompetent. R. 110 [14-15]. These facts alone make a prima facie showing of gender discrimination.³⁵

On top of this, however, this case justifies careful scrutiny for gender discrimination because it involves an implication of domestic violence, which is a gender-

³⁴ R. 57. Each party exercised three peremptory strikes. Id.

³⁵ Batson, 476 U.S. at 96-97 (pattern of striking members of cognizable racial group may give rise to inference of discrimination); Maddox v. State, 708 So.2d 220, 224 (Ala. Ct. App. 1997) (prima facie case established where prosecutor used nine of his eleven peremptory challenges to strike men); People v. Gandy, 878 P.2d 68, 69 (Colo. Ct. App. 1996) (prima facie case established where venire consisted of eleven men and fourteen women, and prosecutor used all six of his peremptory challenges to strike men); State v. Bourgeois, 786 S.2d 771, 776 (La. Ct. App. 2001) (prima facie case established where prosecutor exhibited a pattern of striking men from the jury where "[n]o obvious reason for the strikes other than gender appear of record."); State v. Call, 508 S.E.2d 496, 510 (N.C. 1998) (Factors to consider in evaluating whether a prima facie case has been established "include the gender of the defendant, the victim and any key witnesses; questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of gender discrimination; the frequent exercise of peremptory challenges to prospective jurors of one gender that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members of one gender; whether the State exercised all of its peremptory challenges; and the ultimate gender makeup of the jury."); State v. Turner, 879 S.W.2d 819, 821 (Tenn. 1994); Pharris, 846 P.2d at 458 (this Court found a prima facie case of racial discrimination where prosecutor used three of his four peremptory challenges to strike Native Americans); State v. Donaghy, 769 A.2d 10, 12 (Vt. 2000) (prima facie case established where venire consisted of ten women and eleven men, and prosecutor used six strikes to eliminate men and one strike to eliminate a woman); Payne v. Gundy, 468 S.E.2d 335, 340, 343 (W. Va. 1996) (prima facie case established where venire consisted of nine men and three women, and prosecutor used two of his three peremptory strikes to eliminate women).

sensitive issue. Courts across the country are particularly diligent in scrutinizing jury selection proceedings when cases involve domestic violence, rape, sexual harassment, and other gender-sensitive issues. This is because such cases provide the most fertile ground for the growth of sexual discrimination in jury selection:

The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender of that the “deck has been stacked” in favor of one side.³⁶

And so, in this case the trial court should have been particularly concerned about the possibility of sexual discrimination, and immediately investigated any such possibilities. This, along with the fact that the prosecutor used one hundred percent of her strikes to eliminate men from the jury, and the lack of any apparent reasons to dismiss them, is sufficient to establish a prima facie case of sexual discrimination.

B. The Prosecutor’s Explanation for her Strikes was not Gender-Neutral

The second part of the three-part test requires the prosecutor to come forward with a gender-neutral explanation for the challenged dismissals. J.E.B., 511 U.S. at 145. The explanation “must be based on a juror characteristic other than gender, and the proffered

³⁶ J.E.B., 511 U.S. at 140. See also Donaghy, 769 A.2d at 14 (“Because this case involves the gender-related issue of domestic violence, we review it with a keen eye to preventing state-sanctioned discrimination); Payne, 468 S.E. 2d at 343 (“inasmuch as this action involves a case of alleged domestic assault and battery, it comports with the admonition of J.E.B., set forth above, that the potential for cynicism in the face of gender discrimination in the jury selection process ‘is particularly acute in cases . . . involving rape, sexual harassment, or paternity.’”)

explanation may not be pretextual.” J.E.B., 511 U.S. at 145. In other words, it is not enough for the prosecutor merely to state that there was no intentional discrimination.³⁷ There must be substance to the explanation. Specifically, it must be related to the case being tried, and it must be clear and reasonably specific. Cantu, 778 P.2d at 518.

In this case, the prosecutor’s explanation was not gender-neutral. It was based upon the sexual stereotype that men are the respondents, rather than the petitioners or witnesses, to protective orders. Her explanation was as follows:

I didn’t even initially realize that all three of [my strikes] were men, all three of my challenges were men until [the defense counsel] pointed it out. *I have on my notations that the three struck were part of the protective order, and logically I assumed that usually they would be on defendant’s side, since more than likely than not men are the respondents to protective orders, other than women.* Those were my reasoning. I also struck – I don’t have his name here – the first male, because he was an engineer, I – my reasoning being someone that – I would want someone that’s less analytical.

R. 110 [32] (emphasis added). This explanation demonstrates that the prosecutor relied on a sexual stereotype in striking Mr. Smith and Mr. Neilson from the jury.³⁸ She assumed that these men, both of whom had indicated involvement with protective orders, were the perpetrators of the violence. Id. at 33-34. She also assumed that women involved with

³⁷ Pharris, 846 P.2d at 463 (citing Batson, 476 U.S. at 98).

³⁸ Mr. Jensen does not appeal the prosecutor’s strike against Mr. Dallas Jolley. This strike was based, not only upon his involvement with a protective order, but also on the prosecutor’s wish to avoid having such analytical persons on the jury. Id. This “analytical” explanation provides a basis for his dismissal that is separate from the sexual discriminatory basis, and so the strike is legitimate under the Batson jurisprudence. Bowman, 945 P.2d 153, 157.

protective orders were not.³⁹ These assumptions show that sexual discrimination was inherent in her strikes, and they should have been prevented by the trial court.

