

2009

Utah v. Graham : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

MATTHEW GRAHAM,

Defendant/Appellant

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Case No. 20090478-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, STATE OF UTAH, FROM THE
JUDGMENT, SENTENCE AND COMMITMENT OF THE HONORABLE SAMUEL D. MCVEY FOR
FELONY CONVICTIONS OF TERRORISTIC THREAT AND DOMESTIC VIOLENCE IN THE
PRESENCE OF A CHILD

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ORAL ARGUMENT REQUESTED

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UTAH APPELLATE COURTS
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REPLY BRIEF OF APPELLANT

ARGUMENT

I. BECAUSE OF AMBIGUOUS AND OVERLAPPING TERMS, THE UTAH COUNTY SHERIFF’S OFFICE CANNOT BE EXCLUSIVELY DEFINED AS A “GOVERNMENT” OR “UNIT OF GOVERNMENT” BUT MUST ALSO BE CONSIDERED AN “EMERGENCY” AGENCY

The State erroneously claims that the trial court correctly interpreted Utah Code Ann. § 76-5-107(1)(b). The crux of the State’s argument is that, despite any guidance from the legislature, subsection (b)(i) and (b)(ii) are not redundant or superfluous provisions as applied to law enforcement.. Appellee Br. at 18-28. Subsections (1)(b)(i) and (ii) state:

(1) A person commits a terroristic threat if he threatens to commit any offense involving bodily injury, death, or substantial property damage, and:

...

(b) he acts with intent to:

(i) intimidate or coerce a civilian population or to influence or affect the conduct of a *government or a unit of government*; [or]

(ii) cause action of any nature by an *official or volunteer agency organized to deal with emergencies*....

Utah Code Ann. 76-5-107(1)(b)(i), (ii) (West 2008) (emphasis added).

The arguments supporting Graham’s position that the sheriff is not a government or unit of government for the purposes of the terroristic threat statute and the supporting legislative history are sufficiently covered in his opening brief. This section of this Reply Brief will focus on the alternative, if the sheriff is a government of a unit of government should Graham have been convicted of felony terroristic threat when the sheriff is also clearly an agency organized to deal with emergencies.

a. *Shondel* Doctrine

The State has alleged that “[t]he Shondel doctrine requires courts to apply the lesser of two penalties only if two statutes criminalize *identical* conduct.” Appellee Br. at 31. And also that Shondel could not apply in this case because “The felony subsection requires the intent to influence the conduct or operation of a governmental agency, while the misdemeanor subsection requires only intent to cause the emergency organization to act or respond.” Id.

Perhaps the State argues that the subsections of the statute are distinguished by the actor’s knowledge about the status of the sheriff as a government agency as opposed to the sheriff being an emergency organization.

In the alternative, and more likely, the State is suggesting that, on its face, the language intending to “influence or affect the conduct of a government or unit of government” is different than intending to “cause action... of an agency organized to deal

with emergencies.” Utah Code Ann. § 76-5-107(West 2008). But, what the State fails to admit is that the unenumerated entities that make up the classes of “unit[s] of government” and “agenc[ies] organized to deal with emergencies” overlap, and in those instances the two subsections in fact criminalize identical conduct even though the statute uses different words to do so. That is why, in this case, the State’s distinction is one without a difference, and beyond asserting that there is a difference in the plain language between the two, the State’s brief fails to make any persuasive or even explanatory distinction. The State merely asserts that Graham can not establish that the two sections are identical as required by Shondel because the language in the two subsections is different. Graham again asserts that, despite different yet synonymous terms, the meaning of the two subsections of terroristic threat statute in place at the time criminalized identical conduct. Thus, Shondel doctrine applies here.

In State v. Shondel, 453 P.2d 146, 148 (Utah 1969) the Utah Supreme Court noted “where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser.” There, the defendant, who had possessed LSD, claimed he should have been punished with a misdemeanor for violating the Drug Abuse Control Law which prohibited possession of LSD a misdemeanor instead of being punished with a felony for violating the Narcotic Drug Act which prohibited possession of LSD as a felony. Shondel, at 147. The Court reversed the trial court and remanded for resentencing because the overlapping statutes, created by the very same legislature only a few days apart, were not “clear, specific and understandable as to the penalty imposed for [their] violations.” Id. at 148.

