

2016

**State of Utah, Plaintiff/Appellee, vs. Bradley Bourk, Defendant/
Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

vs.

BRADLEY BOURK,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Appellate Case No.: 20141069-CA

Trial Court Case No.: 141901810 FS

An appeal from a final Sentence, Judgment, and Conviction for Aggravated Robbery, a First Degree Felony, in violation of Utah Code Ann. § 76-6-302, in the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Vernice Trease presiding.

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ORAL ARGUMENT NOT REQUESTED

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ARGUMENT

Defendant did not represent that he had a gun, and Mr. Volkmar's subjective belief that the lighter in Defendant's jacket was a gun was not reasonable.

The evidence presented at trial is insufficient to support a conviction for Aggravated Robbery because Defendant did not represent that he had a gun, and Mr. Volkmar's belief that the lighter in Defendant's jacket was a gun was not reasonable.

In order to affirm the conviction of Aggravated Robbery, this court must find that Defendant "used a 'representation of item' capable of causing death or serious bodily injury as defined by section 76-1-601(5)(b)." *See State v. Ireland*, 2006 UT 82, ¶ 9, 150 P.3d 532. If so, the court must then determine that Defendant's use of that representation led "the victim to reasonably believe the item [was] likely to cause death or serious bodily injury." *See id.*

The Ireland court discussed the plain meaning of the term "representation" as encompassing a gesture. *See id.* ¶ 11. Black's Law Dictionary defines a "representation" as "[a] presentation of fact—either by words or by conduct—made to induce someone to act." *Id.* "In context, the use of the term 'representation' refers to verbal or nonverbal statements or conduct 'conveying an impression for the purpose of influencing action.'" *Id.* In *Ireland*, the defendant entered a jewelry store and told an employee to get all the money in the cash drawer. *See id.* ¶ 2. While the defendant said this, he had his hand in his pocket, pointing towards the employee in a manner described as "gesturing like there was a weapon." *See id.* The court found that because a concealed gun-like gesture is

intended to influence a victim to act out of fear for his life and safety, it falls within the definition of representation. *See id.* ¶ 11.

In this case, Defendant's actions do not qualify as a representation that he possessed¹ or intended to use an item capable of causing death or serious bodily injury, and the Court should find that Defendant's actions would not have led a reasonable person to believe that the item he possessed was likely to cause death or serious bodily injury.

Unlike the defendant in *Ireland*, Mr. Bourk did not make a gun-like gesture in the course of committing a robbery. The State concedes that Mr. Bourk did not make any verbal representations that he had a gun. However, the State reads the record to suggest that Defendant immediately fled after allegedly gesturing to Mr. Volkmar that Defendant had a gun. Mr. Volkmar himself testified that after Defendant allegedly brandished a gun in his jacket and Mr. Volkmar stepped away from him, Defendant seemed "really confused" about the situation and lingered to complain about how his knee had been hurt in the scuffle. (R288:130.) These actions are inconsistent with someone who intended to induce Mr. Volkmar to act out of fear for his safety.² The Court should find that there is

¹ The State argues that Defendant did not produce the lighter that he allegedly pulled from his jacket. However, Defendant did not bear the burden of proof at trial, and therefore his failure to present his lighter at trial should not support an inference that such a lighter does not exist.

² Whether Mr. Volkmar himself was afraid that Defendant would use a gun, as argued in the Brief of Appellee, is not germane to Defendant's appeal. The question is whether a reasonable person would have believed the item was likely to cause death or serious bodily injury. *See Ireland*, 2006 UT 82, ¶ 9

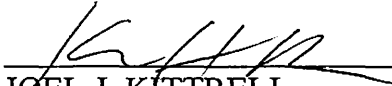
insufficient evidence to prove that Defendant intended any gesture to influence a victim to act out of fear for his life or safety. *See Ireland*, 2006 UT 82, ¶ 11.

CONCLUSION

Given the evidence presented in this case, Mr. Bourke is entitled to have his conviction reduced from aggravated robbery to robbery. There is insufficient evidence to establish that Mr. Bourke used a firearm or a facsimile thereof, or any deadly weapon, in the course of committing the robbery. In the alternative, Mr. Bourke requests that this Court remand the case to the trial court for a new trial.

DATED this 29th day of April, 2016.

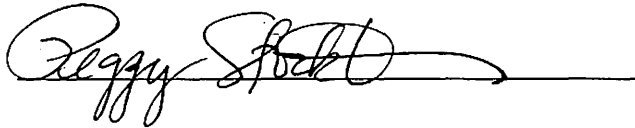
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CERTIFICATE OF SERVICE

I, PEGGY STOCKTON, hereby certify that I have caused to be served a copy of the foregoing **Reply Brief of Appellant** by way of first-class U.S. mail, to Thomas B. Brunker, Assistant Attorney General, Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 29th day of April, 2016.

A handwritten signature in cursive script, reading "Peggy Stockton", is written over a solid horizontal line.

CERTIFICATE OF COMPLIANCE

Appellant, by and through counsel of record, Kristina H. Ruedas of and for the law firm RICHARDS BRANDT MILLER NELSON, hereby certifies that **Reply Brief of Appellant** complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure. Specifically, Brief of Appellant contains 612 words (according to the word count feature in Microsoft Word), exclusive of the cover page, table of contents, table of authorities, certificate of service, and the addenda.

DATED this 29th day of April, 2016.

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