

2011

Utah v. Loren Okuly : Brief of Appellee

Utah Court of Appeals

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Case No. 20110775-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

LOREN OKULY,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for criminal mischief, a class B misdemeanor, in violation of Utah Code Ann. §76-6-106 (West 2004), in the Third Judicial District, Salt Lake County, the Honorable Bruce Lubeck presiding

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Utah Code Ann. §76-2-401 (West 2004) (justification as defense);
Utah Code Ann. §76-2-402 (West Supp. 2011) (force in defense of
persons);
Utah Code Ann. §76-6-106 (West 2004) (criminal mischief);
Utah R. Crim. P. 19 (instructions).

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Case No. 20110775-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/ Appellee,

vs.

LOREN OKULY,
Defendant/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for criminal mischief, a class B misdemeanor, in violation of Utah Code Ann. §76-6-106 (West 2004). This Court has jurisdiction under Utah Code Ann. §78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUES

1. Is the supplemented record adequate to afford Defendant a full and fair review of his issues on appeal?

Standard of Review. This Court reviews a trial court's determination that the record is sufficient for appellate review under the abuse of discretion standard. *State v. Menzies*, 845 P.2d 220, 224 (Utah 1992). This Court "will not find abuse of discretion unless, given the applicable facts and law, the trial court's decision is unreasonable." *Id.* (citation omitted).

Such deference is appropriate because the “judge who presided over the trial is in a far better position to determine whether the record adequately reflects the proceedings.” *Id.*

2. Did the trial court err when it refused to give Defendant’s proposed instruction on justification with respect to the criminal mischief charge?

Standard of Review. The trial court’s refusal to give a jury instruction is reviewed for correctness. *State v. Daniels*, 2002 UT 2, ¶27, 40 P.3d 611.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rule are reproduced in *Addendum A*:

Utah Code Ann. §76-2-103 (West Supp. 2011) (definitions);

Utah Code Ann. §76-2-401 (West 2004) (justification as defense);

Utah Code Ann. §76-2-402 (West Supp. 2011) (force in defense of persons);

Utah Code Ann. §76-6-106 (West 2004) (criminal mischief);

Utah R. Crim. P. 19 (instructions).

STATEMENT OF THE CASE

A. Summary of facts.

1. The offense.

Michelle, the victim, began dating Defendant in March 2010 and moved into his apartment in July 2010. R239:67.¹ On an August evening a month later, she attended her friend's wedding, and he attended his friend's birthday party. R239:70, 73. Both consumed alcohol. *Id.*; R240:326. They argued when Defendant failed to pick her up. R239:72. She got a ride home, locked their bedroom door, and went to bed. R239:76-77. She awoke to Defendant's poking her with a toothpick he had apparently used to pick the lock. R239:77. He yelled and ripped the covers off the bed, she grabbed a blanket as he tried to get her out of the bedroom, and they argued as they continued from the bedroom into the hallway. R239:78-79. He then pushed her down the stairs. R239:79.

After she landed at the bottom of the stairs, Michelle went back upstairs to get her cell phone to call her mother for a ride. R239:79, 83. At that point, she noticed that Defendant had her phone. R239:79. He said, "I'm going to plug this into the computer and see who you've been talking

¹ The State refers to the domestic violence victim in this case by first name. In so doing, the State does not intend to encourage this Court to depart from its current practice of identifying a domestic violence victim only as Victim.

to. This should be fun." R239:84. She asked for the phone so she could make her call. *Id.* She told him that if he did not give her the phone, she would call the police. R239:85. Instead of giving the phone to her, Defendant began hitting her. R239:92. It "wasn't that he was hitting [her] with the phone. He had the phone in his hand while he was hitting [her]." *Id.* She kept saying, "Give me my phone back." R240:87. But instead of giving it back, Defendant "threw it from the top of the stairs to the bottom of the stairs." R239:84-85. Defendant then pinned Michelle down and pressed the back of his arm against her neck, choking her. R239:88, 91. She was frightened because she could not breathe and tried to push him off. R239:91.

At that point, Defendant "went quiet," got up, and went back into the bedroom. *Id.* When Defendant left, Michelle tried to use the regular telephone, but it did not work. R294. She screamed and ran outside to call for help. *Id.* On her way out, she picked up her cell phone which was in pieces on the floor by the television. *Id.*; R239:93. The keyboard was separated from the phone. R239:109; *see also* Exhibit 15. The battery was missing. R294; *see also* R239:93.

Michelle went to a nearby house, which turned out to be the house where Defendant had attended the birthday party. R239:95. She told some

people there, "My boyfriend just beat the crap out of me," and asked to use their phone. R239:96. They handed her the phone, and she called 911. *Id.* She was taken by ambulance to the hospital. R239:44, 100.

When Michelle went home the next day, she found her cell phone battery on the floor next to the TV in the front room. R239:93. After replacing the battery, she could make and receive calls, but she could not read incoming text messages. R239:173.

2. Defendant's version.

Defendant testified that he left his friend's birthday party about 2:00 a.m. and walked to his home about a hundred yards away. R240:294. He went upstairs to see whether Michelle was there and found the bedroom door locked. R240:294-95. He then went back to the party, but returned home again about 3:00 a.m. R240:295-96.

