2018

OREM CITY, Appellee, v. BRIDGETTE CHATWIN, Appellant. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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PARTIES

This is an appeal from a criminal proceding. The Appellant/Defendant is the accused, Bridgette Chatwin ("Chatwin"), and is represented by Nathan E. Burdsal and Hutch U. Fale. Orem City (the "City") is the Appellee/Prosecutor and is represented by Jacob Summers. There are no other parties to the proceeding.

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INTRODUCTION

Chatwin was charged with criminal trespass of a dwelling. Although she was originally cited in May, 2016, she did not have trial until December, 2017. By that time, a key witness was unavailable to testify, severely inhibiting her ability to present her defense.

On May 28, 2016, Chatwin asked her younger brother Payton for a ride so she could pick up her daughter at day care. Payton agreed but told Chatwin he needed to make a quick stop at a friend's house first. Unbeknownst to Chatwin, Payton actually was going to confront a romantic rival. When they arrived, Payton parked in front of the home and went to the door while Chatwin remained in the car. Chatwin was looking at her phone, but when she looked up, she saw Payton and another young man fighting by the front door. Another adult entered the melee and began choking Payton. Chatwin got out of the car and hurried toward the door. By the time she got there, the adult had pushed her brother out of the house. Chatwin squeezed between her brother and the adult. Chatwin faced the adult with her hands up walking backwards while her brother walked towards the car. When Chatwin got in the passenger seat, the adult reached in the car, and removed the keys from the ignition.

After the police arrived, Payton was arrested and Chatwin was issued a citation. She was appointed a public defender and the City filed the case in its own city justice court. A year after the incident, Chatwin finally had her initial trial date. On the day of her trial, however, the City voluntarily dismissed the case. The City refiled the case over a month later in the Fourth Judicial District Court. In December of 2018 – 18 months

after the short incident, Chatwin finally got her her trial. Unfortunately, by that time, a material witness was not available.

Although Chatwin was found guilty, she should have never had to stand trial so long after being charged. This delay is an unconstitutional violation of Chatwin's rights to a speedy trial. Additionally, the City did not present sufficient evidence to support her conviction.

STATEMENT OF THE ISSUES

Issue 1.

An accused has the right to a speedy trial under the Constitution of the United States, the Utah Constitution, and Utah statutory law. Notwithstanding, Chatwin's attorney failed to raise this issue. Where a City takes eighteen months to prosecute a misdemeanor and in the interim a key witness leaves the country, did the trial counsel render ineffective assistance of counsel by failing to seek the dismissal of the case based on a violation of Chatwin's federal and state Constitutional rights to a speedy trial?

This issue is being presented for the first time on appeal. Questions of ineffective assistance of counsel may be raised for the first time on appeal as an exception to the general rule that issues must be preserved. *State v. Sessions*, 2012 UT App 273, ¶ 13. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. McNeil*, 2013 UT App 134, ¶ 13 (internal citations omitted)

Issue 2.

To find an accused guilty of a crime, a prosecutor must present sufficient evidence to demonstrate each element of the crime beyond a reasonable doubt. Where the City did

not present sufficient evidence of Chatwin's intent or her recklessness, did the jury err when it held Chatwin criminally liable for criminal trespass?

A criminal defendant is not required to preserve a sufficiency of the evidence argument at the trial court. *State v. Rudolph*, 2000 UT App 155, ¶ 24. Notwithstanding, this issue was preserved when trial counsel moved for a directed verdict and again during closing arguments. (R.0323, 325, 406-407.) In reviewing a jury decision, this Court "must examine the evidence in the light most favorable to the verdict." *State v. McCardell,* 652 P.2d 942, 945 (Utah 1982). A jury decision should be reversed if "the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Miller,* 709 P.2d 350, 355 (Utah 1985) (quoting *State v. Petree,* 659 P.2d 443, 444 (Utah 1983)).

STATEMENT OF THE CASE

Statement of Facts, Procedural History, Disposition

1. On May 28, 2016, Chatwin found herself in the wrong place at the wrong time.

2. Chatwin had recently separated from her husband, and she had moved back to her family home. However, because of the divorce, she did not have a car as she juggled her new reality as a single mom. (R.332:7-10.)

3. On May 28, 2016 Chatwin asked her younger brother Payton to help her pick up her daughter by driving Chatwin. (R.332:7-10.)

4. Payton agreed to do so but told Chatwin he needed to make a quick stop on the way. (R.333:1-6.)

5. Unbeknownst to Chatwin, Payton had been texting an ex-girlfriend. (Trial Exhibit 9.)

6. Payton had received a text from another young man telling him to stop texting this girl. (Trial Exhibit 9.)

7. Payton wanted to stop at this young man's home before taking Chatwin to the daycare. (R.332:17.)

8. Chatwin was clueless about her brother's high school drama or her brother's plans to confront his romantic rival; she just wanted a ride to pick up her daughter from day care. (R.333:1-6.)

9. When Payton pulled in front of the rival's home, he parked the car on the street. (R.280:19-21.)

10. Chatwin saw Payton get out of the car and walk to the front door. (R.333:25-334:3.)

11. After Payton got to the door, Chatwin looked down at her phone. (R.333:25-334:3.)

12. When she looked up again, Chatwin saw Payton and his romantic rival wrestling. (R.333:25-334:3; 336:22-25.)

13. Chatwin was in shock at seeing a fight break out. Her first reaction was to film the incident, not knowing what had prompted the duel but wanting to record the melee for so that no one could exaggerate the extent of the fight later. (R.337:16-23.)

14. Chatwin saw the boys fall down into the entry of the home, just beyond the threshold of the door. (R.337:13-14.)

15. Soon after the fight began, a third party entered the frey. This individual was obviously bigger and older than the two youths. (R.337:22-338:3.)