Persuasive case law supports this. For example, in Commonwealth v. Tourscher, the Superior Court of Pennsylvania vacated a conviction for several crimes of domestic violence because the prosecutor “blatantly stated that she struck six female venirepersons because ‘from prosecuting domestic cases [she has found] that women are a lot tougher on domestic cases’” Commonwealth v. Tourscher, 682 A.2d 1275, 1280 (Pa. Super. Ct. 1996) (citation omitted). And then, in a case of incest, the Louisiana Court of Appeals remanded for a Batson hearing because the prosecutor commented before the trial and during the impanelment that he was trying to keep men off the jury. Bourgeois, 786 So.2d at 775.

The Alabama Court of Criminal Appeals reversed a rape conviction because the prosecutor’s explanation for removing a black woman from the jury was that “there are some authorities who believe that the fewer the women that you have on a rape case, the . . . as jurors, the better.” Maddox, 708 So.2d at 228. Finally, in a case involving two counts of incest, the Supreme Court of Tennessee affirmed the trial court’s ruling that the defense counsel could not use his peremptory strikes to eliminate women from the jury after he admitted that he was trying to empanel an all-male jury. Turner, 879 S.W.2d at

³⁹ Three venire women, Mary Lee, Debra Jo Garrison, and Judith Mincher, indicated some involvement with protective orders, but they did not explain their involvement. R. 110 [23]. Another woman, Tamra Earl, indicated that she had been a victim of an assault or protective order violation. Id. at 22-23.

Sometimes the discrimination is not blatant, but it is nonetheless illegal. For example, recently, the Supreme Court of Vermont remanded a case for a Batson hearing because the prosecutor used eighty-five percent of his strikes against men. Donaghy, 769 A.2d at 14-15. That Court noted that “[w]hen men appear to be systematically removed from juries selected by a prosecutor [charged with prosecuting violent crimes against women], there is a strong inference of gender discrimination.” Id. at 15. In another case, the West Virginia Supreme Court reversed an assault and battery conviction because the prosecutor’s explanation for using two of his three peremptory strikes to eliminate women was cursory and ambiguous and appeared to be a pretext for gender discrimination. Payne, 468 S.E.2d at 340. Also, the Colorado Court of Appeals remanded a case involving a conviction for burglary because the prosecutor dismissed six men from the jury. Gandy, 878 P.2d at 69. The prosecutor in Gandy had dismissed the men because his “profile for the ideal juror was, like the victim, an educated professional woman who resided in the same neighborhood and in a similar living situation.” Id. at 70. The Court was dissatisfied with this answer, and remanded for further findings and rulings on the issue of gender discrimination. Id.

In this case, the prosecutor justified her dismissal of Mr. Smith and Mr. Neilson on the basis of her unfounded assumption that they were respondents in protective orders. This is sexual stereotyping and it is illegal. As the United States Supreme Court has said, we cannot accept an explanation that is based on “the very stereotype the law

condemns.”” J.E.B., 511 U.S. at 138 (citation omitted). Thus, the trial court should have disallowed the peremptory challenge, and should not have proceeded to the third part of the three-part test.⁴⁰ Because the court did proceed, however, its ruling is examined in the next section.

C. The Trial Court’s Ruling that There was no Intentional Discrimination is Clearly Erroneous In Light of the Prosecutor’s Stereotyping

Under part three of the Batson test, a trial court should consider the prosecutor’s explanation in light of the surrounding circumstances and decide whether there was intentional discrimination. Colwell, 2000 UT 8, ¶20-24. In making this determination, the trial court should keep in mind that there are several things that tend to show that the prosecutor’s explanation is a pretext for discrimination:

(1) [whether there is an] alleged group bias not shown to be shared by the juror in question, (2) [when there is] failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor’s reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.⁴¹

Ultimately, the trial court must determine whether the prosecutor’s explanation is ““(1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4)

⁴⁰ See Bowman, 945 P.2d at 155 (“If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.”) (quoting Higginbotham, 917 P.2d at 547).

⁴¹ Cantu, 778 P.2d at 518-19. See also State v. Span, 819 P.2d 329, 342-43 (Utah 1991).

legitimate.” Cantu, 778 P.2d at 518 (citation omitted).

Applying this law demonstrates that the prosecutor discriminated against Mr. Smith and Mr. Neilson on the basis of gender. She assumed that, because they had indicated some involvement with protective orders, they were the accused perpetrators of domestic violence. She said that, “logically [] assumed that usually they would be on defendant’s side, since more than likely than not men are the respondents to protective orders” R. 110 [32]. This explanation is inherently discriminatory because it assigns certain opinions, sympathies, and tendencies to Mr. Smith and Mr. Neilson solely on the basis of their gender.

Further, sexual discrimination is apparent because there is no explanation for Mr. Smith’s and Mr. Neilson’s dismissal other than the prosecutor’s application of a sexual stereotype. These men appeared neither incompetent nor intellectually lacking. Id. at 14-15. Nor did they say anything that would tend to show bias towards the defense. And, neither of them had any characteristics that would be undesirable from a prosecutorial point of view.⁴²

⁴² The record shows the following information about Mr. Smith: he has lived in Salt Lake County all of his life, and he is married. R. 110 [14]. He went to BYU and works as a car dealer. Id. And, he raised his hand in response to the court’s question: “Have any of you or your close friends or relatives that you’re aware of, of course, ever been a petitioner or a respondent in terms of a protective order?” Id. at 23. He also raised his hand in response to the court’s question: “Have any of you been involved in a domestic violence dispute either as a victim, a witness, or a defendant?” Id. at 24.

The record shows the following information about Mr. Neilson: he has lived in Salt Lake County all his life and he is single. Id. at 16. He is studying to be an EMT and he works as a heavy equipment operator. Id. He raised his hand in response to the court’s question: “Have any

The trial court did not take any of this into account in evaluating whether sexual discrimination had occurred. R. 110 [34]. Indeed, the trial court gave only scant support for its finding of no sexual discrimination. The court merely observed that, because Mr. Smith and Mr. Neilson were involved in some way with protective orders, their exclusion is justifiable. Id. The court said:

I note that indeed they did, in terms of my notes here, were involved in some capacity with protective orders, and I think that we had left that open and not pursued that further in terms of as defendants, victims, and so forth and so on. I think that is a basis – I find that that’s a basis to exclude them, and of course that then is a basis other than gender.