Because the bedroom door was still locked, he grabbed a toothpick to pick the lock, entered the room, and crawled into bed. R240:297. Michelle began screaming, told him to get out, and kicked him with enough force to knock him off the bed and onto the floor. *Id.* Defendant grabbed his blanket off the bed and went downstairs to sleep on the couch. R240:298-99. Ten minutes later, thinking his situation was ridiculous, he went back up to his room. R240:299-300. He entered the bedroom, saw Michelle sleeping

there in the sheets, and pulled the sheets off the bed and threw them into the hallway. R240:301. Defendant claimed that Michelle then hit or slapped him. R240:302. He said she hit him nine or ten times and that he did not hit her back, pull her hair, or grab her clothing. R240:303-06. The last time she tried to hit him, he grabbed her arm. R240:307. He could not remember whether her phone was in her hand the entire time, but knew it was in her hand the last time she tried to hit him and so he took the phone from her hand. R240:306-08. As he took the phone away, she "literally just kind of fell down." R240:308. He went down with her, had her arm in his hand, and held it across her chest. R240:311.

Defendant testified that Michelle did not go down the stairs. R240:309. He also denied putting his hand on her throat. R240:313. He did tell her she needed to stop. *Id.* He then jumped up, ran down the hall into the bedroom, and locked the door. *Id.* Defendant did not say what happened to Michelle's phone or claim that he had any reason to damage it. *See id.*

Defendant said that about thirty seconds later Michelle began beating on the door. R240:314-15. He said that she broke the door, either by hitting or kicking it. R240:315.

Defendant did not call the police to report the incident. R240:335.

3. Defendant's story to Derek Fox.

Derek Fox, Defendant's friend, heard one version of the incident from Michelle and another from Defendant. R240:401. Defense counsel called Derek to testify about what Defendant told him when Derek visited Defendant in jail. R240:402. Derek testified Defendant told him that Michelle was hitting him with her phone and so he eventually "grabbed her arm so she would [stop] hitting" him. *Id.* Derek further testified that Defendant said he took the phone, tossed it over the balcony and down onto the couch, went back into his bedroom, and locked the door. *Id.*

B. Summary of proceedings.

Defendant was charged by amended information with aggravated assault (domestic violence), a third degree felony; criminal mischief (domestic violence), a class B misdemeanor; and damage to or interruption of a communication device (domestic violence), a class B misdemeanor. R121-23. At the close of evidence during trial, defense counsel requested a jury instruction on justification. R240:423-25. The trial judge denied the request, explaining that Defendant denied doing the acts that would be elements of the offenses and that the law of justification did not apply to criminal mischief. *Id.* The jury found Defendant guilty of criminal mischief, but acquitted him of the other two offenses. R214-15.

Defendant filed a timely notice of appeal. R225. Defendant then moved this Court for a remand to determine what happened during several unexplained lapses in the electronic recording of the trial transcript. R247-48. This Court granted Defendant's unopposed motion. R246. Both parties submitted memoranda regarding the missing recording. R265-76, 284-90. The trial court then issued an order supplementing the record with its findings based on the parties' input, the court's own notes from trial, and its memory of the testimony. R291-99 (attached at *Addendum B*).

SUMMARY OF ARGUMENT

1. The supplemented record is adequate to afford Defendant a full and fair review of his claim on appeal. Defendant claims that the record is inadequate because it contains a discrepancy and an alleged inaccuracy in the testimony, and does not contain a record of his objections and the trial court's associated rulings, thus curtailing his ability to identify potential issues for appeal.

But nothing suggests that the allegedly missing testimony would clarify the inconsistency or establish the claimed inaccuracy. Moreover, the alleged inconsistency and inaccuracy go only to peripheral matters tangential to Defendant's guilt or innocence. Finally, as precedent explains, a defendant is not entitled to a new trial simply because there is a gap in the

record that might reveal some error. Rather, he is entitled to a record adequate to review specific claims of error already raised. Here, the record is adequate to provide review of Defendant's one claim.

2. Defendant claims that he was entitled to a self-defense instruction justifying his destroying Michelle's phone. The self-defense statute allows the use of force against persons, not objects, where necessary to defend against another's unlawful use or threat of force. Thus, as the trial court ruled, it does not apply to criminal mischief.

But even if it did, there is no rational basis in the evidence to support a reasonable belief that Defendant intentionally destroyed the phone to protect himself. The victim's testimony was that Defendant was the aggressor, thus precluding a claim of self-defense. Defendant's own testimony is that he took the phone away from the victim and went to his bedroom. Defendant did not testify that he broke the phone, that he intended to break it, or that he had to break it to defend himself. Defendant's friend's hearsay testimony was that Defendant said he took the phone away from the victim and then tossed it from the upstairs balcony down onto the couch. At best, this would support a finding that Defendant intentionally moved the phone to a place where the victim could not access it, not that he intentionally broke the phone, much less that he had to break

it to defend himself. Thus, as the trial court also found, there was no rational basis in the evidence for Defendant to claim that he committed criminal mischief—the intentional destruction of another’s property—but only in self-defense.

ARGUMENT

I.

THE SUPPLEMENTED RECORD IS ADEQUATE TO AFFORD DEFENDANT A FULL AND FAIR REVIEW OF THE SINGLE ISSUE ON APPEAL

Defendant claims that the supplemented record is inadequate for the three reasons:

(1) the trial court “describes a discrepancy as to whether [Michelle] went to the [emergency room] before or after her interview with Officer Elkins” on the night of the incident, Br. Appellant 31;

(2) the trial court order supplementing the record contains an “apparent inaccuracy”—the “trial court concluded that [Michelle] testified that she did not post Defendant’s mug[shot] on her facebook page,” but Defendant’s Exhibit 22 “clearly shows [Defendant’s] mug shot posted on [her] facebook page,” *id.*; and

(3) the supplemental record contains no record of Defendant’s objections or the trial court’s associated rulings, curtailing Defendant’s

opportunity “to identify potential issues that warrant investigation,” *id.* at 32.