16. This individual turned out to be the rival's father, Johnny ("Johnny"). (R.277:7-10.)

17. Johnny punched Chatwin's brother by the back of the head. He then grabbed Chatwin's brother around the neck with one arm and used his other arm to engage a headlock. To Chatwin, it appeared that this adult was choking her brother. (R.277:7-10.)

18. Both Chatwin and her brother testified that all of this happened at the threshold of the home and the entryway of the home. (R.339:9-15; 378:8-9.)

19. Chatwin then got out of the car to break up the fight. She testified that before she got to the home from the car, however, Johnny and her brother were walking out. (R.338:2-3.)

20. Because the front door was open, Chatwin's view into the entryway was unobstructed. However, her view into the rest of home was obstructed by the location of the stairs. (R.339:3-9.)

21. Notwithstanding, at trial the father testified that the initial fight between the boys went into the entry way, around the stairs, and into the dining room area. The father testified that this is where he entered the frey, punching Chatwin's brother and chocking him. (R.276:16-19.)

22. Chatwin testified that when she got to the door of the home – and before she entered the home – the father exited, still pushing her brother who was walking away with his hands up. (R.338:2-3.)

23. Chatwin was adamant that she never entered the home. She testified by the time she reached the door, the father had already moved her brother outside. She stated that outside the house she pushed herself between the father and her brother. The adult let go of his brother who continued to walk away with his hands up. (R.338:2-3; 339:21-340:3.)

24. The father testified that it was in the dining room area where he noticed Chatwin pulling his shirt. (R.277:20-22.)

25. Chatwin continued to walk backwards to the car to stop Johnny from further assaulting her brother, desperately trying to defuse the situation. (R.340:22-341:4.)

26. The father was irate and yelled profanities saying, "I'm going to kill you" to both Chatwin and her brother. (R.340:22-341:4.)

27. Chatwin simply responded, "It's done, we're leaving." Despite the father's repeated attempts to reach around Chatwin and grab her brother. (R.341:21-24.)

28. Payton made it to the driver's side of the car, Chatwin got in the passenger side. (R.342:2-6.)

29. Johnny, however, reached inside the car and removed the keys from the ignition. He said, "you're not going anywhere." (R.342:23-25.)

30. Johnny called the police. Johnny did not explicitly say during that call that Chatwin had entered the home. (R.373:9-11.)

31. Johnny eventually filled out a police report. Again, he never explicitly stated that Chatwin had entered the home. (R.321:11-15.)

32. When asked whether Chatwin's presence caused him any fear, the father denied any fear, but rather stated, "just more just anger towards what had happened, as I was starting to gather what had gone on." (R.294:21-24.)

33. On June 17, 2016 the City originally charged Chatwin with criminal trespass, a class B misdemeanor. (See Docket, attached as Addendum 2.)

34. Attorney Grant Nagamatsu ("Nagamatsu") was appointed to represent Chatwin. (Exhibit A.)

35. Although Chatwin asked her attorney for a speedy trial, a trial was not set until almost a year later, on June 5, 2017 in the Orem Justice Court. (Exhibit A.)

36. However, on the day of trial, the City dismissed the charges against Chatwin. (Exhibit A.)

37. On July 18, 2017, Orem filed a new charge against Chatwin in the Fourth District Court. (R.1.)

38. The new charge was Criminal Trespass within a Dwelling in violation of Utah Code Ann. § 76-6-206(3)(A). (R.1, set forth in Addendum 1.)

39. Nagamatsu was again appointed to represent Chatwin. (R.17.)

40. Chatwin reiterated her desire for a speedy trial. The trial was set on December 6, 2017 – eighteen months after Chatwin was originally indicted. (R.24-25.)

41. By the time that Chatwin's trial was set, Payton's romantic rival had left the country and was unavailable to testify. (R.266:15-21.)

42. Importantly, some of the rival's written statement contradict some his father's testimony. (*See* Statement, attached as Addendum 3.)

43. After trial, a jury entered a guilty verdict against Chatwin. (R.100-105, attached as Addendum 4.)

SUMMARY OF THE ARGUMENT

Waiting 18 months to take a simple misdemeanor case to trial is not speedy. The delay in bringing this case to trial rests solely on the City. The City originally brought the case in its own justice court. On the day of trial, however, the City dismissed the charges only to refile them in the Fourth District Court. Importantly, this significant delay prejudiced Chatwin. By the time Chatwin was finally brought to trial, a material witness was unavailable to testify. Chatwin's counsel should have brought a motion to dismiss the case in light of the delay and prejudice that the City's delay caused.

Additionally, the City failed to present sufficient evidence to justify Chatwin's guilty verdict. The City focused much of its attention on Payton's conduct. Although the City adequately proved her brother's guilt, it failed to prove Chatwin's. Specifically, the City failed to provide evidence that Chatwin intended to cause annoyance or injury, intended to commit a crime, or was reckless as to whether her presence would cause fear. Additionally, the City asked to jury to provide the erroneous definition of "enclosure." These errors prejudiced the case, and the verdict against Chatwin should be set aside.

ARGUMENT

I. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO HAVE THE CASE DISMISSED FOR VIOLATING MS. CHATWIN'S RIGHT TO A SPEED TRIAL.

A. Chatwin was denied her Constitutional rights to a speedy trial.

Under the Sixth Amendment to the United States Constitution, "the accused shall enjoy the right to a speedy . . . trial." U.S. Const. Amend. VI. This right is also reflected in the Utah Constitution. Utah Const. § 12. Similarly, Utah Code Ann. § 77-1-6(1)(f) codifies the rights of a defendant in Utah "to a speedy public trial . . ."