In State v. Fedorowicz, 2002 UT 67, ¶ 46, 52 P.3d 1194, the Court clarified the Shondel doctrine by stating “if one or both of the crimes at issue ‘require[] proof of some fact or element not required to establish the other,’ the statutes do not criminalize identical conduct and the State can charge the individual with the crime carrying the higher classification or more severe sentence.” Citing State v. Clark, 632 P.2d 841, 844 (Utah 1978). The Court continued, “Shondel... requires that a prosecutor who elects to charge an individual with a crime carrying a higher penalty or classification do so knowing that the prosecutor will be required to prove at least one additional or different element to obtain a conviction for the higher penalty crime.” Fedorowicz, 52 P.3d 1194, 1206.

In Fedorowicz the defendant claimed the trial court erred by instructing the jury on both felony murder predicated on child abuse and child abuse homicide because he claimed only jury should only have been instructed on child abuse homicide. Id. at 1205. In order to determine whether the two statutes were wholly duplicative the Court examined the elements to see if they were identical and “whether the same conduct is proscribed.” Id. at 1207. The Court found that, although the two statutes had the same mens rea element, the statutes were “completely dissimilar” because felony murder predicated on child abuse required proof of serious physical injury and child abuse homicide required proof of only physical injury. Id. This finding was supported by the fact that these two elements were defined directly within the statute itself clearly distinguishing the proof required for physical injury from serious physical injury.

In State v. Williams, 2007 UT 98, ¶ 3, 175 P.3d 1029, the defendant, who had been charged with possession of a controlled substance in a drug-free zone, had his case dismissed because the trial court found evidence could not sustain a charge to either felony possession of a controlled substance or misdemeanor possession of drug paraphernalia and thus Shondel required that “the Defendant must be charged with the offense carrying the lesser penalty.”

On grant of certiorari the Utah Supreme Court noted that the Shondel doctrine is aimed at preventing a prosecutor from charging “two people who have engaged in the same conduct with different crimes carrying different penalties” because such discretion “offends our sense of fairness.” Williams, 2007 UT 98, ¶ 10. Equal protection requires that “the criminal laws must be written so that... the exact same conduct is not subject to different penalties depending upon which of two statutory sections a prosecutor chooses to charge.” Id. (citing State v. Bryan, 709 P.2d 257, 263 (Utah 1985)).

The Court held that, even though a person who possessed a controlled substance without any paraphernalia could be convicted of a felony while someone who possessed a controlled substance in connection with drug paraphernalia would only be convicted of a misdemeanor, because the Court had “no difficulty distinguishing between a statute directed at the act of possessing a controlled substance and one targeting the possession of drug paraphernalia” there was no equal protection violation. Id. at ¶ 22. Because prosecutors were not “abandoned to their own predilections when choosing to charge a defendant with one, or both, of misdemeanor paraphernalia possession or felony

possession” there is no threat that the prosecutors would exercise an improper degree of discretion.

In State v. Honie, 2002 UT 4, ¶ 11, 57 P.3d 977, the defendant was charged and convicted of aggravated murder. Defendant appealed claiming the aggravated murder statute was “unconstitutional because it substantially overlaps with the felony murder statute... creating an equal protection problem under State v. Shondel.” Honie, 2007 UT 4, ¶¶ 17, 19. Aggravated murder required “(1) a homicide, ‘the death of another,’ the actus reus; (2) committed ‘intentionally or knowingly,’ the mens rea; (3) plus an aggravating factor.” Id. at ¶ 23. Felony murder requires “(1) a ‘criminal homicide,’ the actus reus; (2) committed while in the commission, attempted commission, or immediate flight from the commission or attempted commission of one of several factors.” Id.

The Utah Supreme Court found the elements of aggravated murder to be different from the elements of felony murder because “while the two statutes contain portions that are the same, the common portions combine differently with other elements within the respective crimes, and the common factors are part of different criminal equations.” Id. at ¶ 24.

