

2011

# Utah v. Loren Okuly : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	APPELLANT'S REPLY BRIEF
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	Case No. 20110775-CA
LOREN OKULY	)	
	)	
Defendant/Appellant.	)	

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APPEAL FROM THE JUDGMENT AND CONVICTION ON ONE  
COUNT OF CRIMINAL MISCHIEF, A CLASS B MISDEMEANOR, IN  
VIOLATION OF UTAH CODE ANN. § 76-6-106(2)(c), IN THE THIRD  
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF  
UTAH, THE HONORABLE BRUCE LUBECK, JUDGE PRESIDING.

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ORAL ARGUMENT REQUESTED

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**UTAH APPELLATE COURTS**

**NOV 28 2012**

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	APPELLANT'S REPLY BRIEF
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ORAL ARGUMENT REQUESTED

### LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of the parties in the proceedings before the Third Judicial District Court:

#### JUDGES

The Honorable Bruce Lubeck, Third District Court Judge, presided over the case against Mr. Okuly.

#### PARTIES

The State of Utah, represented by Melanie Serassio, Assistant District Attorney;

Loren Okuly, Defendant, represented in the Third District Court by Peter D. Goodall, Attorney at Law.

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N.M. STAT. ANN. § 30-2-7 (Michie 2001) 2

OKLA. STAT. tit. 21 § 643, 733 (2000) 2

S.D. CODIFIED LAWS § 22-16-30, 22-16-35, 22-18-4 (Michie 2001) 2

VT. STAT. ANN. tit.13 § 2305 (2001) 2

## ARGUMENT

- I. THE TRIAL COURT ERRED IN FAILING TO GIVE A REQUESTED JURY INSTRUCTION REGARDING JUSTIFICATION AS A DEFENSE WHERE MR. OKULY TESTIFIED THAT HE TOOK THE ALLEGED VICTIM'S PHONE TO PREVENT HER FROM USING IT AS A WEAPON AGAINST HIM AND DAMAGE ALLEGEDLY CAUSED THEREBY WAS THE BASIS OF THE CRIMINAL MISCHIEF CONVICTION.

A trial court's decision and ruling regarding whether to give a requested jury instruction is reviewed for correctness. *State v. Bryant*, 965 P.2d 539, 544 (Utah App. 1998). The State posits that the trial court's denial of the requested jury instruction was appropriate for three reasons; that self-defense is not a justification applicable to criminal mischief, that there was no rational basis in the evidence for Defendant to claim that he committed criminal mischief in self-defense, and that Defendant denied doing the acts that would be elements of the offenses. (Br. Appellee 7, 10, 14). The State also argues that the trial court's refusal to give the instruction caused no harm to Mr. Okuly. (Br. Appellee 14). These arguments are addressed in turn.

- A. **Self-defense should be considered a justification applicable to criminal mischief because the self-defense statute does not expressly limit its application to assault or homicide, and the property damage at issue resulted from Mr. Okuly "using force against another" in self-defense.**

The State argues, and the trial court reasoned, that "self-defense is not a justification applicable to criminal mischief." (Br. Appellee 14). Under Utah Law, the defense of justification may be claimed when an actor's conduct "is in defense of persons



or property under the circumstances described in Sections 76-2-402 through 76-2-406.” Utah Code Ann. §76-2-401(1)(a) (West 2004). Section 402 provides, “A person is justified in threatening or using force *against another* when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person...against another person’s imminent use of unlawful force.” Utah Code Ann. §76-2-402(1)(a) (West 2004) (italics added).

The State argues that the justification of self-defense applies only to the crimes of assault or homicide. Several states place their self-defense statutes within the criminal statutes of assault and homicide specifically.<sup>1</sup> The Utah legislature chose not to include §76-2-401 in Title 76 Chapter 5: Offenses Against the Person, which include Utah’s assault and homicide statutes, but instead chose to place it in Title 76 Chapter 2: Principles of Criminal Responsibility. The Utah legislature therefore intended §76-2-401 to apply to the entire criminal code, including criminal mischief, not just to offenses against the person.

The Utah legislature also did not expressly limit the language in the statute to apply only to assault or homicide. The statute applies when the person has a reasonable belief “that force or a threat of force is necessary to defend the person...against another person’s imminent use of unlawful force.” Utah Code Ann. §76-2-402(1)(a). Mr. Okuly

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<sup>1</sup> See, e.g., CAL.PENAL CODE § 195 (Deering 2001); MISS.CODE ANN. § 97-3-15 (2001); NEV.REV.STAT. ANN. § 200.200, 200.275 (2001); N.M. STAT. ANN. § 30-2-7 (Michie 2001); OKLA. STAT. tit. 21 § 643, 733 (2000); S.D. CODIFIED LAWS § 22-16-30, 22-16-35, 22-18-4 (Michie 2001); VT. STAT. ANN. tit.13 § 2305 (2001).

reasonably believed that his actions were necessary to defend himself against Ms. Tischner's use of unlawful force.