Applicable law. Utah courts review a trial court’s determination that the record is sufficient for appellate review under the abuse of discretion standard. *State v. Menzies*, 845 P.2d 220, 224 (Utah 1992). They “will not find abuse of discretion unless, given the applicable facts and law, the trial court’s decision is unreasonable.” *Id.* (citation omitted). As explained, such deference is appropriate because the “judge who presided over the trial is in a far better position to determine whether the record adequately reflects the proceedings.” *Id.*

Moreover, “a defendant is [not] entitled to a new trial whenever there is a gap in the record, just in case the missing record might reveal some error.” *Provo City v. Garcia-Sanchez*, 2008 UT App 155U, *1 (quoting *State v. Russell*, 917 P.2d 557, 559 (Utah App. 1996)) (internal quotation marks omitted) (alteration in original). Utah law requires “that there be a record adequate to review specific claims of error *already raised*, but it does not require a complete record so appellate counsel can go fishing for error.” *Id.* (quoting *Russell*, 917 P.2d at 559) (internal quotation marks omitted).

In addition, “where an appellant’s best case is that he elicited contradictory evidence that is missing from the record, . . . an appellate

court can rely on the presumption that the jury disbelieved the evidence in conflict with the jury verdict and find that there is evidence sufficient to support the jury's findings." *Id.* (quoting *State v. Gardner*, 2007 UT 70, ¶25, 167 P.3d 1074) (internal quotation marks and additional citation omitted).

Analysis. Here, Defendant brings only one claim of error. He claims that the trial court erred for not giving his proposed instruction that he was justified in damaging the phone to defend himself against Michelle's imminent use of unlawful force (the self-defense instruction). *See* Point II, below. But the possible inadequacies in the evidentiary record that Defendant alleges do not bear on this issue. Rather, the evidence that Defendant asserts may be missing relates only to matters having little significance to Defendant's guilt or innocence of criminal mischief and no bearing at all on whether he was entitled to a self-defense instruction. Whether Michelle went to the emergency room before or after her interview with Officer Elkins and whether she posted Defendant's mug shot on her Facebook page have, at best, tangential significance to the issues at trial and and no significance to the issue on appeal.

Further, while Defendant claims that some objections and rulings may be missing from the record, he does not claim that any missing objections and rulings are relevant to his request for a self-defense

instruction. Rather, he claims that these possibly missing objections and rulings curtail his ability to investigate the possibility of other errors. *See* Br. Appellant 32. But this does not make the record inadequate to permit appellate review of the one issue he has raised. And, as explained, a record that allows appellate review of the issue already raised is adequate. *See Garcia-Sanchez*, 2008 UT App 155U, *1. Utah law “does not require a complete record so appellate counsel can go fishing for error.” *Id.* (internal quotation marks and citation omitted).

In sum, Defendant has not shown that the supplemented record is inadequate. He has not shown that the trial judge abused his discretion by deciding to supplement the record rather than finding that it could not be adequately supplemented.

II.

THE TRIAL COURT DID NOT ERR WHEN IT DENIED DEFENDANT'S PROPOSED INSTRUCTION ON SELF- DEFENSE

Defendant also claims that “the trial court erred in failing to give a requested jury instruction regarding justification as a defense where [he] 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 charge.” Br. Appellant 26. Defendant cites as authority Utah Code Ann. §76-2-401, the justification statute, which sets

forth justification as a defense, and, specifically, Utah Code Ann. §76-2-402, the self-defense statute referenced in section 401. See Br. Appellant 26.

But the trial court did not err by denying an instruction on self-defense as a justification for criminal mischief. *State v. Menzies*, 845 P.2d 220, 224 (Utah 1992). As the trial court reasoned, self-defense is not a justification applicable to criminal mischief and, in any event, the evidence provided no rational basis for the instruction. See R240:423. Finally, even if Defendant was entitled to the instruction, the trial court's refusal to give it caused him no harm.

A. Utah law governing self-defense instructions.

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). Defendant relies on section 402, which 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." Br. Appellant 26 (quoting Utah Code Ann. §76-2-402(1)(a) (West Supp. 2011)).

But a person "is not justified in using force if he was the aggressor." Utah Code Ann. §76-2-402(2)(iii). Nor is he justified if he "initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant." Utah Code Ann. §76-2-402(2)(i).

Moreover, in determining the imminence of the threat against a defendant and the reasonableness of the defendant's actions in response, a jury may properly consider: "the nature of the danger," "the immediacy of the danger," the probability that the unlawful force would result in death or serious bodily injury," "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). "[I]t is the imminence of the harm to another that is central to the legal justification of violence to prevent it." *State v. Berriel*, 2011 UT App 317, ¶6, 262 P.3d 1212. Thus, "[t]he right to [self-defense] ceases when the danger has passed or ceased to be imminent." *State v. Stark*, 627 P.2d 88, 91 (Utah 1981).