In State v. Coble, 2010 UT App 98, 232 P.3d 538 the defendant was charged with felony distribution of pornographic material. Coble, 2010 UT App, ¶ 2. The trial court bound the charge over as misdemeanor lewdness because the elements of the felony and the elements of the misdemeanor, “as applied to the alleged facts of this case, are wholly duplicative.” Id. at ¶ 4. This Court reversed the trial court’s decision because the elements of those two crimes [were] not identical.” Id. 12. The Court reached that

decision by examining the statutory elements at issue in the case and determining if the content of the statutes, rather than the conduct which satisfies the elements, are duplicative. Id. at ¶¶ 8-9. Because the “material or performance underlying the [pornography] charge [must be] pornographic, as opposed to merely lewd” the more serious charge required proof of a fact not required by the lesser charge. Id.

Unlike the statutes at issue in Fedorowicz, where an objective difference existed between the requirements of the elements between the two crimes (one requiring serious physical injury and the other only requiring injury), the difference between these two statutes, with respect to the sheriff, is in title only and to find a distinction between these two statutes as the State attempts to do ignores the purpose of the Shondel doctrine and gives prosecutors an impermissible degree of discretion. The same is true for the statutes in Willaims.

In Williams the Court found the statutes were clearly designed to distinguish between paraphernalia and possession. Unlike Williams, however, there is no difference between the conduct prohibited by felony terroristic threat involving the sheriff as a unit of government and misdemeanor terroristic threat involving the sheriff as an agency responding to an emergency.

Dissimilar to Honie, where the Court recognized the concrete difference in the requirements in mental states, the situation in this case leaves no room to find any real distinction between the two subsections when the entity involved is a sheriff. And finally, unlike the distinction found in Coble, there was no requirement that the State prove the sheriff was a unit of government above and beyond it also being the agency

who responds when an emergency is reported. The trial court improperly found as a matter of law that sheriff was a unit of government, thus there was no additional fact to distinguish the acts of the felony from the misdemeanor.

If the State's argument was correct, this case, and in any case where the threat was intended to cause emergency responders who were also part of a governmental (i.e. police or sheriff, fire department, paramedics, etc.) to act, the prosecutors would have discretion to charge the conduct with either misdemeanor or felony terroristic threat and such discretion and arbitrariness "is foreign to our system of law" and a violation of equal protection. State v. Bryan, 709 P.2d 257, 263 (Utah 1985). Consequently, statutory interpretation requires that Graham receive the benefit of the lesser offense as dictated by the principles of Shondel.

b. Definitional Elasticity

The State claims that the terms used in the statute are not ambiguous and, if they are, a reliable definition can be determined by extra-textual sources, so therefore the rule of lenity does not apply. See, Appellee Br. at 30 (State v. Bradshaw, 2006 UT 87, ¶ 10, 152 P.3d 288). What the State seems to ignore is that because the terms involved are not self-defining and there is a natural confusion arising from the question of whether the police and sheriff are either units or government or agencies organized to deal with emergencies, or both, and extra-textual sources are examined, it is clear that the legislature intended the police and other similar agencies to be covered by the already existing (1)(b)(ii) subsection and for subsection (1)(b)(i) to cover acts of terrorism in a

broad sense in response to the attacks of September 11, 2001. See, Appellant Br. at 34-38 (Addenda, Legislative History for Utah Code Ann. § 76-5-107).

Terroristic threat is a crime of which the primary element is threatening to commit an offense involving injury, death or property damage. In cases not involving weapons of mass destruction, the severity of the crime is determined by the entity at whom the threat is directed or whom the suspect is trying to influence. A person cannot be convicted of both misdemeanor and third degree felony terroristic threatening where his conduct only consists of one threatening act aimed at affecting or influencing one entity even if, as in this case, that entity may satisfy an entity in both classes.