At issue here is whether using force "against another" in self-defense extends to justify using force against the weapon wielded by another unlawfully. When the victim of an imminent attack disarms the attacker of their weapon, justification should not be limited only to the force the victim used against the attacker's body, but should extend to the force used to rid the attacker of their weapon and to prevent further physical harm from attack with that weapon.<sup>2</sup>

Several states have addressed this issue and found their self-defense statutes, which are almost identical to Utah's statute, do apply to criminal mischief. The Court of Criminal Appeals of Texas held that self-defense "is available in a prosecution for criminal mischief where the mischief arises out of the accused's use of force against another." *Boget v. State*, 74 S.W.3d 23, 24 (Tex. Crim. App. 2002).

In that case, Boget was charged with criminal mischief for damage to a truck that he claims was driven into him and the damage occurred from his body hitting the windshield and also from Boget hitting the back window with his flashlight after being struck. *Id.* at 25. The driver claimed that Boget approached her truck and hit the windshield, passenger window, and rear window with his flashlight, causing the damage. *Id.* at 24. Other witnesses testified that the truck was driving towards Boget trying to hit

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<sup>2</sup> As a policy consideration, if a self-defense justification cannot be applied to property damage occurring during an attack, a person acting in self-defense would be liable for damage to the weapon occurring in the heat of the moment when he fears for his life or personal safety. In such a situation, the victim generally gives little thought to preserving the integrity of the attacker's weapon. Such a restriction on the self-defense justification is illogical and does not serve the intent of the Utah legislature.

him. *Id.* at 25. The trial court refused Boget's proposed instruction on self-defense and Boget was convicted of criminal mischief. *Id.* The prosecutor in that case argued on appeal that self-defense is available only to those defendants who have been charged with an offense against a person. *Id.* But the appellate court disagreed. It reasoned that the criminal mischief was "part and parcel of [Boget's] 'use of force against another'" and therefore the justification instruction should have been given to the jury. *Id.* at 27.

Appellate courts in Florida and Washington have also applied the self-defense justification to criminal mischief. *See D.M.L. v. State*, 976 So. 2d 670 (Fla. Dist. Ct. App. 2008) (the self-defense statute applies to criminal mischief where D.M.L. used force against the attacker who swung the bat at him, D.M.L. blocked the attack with his skate board, and damage to the attacker's truck resulted); *State v. Arth*, 121 Wash. App. 205, 210, 87 P.3d 1206, 1208 (2004) ("a defendant must be allowed to defend against criminal liability for the results of [his] force—whether it is damage to property or to a person."). Though none of these cases are binding on this court, they are persuasive authorities illustrating the reasoning of other jurisdictions.

As in *Boget*, Mr. Okuly's use of force was for the purpose of defending himself from an attack and the resulting criminal mischief was part and parcel of his self-defense actions. Were it not for Ms. Tischner's use of unlawful force, Mr. Okuly would not have needed to use force to defend himself which unwittingly resulted in the criminal mischief. Additionally, once Ms. Tischner converted the use of her phone from a communication device to a weapon, the unlawful use of her phone relinquished any expectation she had that her phone was to remain intact and undamaged.

Utah's self-defense statute was intended to provide justification for any person's use of force *against another* in self-defense, including against the attacker's weapon. Self-defense should be considered a justification applicable to criminal mischief because the self-defense statute does not expressly limit its application to assault or homicide, and the criminal mischief in this case resulted from Mr. Okuly's "use of force against another" in self-defense.

**B. The trial court erred in determining that Mr. Okuly denied committing the acts which constitute the elements of criminal mischief.**

The trial court denied the request for a jury instruction on justification, in part, "explaining that Defendant denied doing the acts that would be elements of the offenses." (Br. Appellee 7). The elements of criminal mischief include "intentionally damag[ing]... the property of another." Utah Code Ann. §76-6-106(2)(c). Mr. Okuly testified that he "took the phone from [Michelle's] hand" and "did not say what happened to Michelle's phone or claim that he had any reason to destroy it." (Br. Appellee 6). The trial court incorrectly assumed that Mr. Okuly's testimony was a denial that he acted intentionally.