Utah courts have held that, when a defendant requests a self-defense instruction under section 76-2-402, a trial court must give it whenever "there is a basis in the evidence, whether the evidence is produced by the prosecution or by the defendant, which would provide *some reasonable basis*" for a jury to conclude that a crime was committed in self-defense. *State v.*

Garcia, 2001 UT App 19, ¶8, 18 P.3d 1123 (quoting *State v. Knoll*, 712 P.2d 211, 214 (Utah 1985)) (internal quotation marks omitted); see also *State v. Torres*, 619 P.2d 694, 695 (Utah 1980) (stating that a party is entitled to self-defense jury instruction “if there is any reasonable basis in the evidence to justify it”). In other words, the instruction should be given when there is a rational basis in the evidence to conclude that the crime “was done to protect the defendant from an imminent threat . . . by another.” *Knoll*, 712 P.2d at 214.

However, a defendant is not entitled to a self-defense instruction if “a jury could not reasonably have concluded that the nature or the immediacy of the danger to [the defendant] reasonably justified a belief that it was probable that [the victim] was about to use ‘unlawful force against [him].’” *Berriel*, 2011 UT App 317, ¶6.

And even where a trial court errs for not giving a requested instruction, that error may be harmless. For instance, in *State v. Evans*, 2001 UT 22, ¶20, 20 P.3d 888, the Utah Supreme Court upheld Evans’ conviction for attempted aggravated murder even though the trial court erroneously refused to instruct the jury on the lesser included offense of attempted manslaughter. The *Evans* court acknowledged that the evidence provided a rational basis for the instruction, but nevertheless concluded that the error

was harmless because “there [was] no reasonable likelihood that it affected the outcome of the proceedings.” *Id.* (citation omitted). In that case, the only testimony to support the jury instruction was Evans’s self-serving testimony—meager evidence that stood in contrast to the testimony of the other witnesses. *Id.* at ¶¶20-22.

Similarly, a defendant suffers no harm where the jury’s verdict demonstrates that denying the instruction was harmless. In *State v. Quada*, 918 P.2d 883, 886-87 (Utah App. 1996), Quada complained that the trial court erred in refusing to give a jury instruction on justification for using force to effect a citizen’s arrest. *Id.* at 886-87. But the court found that any error in refusing to give the requested instruction was harmless and did not affect Quada’s substantial rights. *Id.* at 887 (citing Utah R. Crim. P. 19, 30). Under the citizen’s arrest statute then in effect, a person was allowed to make a citizen’s arrest under narrowly defined circumstances. *Id.* (citing Utah Code Ann. §77-7-3 (1995)). But one was not allowed to use deadly force. *Id.* (citing Utah Code Ann. §76-2-403 (1995)). The jury convicted Quada of aggravated assault, necessarily finding that he used a dangerous weapon likely to produce death or serious bodily injury and thus that he had used “deadly force.” *Id.* As a result, even had the jury been properly instructed on the right to make a citizen’s arrest, the jury could not have

found that Quada had made a lawful citizen's arrest. *Id.* Therefore, any error in refusing to give Quada's requested jury instruction was harmless and did not affect his substantial rights. *Id.*

B. Defendant was not entitled to a self-defense jury instruction; alternatively, denial of the instruction caused Defendant no harm.

Defendant was not entitled to a self-defense instruction. First, as the trial court reasoned, self-defense is not a justification applicable to criminal mischief. R240:425. Second, even if self-defense were applicable to criminal mischief, there was no rational basis in the evidence for giving a self-defense instruction with respect to the charge for criminal mischief. And third, even if Defendant were entitled to the instruction, he suffered no harm from the court's refusal to give it.

1. Self-defense is not a justification for criminal mischief.

As the trial court reasoned, self-defense is not a justification for criminal mischief. R240:425. The self-defense statute provides a defense for using force against another to defend oneself against the other's unlawful use of force. See Utah Code Ann. §76-2-402. Therefore, under the proper circumstances, a defendant can claim self-defense for using such force. Here, under his version of the facts, Defendant could perhaps have claimed that he hit or pushed Michelle or even took the phone from her to defend

himself from her alleged blows. In other words, he could have claimed self-defense as a justification for his assault on her. But self-defense does not provide a justification for the intentional destruction of an object. *See id.* Therefore, the trial court correctly declined to give the instruction.

2. There was no rational basis in the evidence to support a self-defense instruction.

Alternatively, there was no rational basis in the evidence to support Defendant's requested instruction. Under the subsection of the criminal mischief statute applicable here, a person commits criminal mischief if he "intentionally damages . . . the property of another." Utah Code Ann. §76-6-106(2)(c). Although three witnesses testified about the August 2010 incident, none of them testified to facts that could show that Defendant intentionally damaged Michelle's phone in self-defense.

Michelle's testimony. Michelle testified that after Defendant threw her down the stairs, she went back upstairs to get her cell phone and call her mother for a ride. R239:79. Defendant had the phone. R239:78-79. She asked for it so she could make her call and said she would call the police if he did not give it to her. R239:84-85. Instead of giving her the phone, Defendant "threw it from the top of the stairs to the bottom of the stairs." R239:85-86, 92. As she ran out of the home, she found the phone in pieces on the floor by the television at the bottom of the steps. R239:88, 93.

Michelle's version of the facts provides no rational basis for a self-defense instruction. Nothing in her version suggests that she used or was about to use unlawful force against Defendant. Under her version of the events, Defendant was the aggressor. Because he was the aggressor, he had no right invoke self-defense. *See* Utah Code Ann. §76-2-402(2)(iii).