The United States Supreme Court has established four factors to balance when determining whether a defendant's right to a speedy trial has been violated, weighing the conduct of both the prosecution and the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The four factors are, (1) the "[l]ength of delay," (2) "the reason for the delay," (3) "the defendant's assertion of his right [to a speedy trial]," and (4) the "prejudice to the defendant." *Id.* (adopted by Utah in *State v. Banks*, 720 P.2d 1380, 1385-1386 (Utah 1986).)

The length of a delay necessary to trigger a speedy trial inquiry is dependent upon the individual factors of each case. *Barker* at 530. The US Supreme Court has specifically noted, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531. In this case, the delay of 18 months is unreasonable. This is a single class A misdemeanor case, closer to the ordinary street crime than a complex conspiracy charge. Indeed, the Utah Court of Appeals has noted that a delay of 16 months was "undesireable" in two counts of lewdness involving a child. *State v. Snyder*, 932 P.2d 120 (Utah App. 1997). Notwithstanding, in this simple

case, it took the city over a year and half to bring this case to trial. There were no complicated theories or forensic evidence considered. This is a case that could have and should have been brought within a few months.

Closely related to the length of delay is the reason for the delay. *Id.* Even if there is no deliberate attempt to delay the trial by the City, neutral reasons such as negligence or overcrowded courts should be considered because the government is ultimately responsible to ensure a timely trial is held. *Id.* Except for a one month delay in the original case, all the other continuances or delays are solely the responsibility of the city. Although Chatwin was originally charged in June of 2016, her original trial was delayed until June of 2017. Importantly, on June 5th, 2017, the City filed a Motion to dismiss so that the case could be refiled in District Court. It was the City's sole decision to originally file the case in its city courts, and it was the City's sole decision to dismiss that case and refiled in District Court. A month and a half after the City's decision dismiss the original case, the City filed a new indictment in District Court. Although it had taken over a year to get to this point, the District Court was able to have a trial five months later. Taken as a whole, Chatwin had to wait eighteen months before she had her day in Court. The City is responsible for the excessive delay in the case.

Finally, Chatwin was prejudiced due to the failure to provide a speedy trial. The Utah Supreme Court calls this prong "perhaps [the] most important[]." *States v. Banks*, 720 P.2d 1380, 1386 (Utah 1986). The US Supreme Court recognized, even if an accused is not incarcerated prior to trial, [s]he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility. *Id.* at 533. Chatwin

suffered these consequences in this case while waiting for her trial. If nothing else, Chatwin has thus suffered prejudice because the City delayed so long in bringing this case to trial.

In addition to these serious consequences, Chatwin's ability to defend herself was also limited due to the City's delay. The son whom her brother fought was not available to testify at trial because he was out of the country. He left the country a few months before the first trial. The US Supreme Court has identified that the availability of a witness to testify owing to the delay is a significant factor showing prejudice. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The Texas Court of Appeals recognized that the unavailability of a witness due to delay is a significant prejudice because "the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *State v. Guerrero*, 110 SW.3d 162 (Tex Ct. App. 2003). In *State v. Guerreo*, the Texas Court of Appeals held that a missing case worker was who could not be located by either the state or the defendant due to delay prejudiced the defendant. In this case, there were four witnesses. One was unavailable because he was in France at the time of the trial. Indeed, the City recognized this witness was "obviously not available to be [in Court]". (R.266:20.) However, this witness was in Utah until just before the first trial. The City has never presented any reasoning why it took over a year to bring the first trial to bear, and then why the City unilaterally dismissed the case to only re-file it in district court after this material witness was gone. Even the City admits in closing argument that "in a perfect world" there would be more witnesses. (R.410.) There was an additional witness in this case, but the City's delay resulted in that witness being unavailable.

Importantly, this witness could have testified regarding (1) whether Chatwin entered the home, and (2) if so what circumstances existed to support her intentions for entering the home. This testimony was not available because the city's failure to timely bring this action to trial.

Chatwin's time to trial was unreasonably long. The City is responsible for this delay. Chatwin is not at fault for this delay, and a main witness was unavailable to testify at trial because of the delay prejudiced Chatwin's defense.

B. Chatwin's trial counsel erred when he failed to seek the dismissal of the charges against Chatwin due to the city's failure to conduct a speedy trial.

Notwithstanding the prejudice and problems that arose as a result of the violation of Chatwin's Constitutional rights, Chatwin's trial counsel erred when he failed to raise this issue.

The US Supreme Court has placed "the primary burden on the courts and the prosecutors to assure that cases are brought to trial." *Id.* at 529. Indeed, both the US Supreme Court and the Utah Court of Appeals has recognized that a defendant does not waive her right to a speedy trial simply by failing to demand it. *See Id.*; *State v. Miller*, 747 P.2d 440, 443 (Utah App. 1987). Notwithstanding, Chatwin's trial counsel failed to affirmatively assert Chatwin's desire to have a speedy trial. This failure constitutes ineffective assistance of counsel.

Chatwin's trial counsel should have initially opposed the City's motion to dismiss for violating Chatwin's right to a speedy trial. The counsel should have also filed a motion in district court seeking the dismissal of the action once it was clear that a witness

was not unavailable. An attorney renders ineffective assistance when the attorney presents a deficient performance below an objective standard of reasonable professional judgment, and the performance prejudices the defendant. *State v. Bond*, 2015 UT 88, ¶ 14. Prejudice exists if, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In this case, the unavailable witness left the country after the first trial was to take place. (R.286:8-13.) As set forth above, this witness could have testified whether Chatwin entered the home, and the situation around her entrance. This is important because it is not enough for criminal trespass to merely enter the home. Rather, the city must establish beyond reasonable doubt that Chatwin did so with the prerequisite intent. As set forth below, this intent may be established through circumstantial evidence. However, Chatwin was denied this opportunity due to the City's lackadaisical approach to getting the case to trial. If Chatwin's trial attorney had brought this to the attention of the district court, there is a reasonable probability that the case would have been dismissed.