Id. However, this ruling is fatally flawed. It ignores the fact that the prosecutor applied a sexual stereotype to determine that Mr. Smith and Mr. Neilson had been the respondents to protective orders. Id. at 32. And then she excluded them on that basis. Id.

Put differently, she did not exclude them simply because they had been involved in protective orders, but because of her assumption that they were respondents to protective orders. That is illegal sexual stereotyping and it is prohibited by J.E.B. Because of this, Mr. Jensen’s conviction should be reversed and this case remanded for a new trial.

III. THE TRIAL COURT’S DECISION TO HOLD TRIAL WITHOUT A CRUCIAL DEFENSE WITNESS WAS AN ABUSE OF DISCRETION

A crucial defense witness, Ms. Thomas, did not appear at trial. Ms. Thomas was

of you or your close friends or relatives that you’re aware of, of course, ever been a petitioner or a respondent in terms of a protective order?” Id. at 23. He also raised his hand in response to the court’s question: “Have any of you been involved in a domestic violence dispute either as a victim, a witness, or a defendant?” Id. at 24.

the petitioner who filed for the protective order that Mr. Jensen was charged with violating. R. 112. Her testimony, and the impeachment of her expected statements, would have established that she told Mr. Jensen and several other people that the protective order had been dismissed. R. 110 [52]. It would have established that she continued her relationship with Mr. Jensen for two years after petitioning for a protective order against him. Id. It also would have shown that she made conflicting statements to police officers about alleged assaults. Id. at 54. Ultimately, it would have established that Mr. Jensen did not knowingly or intentionally⁴³ violate a protective order. Without it, the defense was crippled.

Immediately after the defense counsel discovered that Ms. Thomas had not appeared for trial, he motioned for a continuance. R. 110 [42-43]. The court denied the motion on the grounds that Ms. Thomas was not subpoenaed by the defense. Id. at 44. Then the defense counsel explained that he had not subpoenaed Ms. Thomas because the State had subpoenaed her already, and had assured that she would be at trial. Id. at 60-61. However, the court reiterated its denial of the motion. The defense counsel then asked for an advance ruling regarding the admissibility of statements that he had intended to present which would impeach statements Ms. Thomas had made to the police and others. Id. at 44-45. The court denied this motion on the grounds that it was hearsay. Id. at 58.

The trial court's denial of the motion for a continuance was an abuse of discretion

⁴³ To convict a defendant of violating a protective order the prosecutor must prove beyond a reasonable doubt that the defendant "intentionally or knowingly" violated the order. Utah Code Ann. § 76-5-108 (1) (1999).

because it overlooked the due process and confrontational provisions of the federal constitution. Under due process,⁴⁴ a defendant must have a meaningful opportunity to present his defense. State v. Garcia, 965 P.2d 508, 516 (Utah Ct. App. 1998). This means that he must be allowed to present evidence that is material to that defense.⁴⁵ In this case, material evidence included evidence that: 1) Ms. Thomas told Mr. Jensen and others that the protective order had been lifted; 2) that she continued her relationship with Mr. Jensen for two years after petitioning for the protective order; and 3) that she gave conflicting reports to the police about alleged domestic violence. R. 110 [52-54]. All of this supports Mr. Jensen's defense that he did not know that a protective order was in place. Without Ms. Thomas this information could not be presented. In these circumstances, the trial court's decision to move forward effectively denied Mr. Jensen due process.

⁴⁴ The due process provisions of the federal constitution are found in the Fifth Amendment, which reads "nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .," U.S. Const. amend. V, and the Fourteenth Amendment, which reads "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

⁴⁵ Id. Evidence is material to a defense if it is substantial enough that its absence casts doubt on the fairness of the verdict:

[The] touchstone of materiality is a "reasonable probability" of a different result [had the evidence in question been admitted], and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

State v. Bakalov, 1999 UT 45, ¶31, 979 P.2d 799 (citation omitted). And so, the test is not whether the admission of the evidence would have changed the verdict, but whether the suppression "undermines confidence in the outcome of the trial." Id. (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)).

The trial court's decision also overlooked Mr. Jensen's constitutional right to confront the witnesses against him.⁴⁶ Under the confrontation clause, a defendant has the right to cross-examine the witnesses against him and impeach their testimonies if he is able. State v. Chavez, 2002 UT App 9, ¶18, 41 P.3d 1137. This right is so compelling that it is considered essential to a fair trial. State v. Kendrick, 538 P.2d 313, 315 (Utah 1975).

In this case, evidence of Ms. Thomas' statements to the police were presented, R. 110 [66-75], and the protective order she obtained was submitted, R. 112, but Mr. Jensen never received an opportunity to cross-examine her. This violates Mr. Jensen's right to confront the witnesses against him. As the United States Supreme Court has held, out-of-court statements and written papers cannot take the place of the presence of the witness at trial:

The primary object of the [confrontation provision] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.⁴⁷

The Utah Supreme Court has agreed, and has held that, where no opportunity to cross-examine is provided, the conviction must be reversed and the case remanded for a new

⁴⁶ The confrontation provision of the federal constitution is found in the Sixth Amendment, which reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. Const. amend. VI. This provision was extended to the states in the Fourteenth Amendment. U.S. Const amend. XIV, § 1.

⁴⁷ California v. Green, 399 U.S. 149, 157-58 (1970) (citation omitted).

trial.⁴⁸ Accordingly, in this case Mr. Jensen's conviction must be reversed.