Defendant's testimony. Defendant testified that Michelle repeatedly hit or slapped him and that the last time she tried to hit him the phone was in her hand so he removed it. R240:303-13. After they ended up falling down together at the top of the stairs, Defendant ran down the hall into the bedroom and locked the door. R240:313.

Based on his version of the facts, Defendant may have been entitled to a self-defense instruction with respect to the assault charge, but not the criminal mischief charge. According to Defendant, he did not commit criminal mischief, because he did not intentionally destroy Michelle's property. *See* Utah Code Ann. §76-6-106(2)(c) (requiring that an act of criminal mischief be done intentionally). Rather, he testified, he took the phone from her to protect himself and then went into his bedroom.

Defendant claims on appeal that the phone was damaged when he took it from Michelle. Br. Appellant 28. But he did not testify to that below. Rather, he testified only that he took the phone from Michelle, not that the

phone was damaged. Nor did he explain how the damage occurred. Defendant's testimony does not show that he damaged the phone, much less that he intentionally damaged it to defend himself from her blows.

And even if he took the phone from Michelle to stop her from hitting him with it, and even if the phone was damaged as he took it, that testimony does not provide a basis for a self-defense instruction. Rather, as the court concluded, that testimony constitutes a denial that he intentionally damaged the phone. R240:423. Based on his version, the jury could have acquitted him because he did not intentionally damage the phone. *See* Utah Code Ann. §76-6-106(2)(c). But Defendant's testimony did not provide a basis upon which the jury could have found that he intentionally destroyed the phone, but only in self-defense.

Derek Fox's testimony. Derek Fox visited Defendant in jail, where Defendant recounted another version of the facts. R240:402. Defendant said that Michelle hit him with her phone. *Id.* Defendant said that he grabbed Michelle's arm so she would stop hitting him, took the phone, and tossed it

over the balcony and down onto the couch, then went to his bedroom and locked the door. *Id.*²

This testimony likewise fails to support a self-defense instruction. This testimony, if credited, adds to Defendant's testimony only the fact that, after taking the phone, Defendant tossed it over the balcony and down onto the couch. But this is not testimony that Defendant intentionally destroyed the phone. 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.

There is no basis in this testimony to conclude that Defendant intentionally destroyed the phone. While the testimony might suggest that Defendant somehow accidentally broke the phone when he dropped it down onto the couch, that is not an act from which the jury could infer

² While the prosecutor did not object to Derek Fox's testimony, the testimony was inadmissible under the rules of evidence. Defendant offered for its truth Derek's testimony about what Defendant told Derek at the jail. But when "a party offers his own out-of-court declaration for its truth, it is not an admission, and must satisfy the hearsay rule." Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* 742 (1996). In eliciting Derek's testimony, Defendant offered his own out-of-court declaration for its truth. But the testimony did not fall within the exclusions from the hearsay definition set forth in rule 801, Utah Rules of Evidence (an opposing party's statement offered against the opposing party), or within the exceptions to the rule against hearsay set forth in rule 804, Utah Rules of Evidence (statements against penal interest).

intentional destruction. Had Defendant intended to break the phone, he would not have "tossed it" down onto the couch. Rather, he would have thrown it onto the floor or against some other hard object. If the phone was damaged when he tossed it onto the couch to keep it from Michelle, the damage was inadvertent and Defendant acted, at worst, negligently or recklessly, but not intentionally.

And even if the evidence could show that Defendant intentionally damaged the phone when he tossed it over the balcony, at that point, he had the phone, Michelle could no longer use it to hit him, and any threat that she would do so was no longer imminent. Thus, Defendant would not have been entitled to use self-defense, as that right "ceases when the danger has passed or ceased to be imminent." *Stark*, 627 P.2d at 91; *see also Knoll*, 712 P.2d at 214 (self-defense instruction should be given only where there is evidence to support a finding that the crime "was done to protect the defendant from an imminent threat . . . by another").

Thus, Derek Fox's testimony does not provide a rational basis for a self-defense instruction. Rather, as the trial court found, like Defendant's testimony, it provides a basis to believe that Defendant did not commit criminal mischief, but no basis to believe that although he committed the offense, he committed it in self-defense.

3. Defendant suffered no harm.

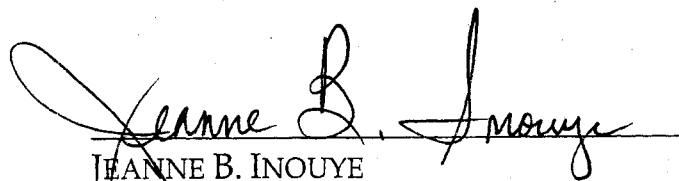
Finally, even assuming *arguendo* that Defendant was entitled to a self-defense instruction, not giving the instruction was harmless. Defendant did not assert in opening statement that the evidence would show that he intentionally damaged Michelle's phone, but only in self-defense. *See* R239:35-42. Nor did he argue that in closing argument. *See* R240:446-475. Rather, he claimed, consistent with his own testimony and with the hearsay testimony he presented through Derek Fox, that he "did not intentionally damage [or] deface the property of another." R240:474. Under these circumstances, there is no reasonable likelihood that Defendant might have been acquitted, had the jury been instructed on self-defense with respect to the criminal mischief charge.

CONCLUSION

For the foregoing reasons, the Court should affirm.