A known right may only be waived if it is done so knowingly and intelligently. The only other issue to examine regarding the speedy trial is whether Chatwin invoked the doctrine. The US Supreme Court has stated, "[w]e have shown above that the right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived. But the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the

prosecutors to assure that cases are brought to trial. We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside." *Baker* at 529

Because Chatwin's appointed trial counsel rendered ineffective assistance of counsel, the verdict against her should be set aside.

II. EVEN IF SHE ENTERED THE HOME, THE CITY PRESENTED INSUFFICIENT EVIDENCE SHE (1) INTENDED TO CAUSE ANNOYANCE OR INJURY, (2) INTENDED TO COMMIT A CRIME, OR (3) WAS RECKLESS AS TO WHETHER HER PRESENCE WILL CAUSE FEAR OF THE SAFETY OF ANOTHER.

Initially, Chatwin strongly disputes Johnny's testimony that she ever entered the home. However, even if she did enter, the city failed to present sufficient evidence that her presence was intended to cause annoyance or injury, commit a crime, or was reckless as to whether her presence would cause fear of the safety of another.

Criminal trespass occurs when (a) the person enters or remains unlawfully on or causes an unmanned aircraft to enter and remain unlawfully over property and: (i) intends to cause annoyance or injury to any person or damage to any property . . . ; (ii) intends to commit any crime, other than theft or a felony; or (iii) is reckless as to whether the person's . . . presence will cause fear for the safety of another. Utah Code Ann. § 76-6-206(2)(a).

Where specific intent is an element of a crime, the specific intent must be proven as an independent fact and cannot be presumed from the commission of the unlawful act." *State v. Steed*, 2014 UT 16, ¶ 22. This intent may be established by direct evidence or inference. *Id.* The Utah Supreme Court wrote,

> It is well established that intent can be proven by circumstantial evidence. When intent is proven by circumstantial evidence, we must determine (1) whether the State presented any evidence that [the defendant] possessed the requisite intent, and (2) whether the inferences that can be drawn from the evidence have a basis in logic and reasonable human experience sufficient to prove that [the defendant] possessed the requisite intent.

State v. Holgate, 2000 UT 74, ¶ 21.

In this case, there is insufficient evidence presented that Chatwin intended to cause annoyance or injury to any person or damage to any property or commit a crime.

A. Marshaling of the Evidence.

The majority of the evidence in this case was presented in the short trial. The evidence that might support the conviction all comes from Johnny's testimony. These statements are as follows:

1. At approximately 5:00 pm on May 28, 2016, the doorbell rang. From the top of the stairs, Johnny saw his son answer the door and Payton standing outside. Payton began hitting his son. (R.271:15-18.)

2. When Payton first came in the home, Johnny did not see Chatwin or anyone else at the door. (R.288:23-24.)

3. "Very quickly" the fight moved from the front door to around the kitchen area. (R.272:5-8.)

4. Seeing this fight, Johnny feared for the safety of his son. (R.300:1-8.)

5. Johnny "went around the bannister and ran down the stairs" in "probably three seconds tops." (R.274:24-275:1.)

6. When Johnny came around the corner, he saw Payton on top of his son throwing punches. (R.276:21-24.)

7. Johnny's first reaction was to "get him off of my son." So he "swung and hit him from the right, and then put [his] arm around his neck and pulled him back off of [his] son." (R.277:7-10.)

8. As soon as Johnny got Payton off his son and his son was standing, Johnny let go. The boy turned around and got in Johnny's face. "As – just as [the boy] got in [Johnny's] face [Johnny] did realize there was someone that had already been on my back and was pulling on my shirt to pull me off of – of him." (R.277:18-22.)

9. The pulling was not "in a headlock, not jumped, not piggybacked, but pulling on my shirt, my shoulders and near my neck on my shirt." The hands were "on [Johnny's] shoulders," not around his neck or collarbone. (R.277:25-278:9.)

10. This was the "first awareness" Johnny had of Chatwin being in the home. (R.289:4-7.)

11. It was "well over a minute" between the start of the fight and this first awareness. (R.289:22-290:1.)

12. Johnny was asked, "as you get Mr. Swenson off and you've got a person now on your back, does that give you any cause for fear." Johnny answered "Yes." (R.300:9-11.)

13. Johnny explained, "at that point it was my son was still in danger and now I'm in danger and my family if they come home they're also in danger." (R.300:13-15.)

14. Johnny wanted to get these two individuals out of his house, so he "threatened them quite strong." The boy "didn't say anything, but [Chatwin] was quite loud and boisterous" and Johnny and Chatwin "had words." (R.278:19-24.)

15. Johnny physically pushed both of them out of his home. (R.279:23-24.)

16. Johnny did not believe that Chatwin was there to attempt to hurt him, but rather, just get Johnny away from her brother. (R.290:11-15.)

17. When they get to the front door, Chatwin and her brother "turned and started more or less running away, rather than being pushed at that point." (R.280:7-8.)

18. However, later Johnny admitted that he didn't "recall" whether they were running, just that he, the assailant, and Chatwin were going the same pace. (R.291:17-19.)

19. Chatwin and her brother got into a car. (R.282:1-3.)

20. Johnny went to the passenger door and held it open to stop them from leaving. (R.282:5; 13.)

21. Johnny reached in and grabbed the keys out of the ignition. (R.282:23.)

22. Johnny did not see anyone put the keys in the ignition and was "assuming they were still in there from the time that [the two] came into the home." (R.292:12-13.)