Mr. Okuly denied having a reason to destroy the phone, but he did intend to remove the phone from Ms. Tischner in self-defense. Though Mr. Okuly never intended to damage Ms. Tischner's property by his actions, his conduct was intentional. This distinction will be further analyzed in the next section. Therefore, Mr. Okuly never denied committing the acts that constitute the elements of criminal mischief, even though the acts were justified.

- C. There was a rational basis in the evidence to support a self-defense instruction because both the jury and the prosecution were able to infer Mr. Okuly's intent when he removed the phone from Ms. Tischner, and reasonable people could disagree as to whether Mr. Okuly acted in self-defense.**

The State argues that “the evidence provided no rational basis for the [self-defense] instruction” because none of the three witnesses testified that “Defendant intentionally damaged Michelle’s phone in self-defense.” (Br. Appellee 14, 19). The State misconstrues the issue at bar. The real question is (1) whether Mr. Okuly’s conduct which resulted in damage to Ms. Tischner’s phone was intentional and (2) whether reasonable people could conclude that it was done in self-defense. *See State v. Harris*, 58 Utah 331, 199 P. 145, 148 (1921) (There need only be “sufficient evidence of [the defendant's] justification to create in the minds of the jury a reasonable doubt of his culpability for the offense charged” to justify the giving of an instruction on the point.); *State v. Wilson*, 565 P.2d 66, 68 (Utah 1977) (If the jury concludes that there is a reasonable doubt as to whether a defendant acted in self-defense, he is entitled to an acquittal.).

First, the State relies on the false assumption that Mr. Okuly did not intend to damage the phone in self-defense and therefore argues that his conduct was not intentional. (Br. Appellee 19-23). But Mr. Okuly acted intentionally even if his desire at the time was not to damage the phone. “A person acts ‘intentionally’ or ‘with intent’ when it is his conscious objective or desire to engage in the conduct or cause the result.” Utah Code Ann. § 76-2-103(1) (emphasis added). Mr. Okuly need not engage in the

conduct (removing the phone from his attacker) **and** desire to cause the result (damaged phone) in order to act with intent. He need only consciously engage in the conduct. His lack of desire to damage the phone in self-defense is irrelevant.

Second, reasonable people can and did conclude that Mr. Okuly's actions were taken in self-defense. Both the jury and the prosecution were able to infer Mr. Okuly's intent from the evidence when he removed the phone from Ms. Tischner. The trial jury concluded that he acted intentionally when they convicted Mr. Okuly of criminal mischief by finding that he "intentionally damage[d]...the property of another." Utah Code Ann. §76-6-106(2)(c). Thus, the jury found that Mr. Okuly acted intentionally even though he did not testify that he intended to damage the phone.

The jury also heard Derek Fox testify that Mr. Okuly took the phone and "tossed it over the balcony and down onto the couch." (Br. Appellee 22).<sup>3</sup> A reasonable jury could infer from both Mr. Okuly and Mr. Fox's testimonies that Mr. Okuly acted intentionally and his conduct was done with the intent to defend himself. *See State v. Robertson*, 2005 UT App 419, ¶ 15, 122 P.3d 895, 901-902 ("[I]ntent ...is a state of mind, which is rarely susceptible of direct proof, it can be inferred from conduct and attendant circumstances in the light of human behavior and experience." (internal quotation marks omitted)). Were the jury given the opportunity to consider the self-defense justification, they could reasonably infer from the evidence presented that Mr. Okuly acted in self-defense in light of human behavior and experience.

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<sup>3</sup> The State argues that Derek Fox's testimony is inadmissible even though the prosecutor did not object to it. (Br Appellee 22). Derek's testimony is admissible under Rule 807(a)(2)-(4) of Utah Rules of Evidence.

The State, in their Brief of Appellee, spelled out how one can conclude that Mr. Okuly intentionally defended himself. The State argues there is no “evidence to support a reasonable belief that Defendant intentionally destroyed the phone to protect himself.” (Br. Appellee 9). Yet, in the same argument the State asserts that, “Based on [Mr. Okuly’s] version, the jury could have acquitted him because he did not intentionally damage the phone.” (Br. Appellee 21). The State continues, “[Derek Fox’s] testimony likewise fails to support a self-defense instruction.[ ] Rather, it supports only an inference that Defendant tossed the phone on the couch to keep it away from Michelle, who had hit him with it and might have tried to wrest it from him and hit him with it again.” (Br. Appellee 22). Thus, the State reaffirms the Defendant’s position, presented through two testimonies which did not contradict each other, that Mr. Okuly disarmed Ms. Tischner and tossed her weapon to the side and the weapon was damaged in the process. The State made the reasonable inference that the Defendant acted intentionally to defend himself from continued attack based on the testimony given at trial.