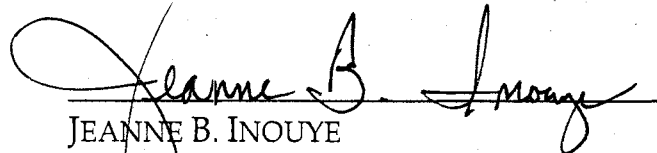
Respectfully submitted on October 2, 2012.

MARK L. SHURTLEFF
Utah Attorney General


JEANNE B. INOUE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 5226 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Book Antiqua 13 point.



JEANNE B. INOUE
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on October 2, 2012, two copies of the foregoing brief were ☒ mailed ☐ hand-delivered to:

Peter D. Goodall
825 North 300 West, Suite N-224
Salt Lake City, UT 84103

Also, in accordance with Utah Supreme Court Standing Order No. 8, a Courtesy Brief on CD in searchable portable document format (pdf):

☐ was filed with the Court and served on appellant.

☒ will be filed with the Court and served on appellant within 14 days.

W. Melina Treger

Addenda

Addendum A

U.C.A. 1953 § ~~76-2-103~~

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 2. Principles of Criminal Responsibility (Refs & Annos)

Part 1. Culpability Generally

§ ~~76-2-103~~. Definitions

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or 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.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

CREDIT(S)

Laws 1973, c. 196, § ~~76-2-103~~; Laws 1974, c. 32, § 4; Laws 2007, c. 229, § 4, eff. April 30, 2007.

HISTORICAL AND STATUTORY NOTES

Laws 2007, c. 229, in subsec. (3) following "Recklessly" deleted " , or maliciously, "; and in subsec. (4) deleted "such" preceding "a nature and degree".

CROSS REFERENCES

Automobile homicide, see § 76-5-207.

Water and irrigation, administrative penalties determined by state engineer, 'knowingly' defined, see § 73-2-26.

LAW REVIEW AND JOURNAL COMMENTARIES

U.C.A. 1953 § 76-2-401

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 2. Principles of Criminal Responsibility

Part 4. **Justification** Excluding Criminal Responsibility

§ 76-2-401. Justification as defense—When allowed

(1) Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of **justification** may be claimed:

- (a) when the actor's conduct is in defense of persons or property under the circumstances described in Sections 76-2-402 through 76-2-406 of this part;
- (b) when the actor's conduct is reasonable and in fulfillment of his duties as a governmental officer or employee;
- (c) when the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis, as limited by Subsection (2);
- (d) when the actor's conduct is reasonable discipline of persons in custody under the laws of the state; or
- (e) when the actor's conduct is justified for any other reason under the laws of this state.

(2) The defense of **justification** under Subsection (1)(c) is not available if the offense charged involves causing serious bodily injury, as defined in Section 76-1-601, serious physical injury, as defined in Section 76-5-109, or the death of the minor.

Laws 1973, c. 196, § **76-2-401**; Laws 2000, c. 126, § 1, eff. May 1, 2000.

LIBRARY REFERENCES

Assault and Battery ~~67~~ to 69.

Criminal Law ~~38~~.

Homicide ~~757~~ to 761, 766 to 809.

Westlaw Key Number Searches: 110k38; 37k67 to 37k69; 203k757 to 203k761; 203k766 to 203k809.

C.J.S. Assault and Battery §§ 87 to 95.

C.J.S. Criminal Law § 49.

RESEARCH REFERENCES

Treatises and Practice Aids

2 Criminal Law Defenses § 143, Authority to Maintain Public Order and Safety.

2 Criminal Law Defenses § 144, Parental and Benevolent Custodial Authority.

2 Criminal Law Defenses § 149, General Public Authority.

2 Substantive Criminal Law § 10.2, Public Duty.

2 Substantive Criminal Law § 10.3, Domestic Authority; Other Special Relationships.

U.C.A. 1953 § ~~76-2-402~~

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 2. Principles of Criminal Responsibility (Refs & Annos)

Part 4. Justification Excluding Criminal Responsibility

§ ~~76-2-402~~. Force in defense of person--Forcible felony defined

(1)(a) 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 or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2)(a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute "combat by agreement":

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4)(a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section 76-6-204, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury;

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship.

CREDIT(S)

Laws 1973, c. 196, § 76-2-402; Laws 1974, c. 32, § 6; Laws 1991, c. 10, § 5; Laws 1994, c. 26, § 1; Laws 2010, c. 324, § 126, eff. May 11, 2010; Laws 2010, c. 361, § 1, eff. May 11, 2010.

HISTORICAL AND STATUTORY NOTES

Laws 2010, c. 324, § 126, in subsec. (2)(b)(i), substituted "Subsection (2)(c)(i)" for "Subsection (i)"; in subsec. (4), substituted "Title 76, Chapter 5, Offenses Against the Person," for "Title 76, Chapter 5," and substituted "Title 76, Chapter 6, Offenses Against Property," for "Title 76, Chapter 6,".

Laws 2010, c. 361, § 1, rewrote the section, which formerly read:

"(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

U.C.A. 1953 § 76-6-106

West's Utah Code Annotated Currentness
Title 76. Utah Criminal Code
Chapter 6. Offenses Against Property
Part 1. Property Destruction
§ 76-6-106. Criminal mischief

(1) As used in this section, "critical infrastructure" includes:

- (a) information and communication systems;
- (b) financial and banking systems;
- (c) transportation systems;
- (d) any public utility service, including the power, energy, and water supply systems;
- (e) sewage and water treatment systems;
- (f) health care facilities as listed in Section 26-21-2, and emergency fire, medical, and law enforcement response systems;
- (g) public health facilities and systems;
- (h) food distribution systems; and
- (i) other government operations and services.