When the legislature wrote subsection (1)(b)(i) it used the terms “government or unit of government” but failed to categorize or identify qualifying entities. The legislature could have listed every entity individually that it considered a government or government entity for the purposes of third degree terroristic threat. Because the legislature did not include that list nor define the terms “government or unit of government” the courts must determine which entities those terms include. From the State’s perspective, that list, had it been made would have included the sheriff’s department. For the sake of argument it may help to presume the list was in the statute and the sheriff’s department is on the list of units of government. Similarly, when the legislature wrote subsection (1)(b)(ii) it used the term “agency organized to deal with emergencies” instead of listing each individual entity it intended to protect. But the legislature could have listed each individual entity it considered an agency organized to deal with emergencies. From Graham’s perspective, and under any reasonable view of

reality, that list clearly would have included the sheriff's department. The fact of this and nearly every other someone calls 911 in the event of an emergency demonstrates that the sheriff or local police respond to emergency situations.

If these two lists, each containing the sheriff's department, were included in the statute, rather than generalized terms intended to include the sheriff, then the statute would violate the Shondel doctrine. Because there would be no distinction between 'intending to influence or affect the conduct of the sheriff's department' and 'intending to cause action of the sheriff's department' the statute would violate equal protection and Shondel. Even without that specific list enumerating the sheriff as both a unit of government and an agency organized to deal with emergencies, the statute still violates equal protection because, in the case of the police and sheriff (and perhaps other overlapping entities) there is no difference between subsection (1)(b)(i) and (1)(b)(ii). Both sections criminalized the exact same conduct and subsection (1)(b)(i) imposed a greater punishment for that conduct.

Because the sheriff is either not a unit of government or is both a unit of government and an agency organized to deal with emergencies the trial court erred by instructing the jury that the sheriff was a unit of government for the purposes of the felony charge. That error clearly resulted in a felony conviction where equal protection, the Shondel doctrine, and the rule of lenity all required the trial court to interpret the statute in favor of Graham. This harmful error should be reversed along with Graham's felony conviction for terroristic threat.

II. GRAHAM'S POSSESSION, WHEN UNACCOMPANIED BY INTENT TO CAUSE FEAR IN A COHABITANT, IS NOT TANTAMOUNT TO USE OF A DANGEROUS WEAPON

Graham asserts the evidence presented at trial was insufficient to a point that rational minds could not have concluded that Graham committed domestic violence, as a third-degree felony, against his co-habitant, Mindy Graham. See, Appellant Br. at 38. In response, the State contends that the evidence was sufficient enough to allow a jury to conclude that Graham *used* a dangerous weapon against Mindy Graham. Appellee Br. at 32-36. The State concedes, however, that mere possession of a weapon is insufficient evidence for a conviction. It is Graham's assertion that he merely possessed, not used, a weapon, and that any perceived threats were not directed at a co-habitant.

a. "Use" of a Dangerous Weapon Requires More than Mere Possession and Must Be Directed at the Cohabitant to be a Felony

The State's argument of whether Graham "used" a weapon, as required under Utah Code Ann. §76-5-109.1(2)(b) (West 2008), relies on fine distinctions found within the meaning of "use." Fundamentally, and Graham agrees, "mere possession of a dangerous weapon during commission of a crime constitutes 'use' whenever 'merely exhibiting the gun creates fear in the victim.'" Appellee Br. at 33 (citing In re R.G.B., 597 P.2d 1333, 1335 (Utah 1979)). Although the State may not have to prove "use" of a weapon in the sense that it was brandished or discharged, it is undisputed that mere possession of a weapon *cannot* be sufficient to qualify this offense as a third-degree felony. See, State v. Ross, 2004 UT App 140U, (finding that brandishing a knife is sufficient "use" to cause fear in the victim); Utah Code Ann. §76-5-109.1(2)(b) (West

2008). Graham may have possessed a weapon, but the evidence falls short to show that he exhibited, brandished or otherwise used the weapon.

In reliance for its position, the State cites State v. Willis, 2004 UT 93, 100 P.3d 1218. In Willis, the Utah Supreme Court affirmed this court's distinction between use and possession. Contextually, Willis addressed the constitutionality of Utah Code Ann. §76-10-503(2)(a), which restricts the *possession* of a firearm by convicted felons. Willis, 2004 UT 93, ¶ 1. During a search of Willis's home, a firearm was discovered in his closet; he was charged with a second degree felony under Utah Code Ann. §76-10-503 and entered a conditional plea. Willis, 2004 UT 93, ¶¶ 2-3.