B. The facts presented and reasonable inferences drawn therefrom are insufficient to establish that Chatwin intended to cause harm or annoyance to anyone or that she intended to commit a crime.

Chatwin's conduct make her intent crystal clear: break up a fight. Johnny's testimony is that Chatwin entered the home and tried to pull him off her brother after he hit her brother in the back of the head and was holding him in a choke hold. He further

testified that she was between her brother and Johnny as they walked to the car. Even if this is true, however, it does not show intent to cause annoyance or injury or damage. Rather, it only shows intent to break up a fight and get her brother out of the home.

Assuming Johnny's testimony is true, Chatwin had a free shot to physically assault Johnny without fear of immediate retribution. Johnny testified that his back was to Chatwin when she pulled on his shirt. If Chatwin's intent was to harm or annoy Johnny or anyone else in the home, she could have. She could have hit Johnny in the back of the head, but she didn't. Johnny's testimony is that she just tried to pull him, a grown man off her brother. When asked if she intended to cause annoyance or injury, she answered "no" (R.344:15-17.) Ms. Chatwin further testified, "If pushing and pulling happened it happened because I tried to get in between them so they would stop fighting." (R.353:7-8.) Further, Chatwin did not have any weapons or items that would indicate her presence was to cause damage to any property or person. All Chatwin did was break up a fight. Her intentions were to stop damage to persons or property. Indeed, the City seemingly acquiesces that her conduct was not intended to cause annoyance or injury. (R.420:3-5.) Accordingly, the City cannot make out a claim under subpart (a) because there is no evidence that Chatwin intended to commit annoyance or injury.

Additionally, there is no evidence that Chatwin intend to commit another crime. The City does not charge Chatwin with committing or attempting to commit another crime, and the City presents no evidence of another crime being committed. Rather, the best testimony for the City is that Chatwin entered the home and got between Johnny and

her brother and then walked out. Chatwin broke up a fight. That is not a crime. Accordingly, the City cannot make out a claim under subpart (b).

C. The facts presented and reasonable inferences drawn therefrom are insufficient to establish that Chatwin was reckless whether her presence will cause fear for the safety of another.

In closing statements, the City admits that its case really rests on subpart (c). Specifically, the city argues by entering the home, Chatwin was "reckless whether her presence will cause fear for the safety of another." Utah Code Ann. § 76-6-206. Although an appellate court must view the evidence along with the reasonable inferences from it, in the light most favorable to the verdict, the verdict should only be upheld if "some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond doubt." *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989).

Initially, the City failed to present any evidence that Chatwin actually caused fear for the safety of another. Johnny initially testified,

> Q. Was there some – probably some degree of fear or worry over what had happened?
>
> A. Just more just anger towards what had happened, as I was starting to gather what had gone on." (R.294:21-24.)

Although Johnny later testified he had "cause for fear," he never once testified that he was actually afraid. However, subpart (c) only provides for criminal liability if an individual was reckless as to whether her presence "**will** cause fear for the safety of another," not "may cause fear." Utah Code Ann. § 76-6-206.

When faced with a question of statutory construction, this Court should "first examine the plain language of the statute." *State v. Larsen*, 865 P.2d 1355, 1357 (Utah

1993). This Court should only resort to other methods of statutory interpretation if it determines "that the language is ambiguous." *State v. Virgil*, 842 P.2d 843, 845 (Utah 1992). The word "will" expresses future tense and inevitable events. (The World Book Dictionary Volume II, Barnhart, (1991).) In this case, if a person "will fear" for the safety of another, that person must express the apprehension of inevitable events concerning another's safety. There is no such evidence presented in this case. Rather, Johnny first denied having any fear, only anger. Later Johnny testified that he had "cause to fear." However, having "cause to fear" is does not reach the inevitable apprehension that must be present for criminal liability to attach under the statute.

Importantly, there is **no** evidence that Chatwin was reckless as to whether her presence would even cause fear. "A person engages in conduct . . . recklessly with respect to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." Utah Code Ann. § 76-2-103(3). Chatwin broke up a fight. She did not throw punches or contribute to the melee in any way. She stopped harm from happening. This is not reckless; it is the commendable response to seeing another human being choked. Indeed, the City convoluted the issue at trial by failing to separate whether Chatwin's presence where she is simply breaking up a fight – caused fear as opposed to Payton's presence, who was clearly there to fight.

There is simply no evidence that Chatwin was reckless as to whether her presence will cause fear. There is no substantial and unjustified risk that her presence will cause fear. Rather, any risk of causing fear was certainly justified in this situation as she was trying to break up a fight, and then bravely stood between Johnny and Payton to stop the fight from escalating again. Indeed, her presence did not cause any fear. Accordingly, there is insufficient evidence for any jury to find, beyond reasonable doubt, that Chatwin acted recklessly as to whether her presence will cause fear.

III. EVEN IF SHE DID ENTER THE HOME, THERE IS NO EVIDENCE SHE KNEW HER PRESENCE WOULD BE UNLAWFUL WHEN SHE WAS MERELY TRYING TO BREAK UP A FIGHT WHERE A GROWN MAN WAS ATTACKING HER TEENAGE BROTHER.

Alternatively, an individual may be guilty of criminal trespass if she knows that her presence would be unlawful because notice was given by personal communication, fencing or other enclosures obviously designed to exclude intruders, or posting of signs reasonably likely to come to the attention of intruders. Utah Code Ann. § 76-6-206(2)(b). However, these elements are not present in the instant case.