(2) A person commits criminal mischief if the person:

- (a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;
- (b) intentionally and unlawfully tampers with the property of another and as a result:
 - (i) recklessly endangers:
 - (A) human life; or
 - (B) human health or safety; or
 - (ii) recklessly causes or threatens a substantial interruption or impairment of any critical infrastructure;
- (c) intentionally damages, defaces, or destroys the property of another; or
- (d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

(3)(a)(i) A violation of Subsection (2)(a) is a third degree felony.

- (ii) A violation of Subsection (2)(b)(i)(A) is a class A misdemeanor.
- (iii) A violation of Subsection (2)(b)(i)(B) is a class B misdemeanor.
- (iv) A violation of Subsection (2)(b)(ii) is a second degree felony.

(b) Any other violation of this section is a:

- (i) second degree felony if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of \$5,000 in value;
- (ii) third degree felony if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of \$1,000 but is less than \$5,000 in value;
- (iii) class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss equal to or in excess of \$300 but is less than \$1,000 in value; and
- (iv) class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss less than \$300 in value.

(4) In determining the value of damages under this section, or for computer crimes under Section 76-6-703, the value of any item, computer, computer network, computer property, computer services, software, or data includes the measurable value of the loss of use of the items and the measurable cost to replace or restore the items.

(5) In addition to any other penalty authorized by law, a court shall order any person convicted of any violation of this section

to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all expenses incurred in responding to a violation of Subsection (2)(b)(ii), unless the court states on the record the reasons why the reimbursement would be inappropriate.

CREDIT(S)

Laws 1973, c. 196, § 76-6-106; Laws 1992, c. 14, § 1; Laws 1995, c. 291, § 11, eff. May 1, 1995; Laws 1996, c. 142, § 1, eff. April 29, 1996; Laws 1997, c. 300, § 1, eff. May 5, 1997; Laws 1998, c. 25, § 1, eff. May 4, 1998; Laws 1999, c. 31, § 1, eff. May 3, 1999; Laws 2002, c. 166, § 6, eff. May 6, 2002.

HISTORICAL AND STATUTORY NOTES

Laws 2002, c. 166, rewrote this section that formerly provided:

“(1) A person commits criminal mischief if the person:

“(a) under circumstances not amounting to arson, damages or destroys property with the intention of defrauding an insurer;

“(b) intentionally and unlawfully tampers with the property of another and as a result:

“(i) recklessly endangers:

“(A) human life; or

“(B) human health or safety; or

“(ii) recklessly causes or threatens a substantial interruption or impairment of:

“(A) any public utility service; or

“(B) any service or facility that provides communication with any public, private, or volunteer entity whose purpose is to respond to fire, police, or medical emergencies;

“(c) intentionally damages, defaces, or destroys the property of another; or

“(d) recklessly or willfully shoots or propels a missile or other object at or against a motor vehicle, bus, airplane, boat, locomotive, train, railway car, or caboose, whether moving or standing.

“(2)(a) A violation of Subsection (1)(a) is a felony of the third degree.

“(b) A violation of Subsection (1)(b) is a class A misdemeanor, except that a violation of Subsection (1)(b)(i)(B) is a class B misdemeanor.

“(c) Any other violation of this section is a:

Utah R. Crim. P. 19. Instructions.

(a) After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.

(d) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(e) Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In stating the objection the party shall identify the matter to which the objection is made and the ground of the objection.

(f) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(g) Arguments of the respective parties shall be made after the court has given the jury its final instructions. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

Addendum B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY,
WEST JORDAN DEPARTMENT, STATE OF UTAH

FILED
THIRD DISTRICT COURT
MAR 28 2012
WEST JORDAN DEPT.

STATE OF UTAH, Plaintiff, vs. LOREN ROBERT OKULY Defendant.	ORDER Case No. 101402100 Judge BRUCE C. LUBECK DATE: March 28, 2012
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The above matter came before the court for determination of the supplemental record on appeal.

BACKGROUND

Defendant was charged with aggravated assault, a third degree felony, and other misdemeanors. A jury trial was held June 14 and 15, 2011, and the jury acquitted defendant of all counts except a Class B Misdemeanor of Criminal Mischief. Defendant was sentenced on July 18, 2011, to be on probation and to pay a fine. He filed a notice of appeal that same date.

The Utah Court of Appeals issued an order, entered in this court on December 6, 2011, staying the appeal and partially remanding the case to this court to determine the reasons for gaps in the transcript and to provide an accurate record.

A hearing was scheduled and continued at the request of the parties and eventually held March 12, 2012. Defendant on February 2, 2012, filed a notice that neither he nor counsel

could recall what was stated in the gaps in the transcript. AT the hearing held March 12, 2012 the State indicated it would file a recreation of the record as best it could. The court ruled that after receipt of that recreation, it would add its input from its notes and issue an order as to how the record is to be supplemented. The State provided that record on March 27, 2012.

This is that order after careful review of the State's position and the court's own notes.