It is true that the defense counsel did not subpoena Ms. Thomas himself, but relied on the State's representation that Ms. Thomas had been subpoenaed. However, this does not justify the trial court's decision to deny the defense counsel's motion for a continuance. The defense counsel's reliance on the prosecutor's representations was reasonable. Prosecutors typically have freer access to their witnesses, as well as more trust from the alleged victims. And so their representations about whether victims or witnesses will appear are usually reliable. The defense counsel's reliance upon these representations was understandable.

The case of State v. Troyer is directly on point. In that case, the defendant was placed in prison but wished to be transferred to the county jail. State v. Troyer, 910 P.2d 1182, 1185 (Utah 1996). He feared that an informant was "planted" at the prison and

⁴⁸ Kendrick, 538 P.2d at 315. In Kendrick, two men, "Travis" and "Kendrick" were charged with robbery. Id. at 314. After appropriate motions, the cases were severed. Id. At his trial, Travis testified that Kendrick had committed the robbery. Id. But when he was brought in to testify at Kendrick's trial, he refused to answer any questions. Id. Finally, he was charged with contempt of court and removed. Id. Then, over objection from the defense counsel, the prosecutor read Travis' testimony from his own trial. Id. On appeal, the Utah Supreme Court reversed, holding that this violated Kendrick's right to confront the witnesses against him:

The problem has been before the United States Supreme Court wherein the rule has been laid down that the right of a defendant to confront the witnesses against him is a fundamental right and is essential to a fair trial. Right of confrontation is based upon the notion that the accused should have an opportunity to cross-examine the witnesses against him. In this case defendant had no opportunity to confront Travis, nor did his counsel have an opportunity to cross-examine him. The fact that the prosecutor cross-examined Travis at his trial cannot be substituted for the defendant's right of cross-examination.

Id. at 315 (citing Pointer v. Texas, 380 U.S. 400 (1965)).

would try to obtain evidence against him. Id. at 1185-86. He filed a motion for a transfer, but the prosecutor opposed it. Id. In its argument, the prosecutor assured the defendant and the trial court that an informant was not planted at the prison, and there was no need for a transfer. Id. On this basis, the defendant did not pursue his motion to transfer. Id. at 1186. Later, to the surprise of all, the prosecutor attempted to introduce the testimony of an informant who had been planted at the prison. Id. The trial court suppressed this evidence, and the State appealed. The Utah Supreme Court affirmed the trial court's decision. Id. at 1195. The Court explained that, because the defendant had relied on the State's assurances and this reliance was reasonable, the State could not breach its promise and thereby profit. Id.

While there is no indication here that the prosecutor consciously attempted to deceive the defense counsel or Mr. Jensen, the prosecutor did assure the defense that Ms. Thomas had been subpoenaed. R. 110 [60]. And, as did the defendant in Troyer, Mr. Jensen reasonably relied upon this assurance to his detriment. That detriment came when the trial court denied his motion for a continuance based on the fact that Mr. Jensen had not subpoenaed Ms. Thomas himself. Id. at 44. This ruling ignored Mr. Jensen's reasonable reliance on the prosecutor's representation.

Finally, there was no practical reason for the trial court to deny the defense counsel's motion for a continuance. For one thing, the State would not have been prejudiced by the continuance. There is no indication that any of its witnesses would have been unavailable later or that its case would have deteriorated in some way. Indeed, the

only harm would have been to Mr. Jensen, who's time in jail would have been prolonged as he waited for the criminal justice process to run its course.⁴⁹ Secondly, the only practical result of granting the motion would have been the appearance of Ms. Thomas in court, and this was crucial to the defense's case. All in all, the court's failure to grant the motion for a continuance was an abuse of discretion.

Further, this error was harmful to Mr. Jensen.⁵⁰ The crux of the defense was to be testimony from Ms. Thomas that she told Mr. Jensen and others that the protective order had been lifted, and that she continued her relationship with Mr. Jensen for two years after petitioning for a protective order. R. 110 [48-54]. Also, she had told conflicting stories to police. Id. Further, the defense planned to show that Ms. Thomas arranged this prosecution well in advance for reasons of vengeance and spite,⁵¹ and not because she was afraid of Mr. Jensen, or for any other legitimate reason. Without Ms. Thomas at trial, Mr. Jensen was not able to present any of this, and the defense was severely crippled.

In sum, the trial court's denial of Mr. Jensen's motion for a continuance denied

⁴⁹ See R. 93 (showing Mr. Jensen was not released until after trial).

⁵⁰ Before Mr. Jensen's conviction may be reversed on the basis of the trial court's error in denying the motion for a continuance, harmfulness must be shown. Chavez, 2002 UT App. 9, ¶22.

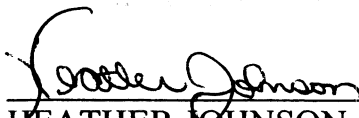
⁵¹ The defense counsel intended to present evidence that, on the day that Ms. Thomas reported that Mr. Jensen had violated the protective order, Ms. Thomas' neighbor, Mr. Johnson, heard her tell Mr. Jensen "F you. I'm going to get you." R. 110 [49]. And, she told Deputy Lindgren that Mr. Jensen had assaulted her, but she told Deputy Nelson that she only found his wallet in her home. Id. Further, in another case of this type that is over a year old, Ms. Thomas deliberately gave authorities a false address for Mr. Jensen so that he would not get arrested, but so she would have "some leverage over him." R. 110 [51].

him his right of due process and his right to confront the witnesses against him. And, it was an abuse of discretion that proved harmful to the defense. In these circumstances, Mr. Jensen's conviction should be reversed and this case should be remanded for a new trial.