While the Court's analysis dealt specifically with the terms "possession" and "use" as applied to Utah Code Ann. §76-10-503(2), the State relies on this distinction here.

In Willis the Court held that "when mere possession serves the possessor's purpose, the weapon is not only being possessed, it is also being used." Willis, 2004 UT 93, ¶ 11. For example, the Court recognized that a weapon is "used" even when "collection, decoration, investment, and peace of mind" are the purpose, "and each reflects a use to which a firearm can be put while not being fired, brandished, or even transported. In each of these instances, it is accurate to say that a firearm is being "used" no less than when a bank robber pulls a handgun on a bank teller." Willis, 2004 UT 93, ¶ 11. While this definition may be appropriate under Utah Code Ann. § 76-10-503, this dicta is distinguishable.

Here, Graham may have possessed a dangerous weapon; however, insufficient evidence existed to prove that he “used” the weapon to serve the purpose of intimidating his co-habitant. Testimony supports that Graham possessed a weapon (R. 508: 92-93); however there is no testimony indicating that he possessed a weapon with the purpose of committing or threatening violence or physical harm against Mindy Graham. See, Utah Code Ann. § 77-36-1(4) (West 2008).

Unlike the other cases cited, in which each defendant took specific action with a weapon to carry out their purpose, the fact that Graham carried a weapon, which was a matter of course, and was upset does not equate to intentionally possessing that weapon with the purpose of threatening a co-habitant.¹ Cf., In re R.G.B., 597 P.2d 1333 (Utah 1979) (juvenile defendant revealed a gun in his belt during a robbery); State v. Weisberg, 2002 UT App 434, 62 P.3d 457 (defendant drove to the victim’s work and removed a pistol-grip shotgun from his vehicle, looked at the office building while walking that direction, then placed the gun in the trunk of the vehicle and drove off). There is no evidence that he exhibited, flashed, pointed to, nodded toward or otherwise even acknowledged the weapon with specific intent to use the presence of that weapon to intimidate another.

¹ As a matter of practicality and public policy Defendant argues that if “use” should be broadly interpreted to include “possession,” as the State proposes, there must be some proof of intent/purpose to use the weapon to threaten another. Otherwise, for example, there would be little to distinguish a simple threat from an aggravated threat with a weapon by a person that otherwise lawfully possesses a weapon but has no intent to use a weapon to further his purpose. It is not what the victim believes or feels, it is what the perpetrator intends that matters. Cf., State v. Johnson, 2005 UT App 210 (unpublished).

Furthermore, the evidence is deficient as to another element of Utah Code Ann. § 76-5-109.1. To be classified as a felony, domestic violence only occurs when the underlying offense is committed by one cohabitant against another. Utah Code Ann. § 77-36-1(4) (West 2008); Appellant Br. at 43-45. As the State indicated, Graham threatened to harm Mindi’s friend Rebecca if she tried to remove the children from the home. Appellee Br. at 35-36. Also, as the State concludes, “[t]his threat, as well as the other explicit and implicit threats made that day, caused Mindi to “resign herself to the fact that might be the day that she died.” Id. Whether or not Graham was in a “prolonged fit of rage,” as the State describes, the fact remains that any perceived threats were directed at others, none at his co-habitant. Appellee Br. at 35. As such, the State failed to prove that Graham committed domestic violence.²

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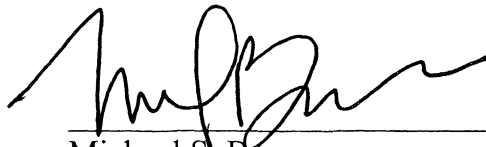
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² The State misreads Defendant’s concessions in footnote 4 of his brief. The State interprets that statement as if he concedes that he committed domestic violence. Appellee Br. at 32. Footnote 4, however, only recognizes that Mindi Graham was a co-habitant and that the children were present during the day’s events. Defendant does not concede that he committed domestic violence. If, however, the court does find that domestic violence did occur, it was only a class B misdemeanor.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Graham respectfully requests this Court to reverse his felony convictions for a terroristic threat and domestic violence in the presence of a child. See, State v. Carruth, 974 P.2d 690, 694 (Utah Ct. App. 1997) (reversing defendant's felony conviction and entering conviction as misdemeanor based on the trial evidence).