DISCUSSION

The transcript is not complete because of a computer malfunction. For no apparent reason the computer recording would simply stop and it was not noticed by the court staff. The judge has no way of knowing when the recording is not working. No device or mechanism is available to the judge so that the judge can see that the recording is not working. Thus, the "gaps" are the fault of no one except the faulty recording system. The origin of those malfunctions is unknown but the problem has been remedied and no longer occurs.

The court's notes as to approximate times vary somewhat from the computer time as shown in the transcript and in the court minutes. The court is in the practice of writing down the times when various aspects of the trial occur, such as jury selection,

opening statements, the time a witness begins testimony on direct examination, the time when cross examination begins, the time of closing arguments, and so forth. The court uses the clock on the court room wall and not the computer time, so the times vary somewhat from the "official" docket times shown in the minutes and the transcript.

There are five "gaps" in recording. The court has notes from each of those. The court has also reviewed the State's version of the testimony at those times.

(1) The first gap in the recording, from page 93 of the transcript begins at 12:28 pm on the first day of trial, June 14, 2011. Michelle Tischner, the complaining witness, took the stand at 11:55 am and the court broke for the lunch hour at approximately 12:30 p.m., and resumed at 1:35 pm. Thus, most of the "gap" is the lunch hour, all but approximately 7 or 8 minutes. The transcript, page 92, shows Tischner was testifying about defendant hitting her in the head with his hand and he had a phone in his hand.

Tischner testified she then went to the bedroom to use a phone. Defendant would not open the door so she kicked the door open and cracked the door but she did not see

that then but defendant later told her she had cracked the door.

Tischner was mad and said she was going to call the police. Tischner said she had a bruised face and ripped dress, the dress was loose and not bunched up. She said the side of her body hurt and she had been hit in the face, on the arms and chest. Tischner said defendant left and she tried the regular telephone and it did not work. She screamed and ran outside calling for help, but no one came. She had picked up her cell phone which was on the floor by the television but the battery was not in it. She returned the next day and found the battery.

At that point the noon recess occurred until about 1:35 pm.

(2) Tischner was still on the stand after the trial resumed after the lunch hour. The transcript at page 110 shows there was another gap from approximately 1:52 to 1:56. Tischner was still undergoing direct examination and cross examination began about 2:15 pm.

After identifying various photographs as shown in the transcript:

Tischner was again shown exhibits 3-8, photos of 3-chest, 4-chest, 5-back of arm, 6-arm, 7-arm, and

8-bruise on arm. She said she was upset and crying and had makeup streaking her face and her eyes were swollen. Defendant was still in the house when she left.

The transcript then resumes as shown at the bottom of page 110.

(3) The next gap in the transcript on page 159 is from 2:48 until 3:00 pm. That was during cross examination of Tischner, which began approximately 2:15 and continued until 3:35 pm.

Tischner said at the preliminary hearing on January 18, 2011, she said she did not know if defendant pushed her down the stairs. She was referred to page 26 line 22 and said she could be drunk. She said she went to see a doctor first then Elkins. She was shown Def Exhibit 1, an Emergency Room report, which shows otherwise, that she saw Elkins before the doctor. She said she did not recall the time she met with Elkins but Elkins said at the preliminary hearing that he, Elkins, met with Tischner at 8:00 pm. On August 15 (the offense was August 14) defendant got out of jail and was given a no contact order. Tischner said she had a Facebook page with 1129 friends but she did not post a mug shot of defendant. She got a protective order on August 16 and to obtain that said defendant had choked her and threw her down the stairs. On

August 17 she wrote a letter, identified her signature, and that was received as Exhibit 26.

The transcript then resumes at page 160.

(4) The transcript at page 172 shows a gap from 3:16 to 3:19. Tischner, again, was still undergoing cross examination before a recess at approximately 3:20 and redirect examination began of Tischner after the recess.

Tischner the next day was shown Exhibit 9, a photo of the broken door, and stated she did indeed break the door. She said the cell phone, still worked after the battery was put in but she got a new phone.

The transcript then resumes on page 173.

(5) On page 421 of the transcript on June 15, 2011, a gap is shown from 11:19 to 11:27. Tischner was again on the witness stand in rebuttal, defendant having rested at approximately 11:10 a.m.

Tischner was being asked about meeting with defendant and defendant said the same story he told in court.

Tischner added nothing new in this rebuttal at that point which took perhaps one minute of unrecorded time. The State rested and the court began its jury instructions. This

portion of the missing transcript contains virtually nothing of importance and included only about one minute of testimony and was mostly the written jury instructions which are part of the record.

The transcript resumes with the court reading from the jury instructions, and the court had been reading those for approximately 5 minutes when the recording began to function again.

ORDER

The existing transcript should also include the above indented material in each of the five instances where the recording equipment failed and it was not noticed for a few moments.

This is ordered to be the supplemental record which conforms to the truth under Utah Rules of Appellate Procedure, Rule 11(h). The court makes these findings based on input from the parties and its own notes taken at the trial and its best memory of the testimony. It is ordered to be a supplement to the transcript already provided to the Utah Court of Appeals.

Any party, pursuant to that rule, may object. Otherwise

this order shall be part of the record on appeal.

DATED this 28 day of Mar, 2012.

BY THE COURT:


BRUCE A. TREBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 101402100 by the method and on the date specified.

MAIL: PETER D GOODALL 825 N 300 W STE N-224 SALT LAKE CITY, UT 84103

BY HAND: STATE OF UTAH

03/28/2012

/s/ RHONDA MEEKS

Date: _____

Deputy Court Clerk