CONCLUSION

Mr. Jensen respectfully asks this Court to reverse his conviction on the grounds that the State failed to show that he was properly served with the protective order he is accused of violating. Alternatively, Mr. Jensen asks this Court to reverse his conviction and remand this case for a new trial either because: 1) the prosecutor sexually discriminated against two veniremen during jury selection, or 2) the trial court's denial of Mr. Jensen's motion for a continuance was a harmful abuse of discretion.

SUBMITTED this 13th day of September, 2002.



HEATHER JOHNSON
Attorney for Defendant/Appellant

RUDY BAUTISTA
Attorney for Defendant/Appellant

L. MONTE SLEIGHT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and two copies to the Salt Lake District Attorney's Office, 2001 South State, S 3700, Salt Lake City, Utah 84190-1200, this 13th day of September, 2002.


HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of September, 2002.

ADDENDUM A

THIRD DISTRICT COURT MURRAY COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 011200642 MO
	:	
LAVAR T JENSEN,	:	Judge: JOSEPH C. FRATTO
Defendant.	:	Date: April 1, 2002

PRESENT

Clerk: wendyc

Prosecutor: MCKINNON, KIMBERLY

Defendant

Defendant's Attorney(s): VIERA, BRENDA

DEFENDANT INFORMATION

Date of birth: May 21, 1972

Audio

Tape Number: 02-164 Tape Count: 1850-1950

CHARGES

1. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 10/16/2001 Guilty

SENTENCE JAIL

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a Class A Misdemeanor, the defendant is sentenced to a term of 1 year(s) in the Salt Lake County Jail.

Defendant is to report to the Salt Lake County Jail.
Commitment is to begin immediately.

Credit is granted for 175 day(s) previously served.

Case No: 011200642

Date: Apr 01, 2002

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

The Court retains jurisdiction. Ms. Viera to look into an evaluation for further options and notice back up.

Dated this 1 day of April, 2002.



JOSEPH C. FRATTO
~~By District Court Judge~~
STAMP USED AT DIRECTION OF JUDGE

ADDENDUM B

(11) "Protective order" means a restraining order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner has given notice in accordance with this chapter.

History: C. 1953, 30-6-1, enacted by L. 1979, ch. 111, § 1; 1989, ch. 32, § 1; 1990, ch. 183, § 15; 1991, ch. 180, § 2; 1993, ch. 137, § 3; 1995, ch. 300, § 2; 1996, ch. 244, § 2; 1997, ch. 303, § 1; 1998, ch. 282, § 12; 2000, ch. 170, § 1; 2001, ch. 9, § 51.

Amendment Notes. — The 2000 amend-

ment, effective May 1, 2000, added Subsection (2)(e), redesignating existing Subsection (2)(e) as (2)(f) and making a related change.

The 2001 amendment, effective April 30, 2001, added "which" after "the District of Columbia" in Subsection (8).

NOTES TO DECISIONS

Cited in Hill v. Hill, 968 P.2d 866 (Utah Ct. App. 1998); Bailey v. Bayles, 2001 UT App 34, 18 P.3d 1129.

COLLATERAL REFERENCES

A.L.R. — Admissibility of expert testimony regarding questions of domestic law, 66 A.L.R.5th 135.

"Cohabitation" for purposes of domestic violence statutes, 71 A.L.R.5th 285.

30-6-2. Abuse or danger of abuse — Protective orders.

NOTES TO DECISIONS

Applicability.

To obtain a protective order under this section, petitioner was required only to demonstrate: (1) she is or was a cohabitant of the respondent, as defined by § 30-6-1(1); (2) she

had suffered physical abuse or domestic violence, as defined by § 77-36-1; and (3) she had an imminent fear of physical harm, or "a present fear of future abuse." Bailey v. Bayles, 2001 UT App 34, 18 P.3d 1129.

30-6-4.2. Protective orders — Ex parte protective orders — Modification of orders — Service of process — Duties of the court.

(1) If it appears from a petition for an order for protection or a petition to modify an order for protection that domestic violence or abuse has occurred or a modification of an order for protection is required, a court may:

(a) without notice, immediately issue an order for protection ex parte or modify an order for protection ex parte as it considers necessary to protect the petitioner and all parties named to be protected in the petition; or

(b) upon notice, issue an order for protection or modify an order after a hearing, whether or not the respondent appears.

(2) A court may grant the following relief without notice in an order for protection or a modification issued ex parte:

(a) enjoin the respondent from threatening to commit or committing domestic violence or abuse against the petitioner and any designated family or household member;

(b) prohibit the respondent from harassing, telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly;

(c) order that the respondent is excluded from the petitioner's residence and its premises, and order the respondent to stay away from the residence, school, or place of employment of the petitioner, and the

premises of any of these, or any specified place frequented by the petitioner and any designated family or household member;

(d) upon finding that the respondent's use or possession of a weapon may pose a serious threat of harm to the petitioner, prohibit the respondent from purchasing, using, or possessing a firearm or other weapon specified by the court;

(e) order possession and use of an automobile and other essential personal effects, and direct the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, automobile, and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings;

(f) grant temporary custody of any minor children to the petitioner;

(g) order any further relief that the court considers necessary to provide for the safety and welfare of the petitioner and any designated family or household member; and

(h) if the petition requests child support or spousal support, at the hearing on the petition order both parties to provide verification of current income, including year-to-date pay stubs or employer statements of year-to-date or other period of earnings, as specified by the court, and complete copies of tax returns from at least the most recent year.

(3) A court may grant the following relief in an order for protection or a modification of an order after notice and hearing, whether or not the respondent appears:

(a) grant the relief described in Subsection (2); and

(b) specify arrangements for parent-time of any minor child by the respondent and require supervision of that parent-time by a third party or deny parent-time if necessary to protect the safety of the petitioner or child.

