IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20040142-CA
v.	)	
	)	F I L E D
Robert Kelton Berry,	)	(August 10, 2006)
	)	2006 UT App 332
Defendant and Appellant.	)	

Third District, West Jordan Department, 031100783
The Honorable Stephen L. Roth

Attorneys: Debra M. Nelson and Kent R. Hart, Salt Lake City, for Appellant
Mark L. Shurtleff, J. Frederic Voros Jr., Robert G. Neill, and Katherine Peters, Salt Lake City, for Appellee

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Before Judges Greenwood, Davis, and Thorne.

THORNE, Judge:

Robert Kelton Berry appeals his conviction of aggravated robbery, a first degree felony. See Utah Code Ann. § 76-6-302 (2003). We affirm.

Berry first argues that his defense counsel provided him with ineffective assistance by misstating the reasonable doubt standard in his closing argument.[1] Berry alleges that counsel improperly urged the jury to equate their reasonable doubt decision with other major life decisions such as marriage or a home purchase. See State v. Robertson, 932 P.2d 1219, 1232 (Utah 1997) (prohibiting jury instructions on reasonable doubt from stating that "a reasonable doubt is one which 'would govern or

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[1]After Berry filed his initial appellate brief, the Utah Supreme Court issued State v. Reyes, 2005 UT 33, 116 P.3d 305. This court ordered supplemental briefing to address Reyes's effect on Berry's appellate arguments. We agree with the parties that two of Berry's original arguments on appeal are foreclosed by Reyes, and therefore address only the two remaining issues.

control a person in the more weighty affairs of life,' as such an instruction tends to trivialize the decision of whether to convict" (quoting State v. Ireland, 773 P.2d 1375, 1381 (Utah 1989) (Stewart, J., dissenting))), overruled on other grounds by State v. Weeks, 2002 UT 98, 61 P.3d 1000, and State v. Reyes, 2005 UT 33, 116 P.3d 305.

Defense counsel's reference to major life decisions is distinguishable from the type of instruction disapproved of in Robertson.[2] Counsel did not simply equate reasonable doubt with other major life decisions, but rather argued that the jurors should view the question of Berry's guilt as more important than other major life decisions. Counsel emphasized that, unlike other decisions, the jury's guilt determination could not be changed after the fact: "You can get a divorce. You can sell your house. But in this case you cannot." Given this distinction, we cannot say that counsel's argument violated Robertson or otherwise fell below an objective standard of reasonableness. See State v. Montoya, 2004 UT 5,¶23, 84 P.3d 1183 (requiring a defendant to demonstrate that counsel's performance fell below an objective standard of reasonableness in order to prevail on an ineffective assistance of counsel claim); see also Strickland v. Washington, 466 U.S. 668, 687 (1984). Berry's ineffective assistance of counsel claim therefore fails.

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[2]We assume for the purposes of this analysis that, despite the supreme court's revisitation of reasonable doubt instructions in Reyes, Robertson remains good law prohibiting trial courts from instructing on reasonable doubt in terms of major life decisions. See State v. Robertson, 932 P.2d 1219, 1232 (Utah 1997) (subsequent history omitted); see also Reyes, 2005 UT 33 at ¶¶11-38.

We also note that Berry has identified no authority stating that defense counsel is prohibited from making a particular analogy in closing arguments merely because the trial court is prohibited from making the same analogy in a jury instruction. Given the vastly different roles played by the trial court and counsel, we see little reason to believe that this is a correct statement of the law. Nevertheless, as we resolve Berry's argument on different grounds, we will assume for the purposes of this analysis that counsel is held to the same standard as the trial court. Cf. State v. Devey, 2006 UT App 219,¶17, 552 Utah Adv. Rep. 50 (holding that "the trial court, the State, and all witnesses" are prohibited from referring to the complaining witness as a "the 'victim'" in cases where the existence of a crime is disputed and the evidence of the crime largely consists of the testimony of the complaining witness).

Second, Berry argues that the trial court erred by failing to take sufficient steps to ameliorate the effect of a trial spectator's apparent coaching of the victim during his testimony. When the coaching was brought to the trial court's attention, it instructed the jury to base their deliberations only on the testimony and evidence presented and not on "gestures, facial expressions, or any other demonstrations by any other person present in the courtroom." The trial court also excluded the alleged coach from the courtroom and allowed Berry to cross-examine the victim about the coaching, but denied Berry's request to question each individual juror about any possible bias. We see no error here.

A trial court generally has broad discretion to respond to events in the courtroom and control the proceedings before it. See Utah Code Ann. § 78-7-5 (2002) (granting every court the authority to "provide for the orderly conduct of proceedings before it" and "control in furtherance of justice the conduct of . . . all other persons in any manner connected with a judicial proceeding before it in every matter"); see also State v. Tueller, 2001 UT App 317,¶12, 37 P.3d 1180 ("[W]e conclude that the trial judge acted within his discretion in responding to events in his courtroom."); cf. In re A.M.S., 2000 UT App 182,¶19, 4 P.3d 95 ("[T]he juvenile court has broad discretion to control its proceedings."). The trial court's decision to cure any improper witness coaching by excluding the alleged coach, allowing Berry to cross-examine the victim about the coaching, and instructing the jury to ignore audience gestures was well within the bounds of its discretion. Cf. State v. Rodriguez, 509 N.W.2d 1, 3-4 (Neb. 1993) ("Ordinarily, permitting the issue [of witness coaching by a spectator] to be raised on cross-examination will constitute an effective cure.").

We additionally disagree with Berry's assertion that the trial court's curative instruction limited the jury's ability to assess the victim's credibility. The trial court's instruction only prohibited the jury from using the coaching itself as evidence. A separate instruction on witness credibility informed jurors that they were the sole judges of witness believability, and that they could use, among other factors, a witness's demeanor, knowledge, and memory in assessing credibility. Read in conjunction, the two instructions properly instructed the jury to ignore any substantive information imparted by the coach, while still allowing it to consider all of the circumstances in determining the victim's credibility. See State v. Hobbs, 2003 UT App 27,¶31, 64 P.3d 1218 ("Jury instructions will be affirmed 'when the instructions, taken as a whole, fairly tender the case to the jury [even where] one or more of the instructions, standing alone, are not as full or accurate as they might have

been.'" (alteration in original) (quoting State v. Garcia, 2001 UT App 19,¶13, 18 P.3d 1123)).

The judgment below is affirmed.

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William A. Thorne Jr., Judge

WE CONCUR:

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Pamela T. Greenwood,
Associate Presiding Judge

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James Z. Davis, Judge