There was a rational basis in the evidence to support a self-defense instruction because Mr. Okuly’s conduct was intentional and reasonable people were able to infer that Mr. Okuly intended to defend himself when he removed the phone from Ms. Tischner. There is sufficient evidence of Mr. Okuly’s justification to create in the minds of the jury a reasonable doubt of his culpability for the offense charged. The trial court was incorrect to find otherwise and deny the instruction.

**D. Refusal to give the jury instruction of justification harmed Mr. Okuly because the instruction would have allowed the jury to consider Mr. Okuly's substantial right to defend himself from unlawful force and he was acquitted of the more grave offense of Aggravated Assault.**

The State argues that the trial court's refusal to give the instruction caused no harm to Mr. Okuly. (Br. Appellee 14). The State refers to *State v. Evans*, where a conviction for aggravated murder was upheld despite the trial court erroneously refusing to instruct the jury on the lesser offense of attempted manslaughter because the error was harmless. 2001 UT 22, ¶20, 20 P.3d 888; (Br. Appellee 16). That case is distinguishable from the current case because Mr. Okuly was acquitted of the graver offense of aggravated assault, so denial to instruct the jury on the lesser charge of criminal mischief was harmful to Mr. Okuly because the jury was not allowed to consider the justification instruction which likely would have resulted in an acquittal of the lesser offense.

Another case cited by the State, *State v. Quada*, is also distinguishable from the current case. 918 P.2d 883, 886-87 (Utah App. 1996); (Br. Appellee 17). In that case, Quada's use of deadly force was not justified to make a citizen's arrest. *Id.* at 886-87. The Utah Court of Appeals reasoned that any error in refusing to give the requested instruction was harmless and did not affect Quada's substantial rights. *Id.* at 887. But unlike *Quada*, Mr. Okuly's right to defend himself from unlawful force is a substantial right and failure to give the requested instruction barred the jury from considering that substantial right. Also, unlike *Quada*, Mr. Okuly did not use deadly force to effect his substantial right, he only used force reasonably necessary to defend himself from Ms. Tischner's attack. Denial of the justification instruction harmed Mr. Okuly by restricting



the jury's ability to consider his reasonable use of force in exercising his substantial right to defend himself.

In conclusion, the justification instruction should apply to criminal mischief, Mr. Okuly never denied committing the acts that constitute the elements of the crime, there was a rational basis for giving the justification instruction, and Mr. Okuly was harmed by the trial court's denial to give it.

II. RECORDING LAPSES IN THE TRIAL TRANSCRIPT REQUIRE A NEW TRIAL WHERE UP TO THIRTY MINUTES OF THE ALLEGED VICTIM'S TESTIMONY WAS NOT RECORDED AND WHERE THE TRIAL COURT'S SUBSEQUENT RECONSTRUCTION IS INCOMPLETE AND INADEQUATE.

The sufficiency of a trial court's reconstruction of the record is reviewed for an abuse of discretion. *State v. Menzies*, 845 P.2d 220, 223 (Utah 1992). Utah law requires "that there be a record adequate to review specific claims of error already raised." *State v. Russell*, 917 P.2d 557, 559 (Utah App. 1996). Utah law also requires a showing of prejudice to overturn a conviction on the basis of errors in the record. *Menzies*, 845 P.2d at 228. The State argues that the missing parts of the record in this case are of "tangential significance to the issues at trial and no significance to the issue on appeal." (Br. Appellee 11-12).

The issue here is whether the trial court's reconstruction of the lapses in the trial transcript were sufficient so as not to prejudice Mr. Okuly's first claim raised on appeal; i.e., that the trial court erred in failing to give a requested jury instruction regarding

justification as a defense. The reconstruction is insufficient as to Mr. Okuly's first claim because the omissions were extensive and it is reasonable to believe that facts omitted from the record due to the lapses are directly related to the criminal mischief charge and the self-defense justification. Thus, Mr. Okuly's first claim is prejudiced.

An accurate record of proceedings before the appellate court is essential. See *State v. Harris*, 2004 UT 103 at ¶¶33-35, 104 P.3d 1250 (recognizing right to complete record on appeal). In *State v. Taylor*, the Utah Supreme Court ordered a new trial because the omissions in the transcript rendered the record inadequate for appeal. 664 P.2d 439, 447 (Utah 1983). In reaching this conclusion, the Court "noted that the omissions were extensive" and "occurred in portions of the transcript that directly related to issues on appeal." *Menzies*, 845 P.2d at 232 (examining *Taylor*). Nearly thirty minutes of missing testimony was from the only witness, besides Mr. Okuly, to the events at issue. These omissions are extensive and contain testimony essential to the case and important to the jury's deliberations.