(4) Following the protective order hearing, the court shall:

(a) as soon as possible, deliver the order to the county sheriff for service of process;

(b) make reasonable efforts to ensure that the order for protection is understood by the petitioner, and the respondent, if present;

(c) transmit, by the end of the next business day after the order is issued, a copy of the order for protection to the local law enforcement agency or agencies designated by the petitioner; and

(d) transmit a copy of the order to the statewide domestic violence network described in Section 30-6-8.

(5) (a) Each protective order shall include two separate portions, one for provisions, the violation of which are criminal offenses, and one for provisions, the violation of which are civil violations, as follows:

(i) criminal offenses are those under Subsections (2)(a) through (e), and under Subsection (3)(a) as it refers to Subsections (2)(a) through (e); and

(ii) civil offenses are those under Subsections (2)(f) through (h), and Subsection (3)(a) as it refers to Subsections (2)(f) through (h).

(b) The criminal provision portion shall include a statement that violation of any criminal provision is a class A misdemeanor.

(c) The civil provision portion shall include a notice that violation of or failure to comply with a civil provision is subject to contempt proceedings.

(6) The protective order shall include:

(a) a designation of a specific date, determined by the court, when the civil portion of the protective order either expires or is scheduled for

review by the court, which date may not exceed 150 days after the date the order is issued, unless the court indicates on the record the reason for setting a date beyond 150 days;

(b) information the petitioner is able to provide to facilitate identification of the respondent, such as social security number, driver license number, date of birth, address, telephone number, and physical description; and

(c) a statement advising the petitioner that:

(i) after three years from the date of issuance of the protective order, a hearing may be held to dismiss the criminal portion of the protective order;

(ii) the petitioner should, within the 30 days prior to the end of the three-year period, advise the court of the petitioner's current address for notice of any hearing; and

(iii) the address provided by the petitioner will not be made available to the respondent.

(7) Child support and spouse support orders issued as part of a protective order are subject to mandatory income withholding under Title 62A, Chapter 11, Part 4, Income Withholding in IV-D Cases, and Title 62A, Chapter 11, Part 5, Income Withholding in Non IV-D Cases, except when the protective order is issued ex parte.

(8) (a) The county sheriff that receives the order from the court, pursuant to Subsection (5)(a), shall provide expedited service for orders for protection issued in accordance with this chapter, and shall transmit verification of service of process, when the order has been served, to the statewide domestic violence network described in Section 30-6-8.

(b) This section does not prohibit any law enforcement agency from providing service of process if that law enforcement agency:

(i) has contact with the respondent and service by that law enforcement agency is possible; or

(ii) determines that under the circumstances, providing service of process on the respondent is in the best interests of the petitioner.

(9) (a) When an order is served on a respondent in a jail or other holding facility, the law enforcement agency managing the facility shall make a reasonable effort to provide notice to the petitioner at the time the respondent is released from incarceration.

(b) Notification of the petitioner shall consist of a good faith reasonable effort to provide notification, including mailing a copy of the notification to the last-known address of the victim.

(10) (a) A court may modify or vacate an order of protection or any provisions in the order after notice and hearing, except as limited under Subsection (10)(b).

(b) Criminal provisions of a protective order may not be vacated within three years of issuance unless the petitioner:

(i) is personally served with notice of the hearing as provided in Rules 4 and 5, Utah Rules of Civil Procedure, and the petitioner personally appears before the court and gives specific consent to the vacation of the criminal provisions of the protective order; or

(ii) submits a verified affidavit, stating agreement to the vacation of the criminal provisions of the protective order.

(11) A protective order may be modified without a showing of substantial and material change in circumstances.

(12) Insofar as the provisions of this chapter are more specific than the Utah Rules of Civil Procedure, regarding protective orders, the provisions of this chapter govern.

ADDENDUM C

Advisory Committee Note. — This rule is of Evidence (1971), contained a comparable the federal rule, verbatim. Rule 65, Utah Rules provision.

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983 — Part III, 1995 Utah L. Rev. 683.

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence §§ 254, 267 et seq.

C.J.S. — 31A C.J.S. Evidence § 337 et seq.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification.

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by court rule or statute of this state.

Advisory Committee Note. — Subdivision (b)(2) is in accord with State v. Freshwater, 30 Utah 442, 85 Pac. 447 (1906). Subdivision (b)(8)

is comparable with Rule 67, Utah Rules of Evidence (1971), except that the former rule imposed a 30-year requirement. Subdivision

ADDENDUM D

(b)(10) is an adaptation of subdivision (10) in the comparable federal rules to conform to state practice.

Cross-References. — Official record, authentication of copy, U.R.C.P. 44(a).
Writings, manner of proof, § 78-25-9.

NOTES TO DECISIONS

Affidavits.
Identification testimony.
Nonexpert opinion on handwriting.
Photographs.
Public records or reports.

Affidavits.

An affidavit that was undated, unpaginated, lacked a typical attestation at the end, did not say whether the affiant was making the statement from personal knowledge, and did not state that the affiant had even read the document was properly excluded. *State v. Chaney*, 1999 UT App 309, 989 P.2d 1091.

Identification testimony.

Voice identification under this rule does not involve the same concerns about reliability as eyewitness identification. Moreover, because the trial court engaged in an analysis akin to that required for admitting eyewitness identification, in response to defendant's claim that the identification procedure was unduly suggestive, defendant's due process rights were not violated. *State v. Silva*, 2000 UT App 292, 13 P.3d 604.

Nonexpert opinion on handwriting.

Writing may be proved by evidence of a witness who has seen the person write, even if the witness has seen him write only once and then only his name. The proof in such case may be very light, but the jury will be permitted to weigh it. *State v. Freshwater*, 30 Utah 442, 85 P. 447 (1906) (referred to in Advisory Committee Note).

Before allowing the proponent to provide authentication testimony on samples of defendant's handwriting, the trial court should require testimony as to the origin of proponent's familiarity with defendant's handwriting, and, in particular, whether it was acquired for pur-

poses of the current litigation. *State v. Jacques*, 924 P.2d 898 (Utah Ct. App. 1996).