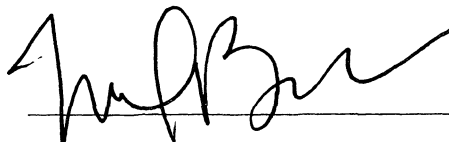
RESPECTFULLY SUBMITTED this 5th day of November, 2010.



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CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 5th day of November, 2010.



Not Reported in P.3d, 2005 WL 1119638 (Utah App.), 2005 UT App 210
(Cite as: 2005 WL 1119638 (Utah App.))

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NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellant,
v.
Ryan Wayne JOHNSON, Defendant and Appellee.
No. 20040522-CA.

May 12, 2005.

Third District, Salt Lake Department, 041900176; The Honorable Leslie A. Lewis.
Mark L. Shurtleff and Brett J. DelPorto, Salt Lake City, for Appellant.

Patrick L. Anderson and Debra Meek Nelson, Salt Lake City, for Appellee.

Before Judges BILLINGS, DAVIS, and JACKSON.

MEMORANDUM DECISION (Not For Official Publication)

BILLINGS, Presiding Judge:

*1 The State appeals an interlocutory order granting Defendant Ryan Wayne Johnson's motion to reduce the charges from aggravated robbery to robbery on six counts. The State argues that the trial court erred in interpreting the term "representation" of a dangerous weapon in Utah Code sections 76-6-302 and 76-1-601 to include only verbal statements. Utah Code Ann. §§ 76-6-302, 76-1-601 (2004). The State avers that Johnson's use of his hand in his pocket to simulate a gun constitutes a nonverbal "representation" within the meaning of the Utah Code. Johnson argues that even if we determine nonverbal statements or gestures constitute a "representation" under the statute, the victims did not have a reasonable belief that "the item [was] likely to cause death or serious bodily injury" as required by Utah Code section 76-1-601. ^{FN1} *Id.* § 76-1-601(5)(b)(i). We reverse on five counts and affirm on one count of the robbery charges.

FN1. We review the trial court's interpretation of statutes for correctness. *See State v. Pixton*, 2004 UT App 275, ¶ 4, 98 P.3d 433.

Johnson was charged with a total of six counts of aggravated robbery in two separate criminal informations. Four counts allegedly occurred in December 2003 and two counts in January 2004. Victims testified that on each occasion Johnson approached the victim and asked for money, that Johnson had a bulge in his right pocket, that he had his hand in his pocket, and that something was protruding which looked like a gun. The testimony was that Johnson made no verbal threats nor did he tell any of the victims that he had a gun in his possession. In addition, some of the victims testified that they complied with Johnson's requests because they feared for their

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lives.

In *State v. Ireland*, 2005 UT App 209, also issued today, we held that a “representation” constitutes both verbal and nonverbal statements or gestures. *See id.* at ¶ 10. Because the facts of this case are nearly identical to those of *Ireland*, the same reasoning applies. Consequently, we hold that the trial court erred in interpreting Utah Code sections 76-6-302 and 76-1-601 and that a “representation” may be made by both verbal and nonverbal statements or gestures. For each of the six counts of robbery, Johnson's action of holding his hand in his pocket simulating a gun constitutes a “representation” within the meaning of Utah Code section 76-1-601. Johnson's conduct is sufficient to sustain aggravated robbery charges so long as the victims “reasonably belie[ved] the item [was] likely to cause death or serious bodily injury.” Utah Code Ann. § 76-1-601(5)(b)(i).

After reviewing the record on each of the six counts, we determine that the victims had the requisite “reasonable belief” to sustain an aggravated robbery charge in all but one of the six counts. In *Ireland*, we determined that there must be objective conduct by the defendant coupled with the victim's subjective apprehension to constitute a reasonable belief. *See* 2005 UT App 209 at ¶ 12. In five of the counts, victims testified that they saw or assumed that Johnson had a gun, and for that reason they complied with Johnson's request to give him money. However, the victim in Count I, occurring in January 2004, “didn't think [that Johnson had a gun] because the bulge wasn't big enough.” Moreover, the victim stated she thought that Johnson “was very nice-spoken[,] ... not aggressive, not anything that would make you think that he was going to cause you harm.” Clearly, this victim did not have the requisite reasonable belief that Johnson would cause “death or serious bodily injury,” and the objective facts of the encounter reinforce this reasonable belief. Thus, there cannot be an aggravated robbery charge for this count.