The lapses in the transcript occurred in portions that directly relate to the first issue in Mr. Okuly's appeal and to the State's arguments. The State argues that once Mr. Okuly removed the phone from Ms. Tischner, the threat was no longer imminent and his right to defend himself ceased at that point. (Br. Appellee 23). Looking at the lapses in the trial record, it is reasonable to believe that facts pointing to the imminence of Ms. Tischner's unlawful force against Mr. Okuly were omitted from the record and the reconstruction. "In determining imminence...the trier of fact may consider...the nature of the danger;...the other's prior violent acts or violent propensities; and any patterns of

abuse or violence in the parties' relationship." Utah Code Ann. §76-2-402(5). It is also reasonable to believe that facts directly relating to the criminal mischief charge were missing from the record and the court's reconstruction.

During the fourth lapse in the trial record Ms. Tischner was testifying on cross examination that she did kick and break the bedroom door after Mr. Okuly had locked himself inside. (Br. Appellant 23). The lapse lasted three minutes from 15:16:54 to 15:19:55. (Tr. Vol. I at 172). According to the trial court's Order Supplementing Record on Appeal ("Order"), during this lapse Ms. Tischner stated she "did indeed break the door" and "she said the cell phone, still worked after the battery was put in but she got a new phone." (Br. Appellant Add. IV at 6). When the record resumes Ms. Tischner confirms that her phone was working and that she did use her cell phone again "after August 30<sup>th</sup>." It is reasonable to believe that her missing testimony during this lapse is relevant to a showing of Ms. Tischner's "violent propensities" and the "nature of the danger." (Tr. Vol. I at 173). The details of her attack on the door of the room where Mr. Okuly was hiding and her recollection of how and when she retrieved her phone are relevant to Mr. Okuly's claim of self-defense.<sup>4</sup>

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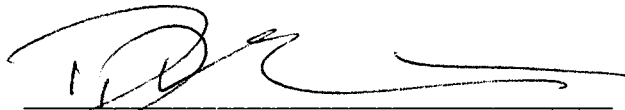
<sup>4</sup> The first lapse in the record is also troubling because the Order indicates the lapse "begins at 12:28 pm" when in reality the lapse began at 12:21:04 p.m. and ended at 13:34:37 p.m. (Add. IV at 3; Br. Appellant 20). Before this lapse Ms. Tischner was being questioned about her testimony that Mr. Okuly had hit her while her phone was in his hand, and resumed with her "talk[ing] about the pieces of [Ms. Tischner's] phone that were on the floor." (Tr. Vol. I at 93). Any testimony as to how the phone ended up in pieces downstairs by the television would be directly applicable to the criminal mischief charge. Also, in the State's "Position Regarding Reconstruction of Trial Record," the State recorded on the third page of the document, "Didn't have service (phone)." Why would Ms. Tischner state that her phone had no cellular service if it was broken in pieces on the floor like she testified? Such a fact would be useful in determining if Mr. Okuly had in fact damaged the phone.

The foregoing omissions show the insufficiency of the Order in determining the imminence of Ms. Tischner's threat, Mr. Okuly's role in the damage to the phone, and his self-defensive actions related to the criminal mischief charge. It is reasonable to believe that the record and reconstruction omitted other statements made by Ms. Tischner revealing the truth of what happened to her phone which directly relate to Mr. Okuly's justification defense.

#### CONCLUSION

Based upon the foregoing, Appellant, Mr. Okuly, respectfully requests this Court to reverse his conviction and to remand the case to the trial court for a new trial.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of November, 2012.



PETER D. GOODALL

Attorney for Defendant / Appellant

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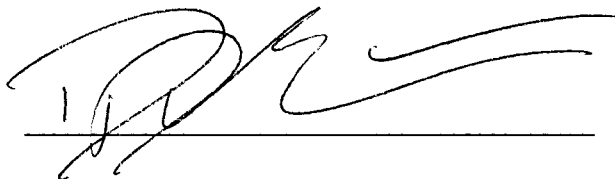
  
\_\_\_\_\_  
Attorney's or Party's Name Peter Goodall

Dated: 11/20/12

CERTIFICATE OF SERVICE

I hereby declare that I mailed/delivered two true and correct copies of the foregoing Appellant's Reply Brief, postage prepaid, this 26<sup>th</sup> day of November, 2012, to:

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A handwritten signature in black ink, appearing to be "M. Shurtleff", is written over a horizontal line.