Court's error in admitting authentication testimony and related evidence was not harmless. *State v. Jacques*, 924 P.2d 898 (Utah Ct. App. 1996).

Photographs.

In general, if a competent witness with personal knowledge of the facts represented by a photograph testifies that the photograph accurately reflects those facts, it is admissible, and any minor discrepancies in the testimony which go only to the details of the time and place the picture was taken are not material to the purpose for which the evidence is introduced and they do not undermine the adequacy of the foundation for admissibility of the photographs. *State v. Purcell*, 711 P.2d 243 (Utah 1985).

Trial court's determination that a witness did not establish the accuracy of the perspective of a proffered photograph was reasonable; court did not abuse its discretion in excluding the photograph for lack of proper authentication. *State v. Horton*, 848 P.2d 708 (Utah Ct. App.), cert. denied, 857 P.2d 948 (Utah 1993).

Public records or reports.

No Utah statute recognizes the certifying signature of a notary public, without more, as a proper means of authenticating an official document as evidence. *State v. Lamorie*, 610 P.2d 342 (Utah 1980).

Copies of county court records, certified by a duly authorized notary public who had no custody of the documents, official or unofficial, and who was not a deputy of the court clerk, the court clerk being the official custodian of the documents, did not constitute adequate authentication. *State v. Lamorie*, 610 P.2d 342 (Utah 1980).

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983 — Part III, 1995 Utah L. Rev. 683.

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 849 et seq.

C.J.S. — 32A C.J.S. Evidence § 819 et seq.

A.L.R. — Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 A.L.R.3d 1018.

Public records kept or stored on electronic computing equipment, 71 A.L.R.3d 232.

Construction and effect of § 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness, 72 A.L.R.3d 1243.

Authentication of bullets and other inorganic substances removed from human body for purposes of analysis, 79 A.L.R.5th 237.

Admissibility in evidence of aerial photographs, 85 A.L.R.5th 671.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or

the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in Paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by court rule, statute, or as provided in the constitution of this state.

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit or a written declaration of its custodian or other qualified person, certifying that:

(A) the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) the record was kept in the course of the regularly conducted activity;

(C) the record was made by the regularly conducted activity as a regular practice; and

(D) the person certifying the records does so under penalty of making a false statement in an official proceeding.

The affidavit or declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified foreign records of regularly conducted activity.* In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit or a written declaration by its custodian or other qualified person certifying that:

(A) the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) the record was kept in the course of the regularly conducted activity;

(C) the record was made by the regularly conducted activity as a regular practice; and

(D) the person certifying the records does so under penalty of making a false statement in an official proceeding.

The affidavit or declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(Amended effective October 1, 1992; November 1, 2001.)

Advisory Committee Note. — Subdivision (1) is comparable to Rule 68, Utah Rules of Evidence (1971).

Subdivision (2) is comparable to Rule 68(3), Utah Rules of Evidence (1971).

Subdivision (10) is Rule 902(10), Uniform Rules of Evidence (1974).

This subdivision [sic] does not supersede Rule 44, Utah Rules of Civil Procedure, which defines the form of certification.

The amendment to Rule 803(6) and the addition of Rules 902(11) and 902(12) were made to track the changes made to Federal Rule of

Evidence 803(6) and the adoption of Federal Rules 902(11) and 902(12), effective December 1, 2000. The changes to the federal rules benefit from a federal statute allowing the use of declarations without notarization. Utah has no comparable statute, so the requirements for declarations used under the rule are included within the rule itself.

Amendment Notes. — The 2001 amendment added Subdivisions (11) and (12).

Cross-References. — Proof of official record, U.R.C.P. 44.

NOTES TO DECISIONS

Certified copies of public records.

Foreign public documents.

Certified copies of public records.

Although a bench warrant was certified by the custodian of records of a county sheriff's office, the motion and order that referred to defendant's felony conviction were not certified by any official and were therefore not properly authenticated for admission under this rule. *State v. Higginbotham*, 917 P.2d 545 (Utah 1996).

Foreign public documents.

Copies of Colorado court records, certified by notary public who had no custody, official or unofficial, of the documents, were lacking sufficient authentication to permit their receipt into evidence to establish that one charged with unlawful possession of dangerous weapon was on parole for felony. *State v. Lamorie*, 610 P.2d 342 (Utah 1980).

ADDENDUM E

ADDENDUM E
ADDENDUM E
ADDENDUM E

JOANNA B. SAGERS, #5632
ROBIN L. RAVERT, #7964
LEGAL AID SOCIETY OF SALT LAKE
ATTORNEY FOR PETITIONER
225 SOUTH 200 EAST, SUITE 200
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 328-8849

FILED

MAY 25 1999

Pf
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOLYNNE THOMAS,
Petitioner,

vs.

LAVAR T. JENSEN,
Respondent.

PROTECTIVE ORDER

Civil No. 994902937CA

Judge Frank G. Noel

Comm Lisa A. Jones

This matter came for hearing on MAY 25, 1999, before the undersigned. The following parties were in attendance:

☒ Petitioner ☒ Petitioner's attorney Robin Ravert
Joanna B. Sagers
☒ Respondent ☐ Respondent's attorney _____

The Court having reviewed Petitioner's Verified Petition for Protective Order and:

___ having received argument and evidence,
☒ having accepted the stipulation of the parties
___ having entered the default of the Respondent for failure to appear
and it appearing that domestic violence or abuse has occurred,

IT IS HEREBY ORDERED:
(The Judge or Commissioner shall initial
each section that is included in this Order.)

- ☒ 1. The Respondent is restrained from attempting, committing, or threatening to commit abuse or domestic violence against Petitioner.