*2 Accordingly, we reverse on the four counts occurring in December 2003 and Count II in January 2004 and hold that those counts sustain an aggravated robbery charge under Utah Code sections 76-6-302 and 76-1-601. *See* Utah Code Ann. §§ 76-6-302, 76-1-601. We affirm Count I in January 2004 as a robbery charge because the victim did not have the requisite reasonable objective belief to sustain an aggravated robbery charge.

WE CONCUR: JAMES Z. DAVIS and NORMAN H. JACKSON, Judges.

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(Cite as: 2004 WL 1368316 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Dale ROSS, Defendant and Appellant.
No. 20030223-CA.

April 29, 2004.

Second District, Ogden Department; The Honorable Michael Lyon.
Dee W. Smith and Randall W. Richards, Ogden, for Appellant.

Mark L. Shurtleff and Matthew D. Bates, Salt Lake City, for Appellee.

Before Judges BENCH, DAVIS, and JACKSON.

MEMORANDUM DECISION (Not For Official Publication)

BENCH, Associate Presiding Judge:

*1 Defendant Ross challenges the sufficiency of the evidence to sustain his conviction for aggravated robbery, a first-degree felony. *See* Utah Code Ann. § 76-6-302 (2003).^{FN1} Ross raises this issue for the first time on appeal; thus, we review it for plain error. *See State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346. “[T]o establish plain error, a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.” *Id.*

FN1. For the sake of convenience, and because no pertinent changes have been made to the aggravated robbery statute, we cite to the most recent version.

The relevant portion of the aggravated robbery statute provides the following:

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

....

(3) For the purposes of this part, an act shall be considered to be “in the course of committing a robbery” if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

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Utah Code Ann. § 76-6-302(1)(a), (3).

Ross directs us to *State v. Colonna*, 766 P.2d 1062 (Utah 1988), for the proposition that “the threat of bodily injury is a necessarily implied element of an aggravated robbery charge.” *Id.* at 1065. The threat of bodily injury clearly exists “if the statutory elements of simple robbery and use of a weapon are proved.” *Id.*

Here, the State presented uncontroverted evidence that Ross used a weapon by brandishing a knife and pointing it in the direction of Craner. *Cf. In re R.G.B.*, 597 P.2d 1333, 1335 (Utah 1979) (“[I]t is not necessary that the State prove that the robber actually pointed a gun at the victim.... If merely exhibiting the gun creates fear in the victim, it constitutes ‘use of a firearm’ for that purpose.”); *State v. Weisberg*, 2002 UT App 434, ¶ 17, 62 P.3d 457 (“[A] weapon is used even if it is never actually pointed at a victim, so long as ‘exhibiting the [weapon] creates fear in the victim.’ “ (citation omitted)). Ross's use of the knife created fear in the victim. Craner testified that he felt “threatened,” “compromised,” and that his “safety was in jeopardy.”

Further, the elements of simple robbery were satisfied. The robbery statute, Utah Code Annotated section 76-6-301 (2003), requires that a “person intentionally or knowingly use[] force or fear of immediate force against another in the course of committing a theft.” *Id.* § 76-6-301(1)(b). Ross concedes that he was “in the course of committing a theft,” *id.*, but argues that he did not use “force or fear of immediate force.” *Id.* The evidence reflects, however, that Ross shook his knife at Craner while telling him not to use his cell phone. When Craner spoke to the police dispatcher on the phone, he backed away from Ross. Ross again shook the knife at Craner, took a step toward him, and told him “that was a mistake.” Thus, Ross used “force or fear of immediate force,” *id.*, and thereby satisfied the elements of simple robbery.

*2 The evidence was sufficient to convict Ross of aggravated robbery. We therefore affirm.

WE CONCUR: JAMES Z. DAVIS and NORMAN H. JACKSON, Judges.

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