IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Larry Yazzie Cly, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060788-CA F I L E D (June 21, 2007) 2007 UT App 212

Seventh District, Monticello Department, 061700058
The Honorable Lyle R. Anderson

Attorneys: William L. Schultz, Moab, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City, for Appellee

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Before Judges Bench, Billings, and Davis.

DAVIS, Judge:

Defendant Larry Yazzie Cly appeals his convictions of child abuse, see Utah Code Ann. § 76-5-109 (Supp. 2006); domestic violence in the presence of a child, see id. § 76-5-109.1 (2003); and aggravated assault, see id. § 76-5-103 (2003), all third-degree felonies.

Defendant first argues that there was insufficient evidence from which the jury could have found him guilty of child abuse. When reviewing a challenge for sufficiency of the evidence, we are "highly deferential to a jury verdict," State v. Workman, 2005 UT 66,¶29, 122 P.3d 639, and we will reverse only when "'reasonable minds could not have reached the verdict,'" id. (quoting State v. Widdison, 2001 UT 60,¶74, 28 P.3d 1278). Thus, "[w]e will reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Shumway, 2002 UT 124,¶15, 63 P.3d 94.

A person is guilty of third-degree felony child abuse if he recklessly "inflicts upon a child serious physical injury." Utah Code Ann. § 76-5-109(2). A person acts 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." Id. § 76-2-103(3) (2003). Defendant argues that even if he did injure his son (Son), his actions do not qualify as felony child abuse because he did not inflict a "serious physical injury," but rather merely a "physical injury." See id. § 76-5-109(1)(c)-(d). However, if the injury is caused by a "dangerous weapon" as defined in Utah Code section 76-1-601(5), see id. § 76-1-601(5) (2003), then the degree of actual injury is irrelevant. See id. § 76-5-109(1)(d)(ii)(D). The dangerous weapon provision is satisfied here because the evidence infers that Defendant threw a knife, see id. § 76-1-601(5), which left a bruise on Son's ankle. See id. § 76-5-109(1)(c) (stating that a physical injury includes "a bruise or other contusion of the skin"). Thus, notwithstanding the fact that Son suffered a "little teeny nip," such injury constitutes a serious physical injury because it resulted from Defendant's reckless use of a dangerous weapon.

Defendant claimed that he threw the knife at the bushes and not at Son. He later admitted, however, that the knife could have struck Son. Son originally stated to both a police officer and a victim advocate that he had been struck by the knife in the ankle. Also, Defendant's wife (Wife) testified that Defendant possessed the knife up until the point that Son ran for help. Wife further testified that Defendant told Son to come back, a fact supporting an inference that Defendant threw the knife in an attempt to stop Son. Finally, the police officer stated that the injury on Son's ankle appeared to be fresh. When reviewed in the light "most favorable to the verdict," this evidence, along with all inferences drawn therefrom, is not so improbable such that "reasonable minds could not have reached the verdict." Workman, 2005 UT 66 at ¶29 (quotations and citations omitted).

Defendant's second issue on appeal is that the trial court should have given a jury instruction on voluntary intoxication as a defense to aggravated assault. Aggravated assault, as defined in Utah Code section 76-5-103(1)(b), does not specify a culpable mental state. See Utah Code Ann. § 76-5-103(1)(b). "'[W]hen the definition of an offense does not specify a culpable mental state . . . , intent, knowledge, or recklessness shall suffice to establish criminal responsibility.'" State v. Royball, 710 P.2d 168, 170 (Utah 1985) (quoting Utah Code Ann. § 76-2-102 (Supp. 1983)). Further, "[v]oluntary intoxication does not absolve a defendant of criminal responsibility for reckless criminal acts."

Id.; see also Utah Code Ann. § 76-2-306 (2003) (stating that when recklessness is an element of an offense, it is immaterial whether the actor's unawareness of the risk was because of voluntary intoxication). Because Defendant could have been convicted of aggravated assault if his actions were reckless, voluntary intoxication would not have served as a defense. Thus, the trial court's withholding of the voluntary intoxication jury instruction was proper.[1]

Defendant's final argument on appeal is that the child abuse charge should have been merged with the domestic violence in the presence of a child charge because child abuse is the first element of domestic violence in the presence of a child. Although Defendant raised a merger argument below, it is not the same merger argument that he brings here. "As a general rule, claims not raised before the trial court may not be raised on appeal. Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate." State v. Briggs, 2006 UT App 448,¶4, 147 P.3d 969 (quotations and citations omitted). This requirement for specific objections "arises out of the trial court's need to assess allegations by isolating relevant facts and considering them in the context of the specific legal doctrine placed at issue." State v. Hardy, 2002 UT App 244,¶15, 54 P.3d 645 (quotations and citation omitted). Here, Defendant did not preserve a merger argument concerning the child abuse charge and the domestic violence in the presence of a child charge. Because this argument requires different facts and different legal analysis than the argument made below, and because Defendant failed to argue plain error or

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[1]Defendant also argues for the first time in his reply brief that by refusing the voluntary intoxication instruction, the trial court foreclosed his ability to request a lesser included offense instruction on the crime of "[t]hreatening with or using dangerous weapon in fight or quarrel." Utah Code Ann. § 76-10-506 (2003). Generally, however, "'issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered.'" Gildea v. Guardian Title Co. of Utah, 2001 UT 75,¶10 n.1, 31 P.3d 543 (quoting Brown v. Glover, 2000 UT 89,¶23, 16 P.3d 540). Thus, we need not address Defendant's argument.

exceptional circumstances on appeal, see id., we need not address his newly advanced merger argument.

We affirm.

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James Z. Davis, Judge

WE CONCUR:

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Russell W. Bench,
Presiding Judge

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Judith M. Billings, Judge