The City argued below that the presence of the front door on the home constitutes an "enclosure" providing notice that an intruder's presence is unlawful. This is incorrect. In *State v. Wilson*, 701 P.2d 1058, 1060 (Utah 1985), the Utah Supreme Court analyzed the term "other enclosure" under the statute and concluded, "the general word 'enclosure' is restricted to a sense analogous to the less general word "'fence.'" (citing *Hansen v. Wilkinson*, 658 P.2d 1216, 1217 (Utah 1983). Indeed, the Wilson Court rejected the argument that breaking a window and entering into a locked building constituted

improper entry under the "other enclosure" definition. *Id.* There is simply no basis that the presence of a lockable door constitutes "other enclosures" under the code. It is not a fence or anything analogous to a fence. Accordingly, this argument should be rejected.

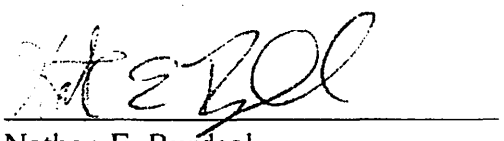
Further, as set forth above, Chatwin only left the car after she saw a grown man choking her brother. After the threat was ended, and within seconds of being told to leave, Johnny testified she escorted her brother out.

CONCLUSION

Chatwin did not receive the constitutionally protected rights in this case. She was denied effective trial counsel. Further, the City failed to present evidence of her guilt. Accordingly, the verdict against her should be set aside.

DATED this 21 day of August, 2018.

AVERY BURDSAL & FALE, PC



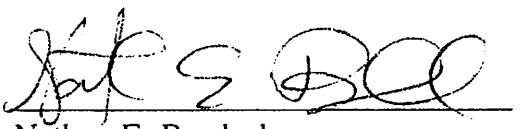
Nathan E. Burdsal
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Utah Rules of Appellate Procedure, Rule 24(g)(1) limits this brief to 14,000 words. I hereby certify that this brief in total consists of 6,656 words based on the word count of the word processing system used to prepare the brief. I also certify that this brief complies with Rule 21 governing public and private records.

DATED this 21 day of August, 2018.

AVERY BURDSAL & FALE, PC



Nathan E. Burdsal
Attorney for Appellant

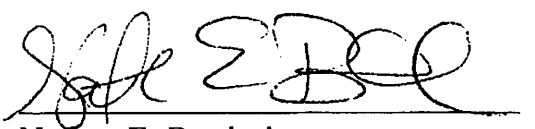
CERTIFICATE OF SERVICE

I hereby certify that ~~ten~~ two (2) copies of this brief was sent via United States first-class mail, postage prepaid, to the following:

D. Jacob Summers (USB 12253)
City of Orem
56 North State Street
Orem Utah 84057

DATED this 21 day of August, 2018.

AVERY BURDSAL & FALE, PC



Nathan E. Burdsal
Attorney for Appellant

ADDENDUM 1
Utah Code Ann. § 76-7-206

76-6-206. Criminal trespass.

(1) As used in this section:

(a) "Enter" means intrusion of the entire body or the entire unmanned aircraft.

(b) "Remain unlawfully," as that term relates to an unmanned aircraft, means remaining on or over private property when:

(i) the private property or any portion of the private property is not open to the public; and

(ii) the person operating the unmanned aircraft is not otherwise authorized to fly the unmanned aircraft over the private property or any portion of the private property.

(2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in Section 76-6-202, 76-6-203, or 76-6-204 or a violation of Section 76-10-2402 regarding commercial obstruction:

(a) the person enters or remains unlawfully on or causes an unmanned aircraft to enter and remain unlawfully over property and:

(i) intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti as defined in Section 76-6-107;

(ii) intends to commit any crime, other than theft or a felony; or

(iii) is reckless as to whether the person's or unmanned aircraft's presence will cause fear for the safety of another;

(b) knowing the person's or unmanned aircraft's entry or presence is unlawful, the person enters or remains on or causes an unmanned aircraft to enter or remain unlawfully over property to which notice against entering is given by:

(i) personal communication to the person by the owner or someone with apparent authority to act for the owner;

(ii) fencing or other enclosure obviously designed to exclude intruders; or

(iii) posting of signs reasonably likely to come to the attention of intruders; or

(c) the person enters a condominium unit in violation of Subsection 57-8-7(8).

(3) (a) A violation of Subsection (2)(a) or (b) is a class B misdemeanor unless the violation is committed in a dwelling, in which event the violation is a class A misdemeanor.

(b) A violation of Subsection (2)(c) is an infraction.

(4) It is a defense to prosecution under this section that:

(a) the property was at the time open to the public; and

(b) the actor complied with all lawful conditions imposed on access to or remaining on the property.

ADDENDUM 2
Docket

OREM CITY JUSTICE COURT
UTAH, STATE OF UTAH
OREM CITY vs. CHATWIN, BRIDGETTE MARIE

CASE NUMBER 161900655 - Other Misdemeanor

CURRENT ASSIGNED JUDGE: REED PARKIN

Parties

Relationship	Party	Represented By
Plaintiff	OREM CITY	D J SUMMERS
Defendant	BRIDGETTE MARIE CHATWIN	GRANT C NAGAMATSU D J SUMMERS

Charges

	Offense	Offense Date
Charge 1	76-6-206 - CRIMINAL TRESPASS Class B Misdemeanor **Plea:** August 03, 2016 Not Guilty **Disposition:** June 05, 2017 Dismissed (w/o prej)	May 29, 2016