_____ 2. The Respondent is restrained from attempting, committing, or threatening to commit abuse or domestic violence against the following minor children and members of Petitioner's family or household: .

yes X 3. The Respondent is prohibited from directly or indirectly contacting, harassing, telephoning, or otherwise communicating with the Petitioner.

yes X 4. The Respondent shall be removed and excluded, and shall stay away, from Petitioner's residence, and its premises, located at: 4924 South Holladay Blvd., Holladay, Utah 84117, and Respondent is prohibited from terminating or interfering with the utility services to the residence.

yes X 5. The Respondent is ordered to stay away from the school, place of employment, and/or other places, and their premises, frequented by Petitioner, the minor children and the designated household and family members. These places are identified by the following addresses: Novus Services, 8475 South Sandy Parkway, Sandy, Utah; 272 East 8000 South, Sandy, Utah (Petitioner's son); 4561 Dixie Ann Drive, West Valley City, Utah 84121 (Petitioner's sister); and, 6835 South Vista Grande Drive, Holladay, Utah (Petitioner's sister).

_____ 6. The Court having found that Respondent's use or possession of a weapon may pose a serious threat of harm to Petitioner, the Respondent is prohibited from purchasing, using, or possessing a firearm and/or the following weapon(s): .

_____ 7. The Petitioner is awarded possession of the following residence, automobile and/or other essential personal effects: .
This award is subject to orders concerning the listed property in future domestic proceedings.

_____ 8. An officer from the following law enforcement agency: Salt Lake County Sheriff shall accompany Petitioner to ensure that Petitioner safely regains possession of the awarded property.

_____ 9. An officer from the same law enforcement agency shall facilitate Respondent's removal of Respondent's essential personal belongings from the parties' residence. The law enforcement officer shall contact Petitioner to make these arrangements. Respondent may not contact the Petitioner or enter the residence to obtain any items.

_____ 10. The Respondent is placed under the supervision of the Department of Corrections for the purposes of electronic monitoring. Within 24 hours of the execution of this Order, the Department of Corrections shall place an electronic monitoring device on Respondent and shall install monitoring equipment on the premises of Petitioner and in the residence of Respondent. Respondent is ordered to pay to the Department of Corrections the costs

of the electronic monitoring required by this Order. The Department of Corrections shall have access to Petitioner's residence to install the appropriate monitoring equipment.

RESPONDENT'S VIOLATION OF PROVISIONS "1" THROUGH "10" MAY BE A CLASS A MISDEMEANOR.

Petitioner is granted the following temporary relief (provisions "a" through "l") which will (expire/be reviewed by the court) 150 days from the date of this order:

- _____ a. The Petitioner is granted custody of the following minor children:
- _____ b. Visitation shall be as follows:
- _____ c. The Respondent is restrained from using drugs and/or alcohol prior to or during visitation.
- _____ d. The Respondent is restrained from removing the parties' minor child/ren from the state of Utah.
- _____ e. The Respondent is ordered to pay child support to the Petitioner in the amount of \$ pursuant to the Utah Uniform Child Support Guidelines.
- _____ f. The Respondent is ordered to participate in mandatory income withholding pursuant to Utah Code Annotated § 62A-11, Parts 4 and 5.
- _____ g. The Respondent is ordered to pay one-half of the minor child/ren's day care expenses.
- _____ h. The Respondent is ordered to pay one-half of the minor child/ren's medical expenses including premiums, deductibles and co-payments.
- _____ I. The Respondent is ordered to pay Petitioner spousal support in the amount of \$.
- _____ j. The Respondent is ordered to pay Petitioner's medical expenses, suffered as a result of the abuse in the amount of \$_____.
- _____ k. The Respondent is ordered to pay the minor child/ren's medical expenses, suffered as a result of the abuse in the amount of \$_____.
- _____ l. Other: _____

Violation of provisions "a" through "l" may subject Respondent to contempt proceedings.

11. The Division of Child and Family Services is ordered to conduct an investigation into the allegation of child abuse.

12. Other: _____

13. Law enforcement agencies with jurisdiction over the protected locations shall have authority to compel Respondent's compliance with this Order, including the authority to forcibly evict and restrain Respondent from the protected areas. Information to assist with identification of the Respondent is attached to the Appendix to this Order.

14. Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994, P.L. 103-322, 108 Stat. 1976, 18 U.S.C.A. 2265, this order is valid in all the United States, the District of Columbia, tribal lands, and United States Territories.

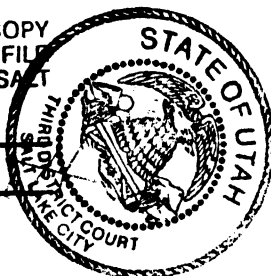
15. Three years after the date of this order, a hearing may be held to dismiss the remaining provisions of the order. Within 30 days prior to the end of the three-year period, the Petitioner should provide the court with a current address, which address will not be made available to Respondent.

DATED: May 25, 1999


BY THE COURT:

William W. Barnett
DISTRICT COURT JUDGE

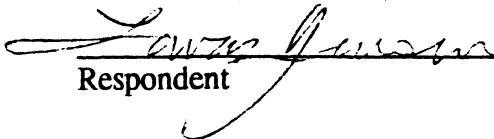
I CERTIFY THAT THIS IS A TRUE COPY
OF AN ORIGINAL DOCUMENT ON FILE
IN THE THIRD DISTRICT COURT SAULT
LAKE COUNTY STATE OF UTAH
DATE June 4, 99
William W. Barnett
DEPUTY COURT CLERK



Recommended by:

 15/25/99
District Court Commissioner Date

By this signature, Respondent approves the form, and accepts service, of this Protective Order and waives the right to be personally served.


Respondent

Serve Respondent at:

6985 So. Pine Mt. Dr. 84121