Events

Date	Event
June 17, 2016	ARRAIGNMENT set on 07/01/2016
June 17, 2016	Case filed by mayrap
June 17, 2016	Filed: Information
June 17, 2016	**** PRIVATE **** Filed: Citation (copy)
July 12, 2016	ARRAIGNMENT set on 08/03/2016
July 12, 2016	Filed: Promise to Appear
August 03, 2016	Filed: Rights and Instruction Form
August 03, 2016	**** PRIVATE **** Filed: Affidavit of Indigency-approved
August 03, 2016	PRE-TRIAL CONFERENCE set on 09/19/2016
August 03, 2016	ARRAIGNMENT
August 03, 2016	Filed: Pre-Sentence Minute Entry
August 03, 2016	Filed: ARRAIGNMENT
September 19, 2016	PRE-TRIAL CONFERENCE set on 11/02/2016
September 19, 2016	PRE-TRIAL CONFERENCE
September 19, 2016	Filed: Pre-Sentence Minute Entry
September 21, 2016	Filed: PRE-TRIAL CONFERENCE
November 02, 2016	Filed: Pre-Sentence Minute Entry
November 02, 2016	PRE-TRIAL CONFERENCE continued to 12/12/
November 02, 2016	CONTINUANCE
November 03, 2016	Filed: CONTINUANCE
December 12, 2016	Filed: Pre-Sentence Minute Entry
December 12, 2016	PRE-TRIAL CONFERENCE
December 29, 2016	PRE-TRIAL CONFERENCE set on 03/13/2017
December 29, 2016	Filed: Notice for Case 161900655 ID 12124907
January 09, 2017	Filed: PRE-TRIAL CONFERENCE
March 13, 2017	BENCH TRIAL set on 06/05/2017
March 13, 2017	PTC
March 13, 2017	Filed: PTC
March 13, 2017	Filed: Pre-Sentence Minute Entry
March 16, 2017	Filed: Reverse Discovery Request
March 16, 2017	Filed: Return of Electronic Notification
March 22, 2017	Filed: Subpoena on Return

March 22, 2017	Filed: Subpoena on Return
March 22, 2017	Filed: Return of Electronic Notification
June 05, 2017	Filed: Motion To Dismiss
June 05, 2017	Filed: Order (Proposed) To Dismiss
June 05, 2017	Filed: Return of Electronic Notification
June 05, 2017	Case Closed
June 05, 2017	Filed: Pre-Sentence Minute Entry
June 05, 2017	Charge 1 Disposition is Dismissed (w/o
June 05, 2017	TRIAL-BENCH
June 06, 2017	Filed: TRIAL-BENCH
June 08, 2017	Filed: Order To Dismiss
June 08, 2017	Filed: Return of Electronic Notification

ADDENDUM 3
Written Statement

OREM POLICE DEPARTMENT

95 E. Center Street, Orem, Utah 84057
Phone: 801-229-7070
Fax: 801-229-7242

"Proudly Serving the Citizens of Orem"

VOLUNTARY STATEMENT FORM

Officer _____ Case # _____

Name: Branson Tanner Age: 18 Date of Birth: 03/11/98

Address: 313 N. 550 E City/State/Zip: Orem UT 84097 Today's Date: 05/29/16

Phone: 801-865-0332 Alternate Phone: 801-694-3512 Email Address: branson.webslinger@gmail.com

NOTICE: Pursuant to Section 76-8-504.5 Utah Code annotated, 1953 as amended, you are notified that statements you are about to make may be presented to a magistrate or judge in lieu of your sworn testimony as a preliminary examination. **Any false statements you make and that you do not believe to be true may be subject to criminal punishment as a Class A Misdemeanor.**

Describe what occurred at the time of the incident:

My Girlfriend (Kaylee Lowry) And Payton Swensen went on a couple of dates about a year ago. He somehow made her mad and she completly broke it off. He kept texting her for months after. When me and Kaylee started dateing, he would text her almost daily. At Graduation (05-26-2016) He kept texting her and it made her upset. so [redacted] friday I Messaged him telling him to let her go. saying That I know how it feels and that I could help him. About 10 Minutes later we heard a light knock on our front door. Me and my dad (Johnny Tanner) Both came to the top of the stairs to see who it was. I walked downstairs while my dad was standing on the top of the stairs to see who it might be. I opened the door to see payton standing on the front steps.

Signature: _____

(Use back of sheet if necessary)

Statement Form-Continued:

Almost emediatly after opening the door he swings hitting my cheek. I kept stepping back and blocking his punches. I kept stepping back until my foot got caught ~~on~~ the bottom of a high chair. I fell to the ground and that is when my dad got to the bottom of the stairs. I don't know if he punched me again, all I remember is my dad putting him in a choke hold to get him away from me and paytons sister Grabing my dad's shirt to get My dad off of payton. once payton had gotten my dad off of his back my dad said to get out of the house and that he was calling the cops. payton looked remorseful once my dad said that. he walked outside and got in his car on the passenger side with his sister getting in the driver side with both me and my dad behind them. payton tried to close the door but my dad held it open saying that he was not going to let them leave then he proceeded to call 911. during which payton and his sister switched seats. My dad thought that they might have togried to drive away so he reached in and took the keys from the ignition. once payt his sister got into the passenger seat he handed the keys to her. After that point one of the cops showed up.

Initials: BT

ADDENDUM 4
Judgment

The Order of the Court is stated below:
Dated: December 07, 2017
04:56:53 PM

At the direction of:
/s/ JARED ELDRIDGE
District Court Judge

by
/s/ AUDREY BRANN
District Court Clerk

4TH DISTRICT COURT - SP FORK
UTAH COUNTY, STATE OF UTAH

OREM CITY,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 171300814 MO
BRIDGETTE M CHATWIN,	:	Judge: JARED ELDRIDGE
Defendant.	:	Date: December 6, 2017

PRESENT
Clerk: audreyb
Prosecutor: SUMMERS, D J
Defendant Present
The defendant is not in custody
Defendant's Attorney(s): NAGAMATSU, GRANT C

DEFENDANT INFORMATION
Date of birth: July 29, 1996
Audio
Tape Number: Room 1 Tape Count: 9:16:51

CHARGES
1. CRIMINAL TRESPASS WITHIN A DWELLING (amended) - Class A Misdemeanor
Plea: Guilty - Disposition: 12/06/2017 Guilty

TRIAL

TIME: 9:16 AM All parties are present. On the city's motion, the information is amended by having the offense date reflect May 28, 2017.

TIME: 9:23 AM The jurors are now present in the courtroom.

TIME: 9:31 AM The jurors are given the oath on Voir Dire. The selection process begins.
TIME: 10:09 AM The attorney's are excused to chambers.

Case No: 171300814 Date: Dec 06, 2017

TIME: 10:12 AM Court is back on the record. A few jurors are called back to the Judge's chamber for questioning.

TIME: 11:42 AM Court takes a brief recess. Counsel return to the courtroom.

TIME: 11:44 AM Court is back on the record. All parties are present. The Peremptory Challenge begins.

TIME: 11:54 AM The jury is selected. The remaining jurors, not selected, are excused from the courtroom. The jurors selected are sworn and seated in the jury box.

TIME: 11:57 AM The court takes a brief recess.

TIME: 12:09 PM Court is back on the record. All parties are present. The jurors are returned to the courtroom. The court reads the Preliminary Instructions.

TIME: 12:22 PM On the city's motion, the exclusionary rule is invoked. The witnesses are excused from the courtroom. The city gives an opening statement.

TIME: 12:28 PM Mr. Nagamatsu gives an opening statement.

TIME: 12:34 PM Court is in recess for lunch.

TIME: 1:36 PM The court is back in session. All parties are present. The jurors are also present.

TIME: 1:38 PM The city calls Johnny Tanner to the stand. He is sworn and examined. Exhibit #1 (picture of Tanner house), exhibit #2 (picture of entry way), exhibit #3 (picture of hall way),
exhibit #4 (picture of dining room), exhibit #5 (a different picture of dining room), exhibit #6 (picture of car and cul-de-sac), exhibit #7 (copy of Mr. Tanner's statement) are marked and received. The witness is excused from the stand.

TIME: 2:30 PM The city calls Officer Grazzini to the stand. The witness is sworn and examined. Exhibit #8 (copy of citation) is marked and received.

TIME: 2:56 PM The officer is excused from the stand. The city rests. The court takes a brief recess.

TIME: 3:11 PM The court is back in session. Mr. Nagamatsu motions for a directed verdict. Based on the objection given by the city, the court denies the motion.

TIME: 3:26 PM The jurors are now present in the courtroom. The defense calls the defendant to the stand. She is sworn and examined. The defendant is excused from the stand.

TIME: 4:01 PM Defense calls Patton Swenson (brother of the defendant) to the stand. He is sworn and examined. The city submits exhibits #8 (statement of the witness) and exhibit #10 (Sentencing and Judgment of the witness) they are marked and received.

TIME: 4:26 PM The witness is excused from the stand. The defense rests. The city recalls Mr. Tanner to the stand for further questioning. The city rests.

TIME: 4:31 PM The jurors are excused. The court takes a brief recess.

TIME: 4:33 PM Court is back on the record. The court goes over the Jury Instructions with the attorneys.

TIME: 4:45 PM Court is in recess.

TIME: 5:00 PM Court is back in session. The court reads the Jury Instructions to the jurors.

TIME: 5:24 PM The city gives a closing argument.

TIME: 5:31 PM Defense gives a closing argument.

TIME: 6:08 PM The city gives a rebuttal.

TIME: 6:28 PM The bailiff is sworn to take charge of the jury. The jurors are excused to deliberate. Court is off the record. Court is in recess.

TIME: 8:14 PM Court is back in session. All parties are present. The jurors have reached a verdict. The clerk reads the verdict. The jurors are excused from the courtroom.

TIME: 8:17 PM Court takes a brief recess.

TIME: 8:22 PM Court is back in session. Defendant waives time to be Sentenced.
Sentencing is imposed.
Court is adjourned.

ENDING TIME: 8:26:40 PM

SENTENCE JAIL
Based on the defendant's conviction of CRIMINAL TRESPASS WITHIN A DWELLING a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

SENTENCE FINE

Charge # 1 Fine:	$2500.00
Suspended:	$2000.00
Surcharge:	$259.47
Due:	$500.00
Total Fine:	$2500.00
Total Suspended:	$2000.00
Total Surcharge:	$259.47
Total Principal Due:	$500.00
	Plus Interest

Defendant is to pay a fine of 500.00 which includes the surcharge. Interest may increase the final amount due.
Fine payments are to be made to The Court. This can be paid online at:
www.utcourts.gov/epayments.

SENTENCE FINE PAYMENT NOTE
The court grants community service for up to 1/2 ($250.00) in lieu of the fine, at the rate of $10.00 an hour.

SCHEDULED TIMEPAY
The following cases are on timepay 171300814.
The defendant is to pay $50.00 monthly on the 6th.
The number of payments scheduled is 9 plus a final payment of $56.57.
The first payment is due on 01/06/2018 the final payment of $56.57 is due on

10/06/2018. The final payment may vary based on interest.

ORDER OF PROBATION
The defendant is placed on probation for 12 month(s).
Probation is to be supervised by Fourth District Court.
Violate no law.
Keep current address on file with the court.
Report to court when required.
Pay fine/costs in timely manner.

CUSTODY

The defendant is not in custody.

End Of Order - Signature at the Top of the First Page