IN THE UTAH COURT OF APPEALS

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| State of Utah,<br><br>Plaintiff and Appellee,<br><br>v.<br><br>Joshua S. Hale,<br><br>Defendant and Appellant. | MEMORANDUM DECISION<br>(Not For Official Publication)<br><br>Case No. 20050461-CA<br><br>F I L E D<br>(October 19, 2006)<br><br>2006 UT App 434 |

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Third District, Sandy Department, 041400524
The Honorable Royal I. Hansen

Attorneys: Elizabeth Hunt, Salt Lake City, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

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Before Judges Bench, Greenwood, and Davis.

DAVIS, Judge:

Defendant Joshua S. Hale appeals from a conviction for aggravated assault, a second degree felony, see Utah Code Ann. § 76-5-103 (2003), and a conviction for burglary, a second degree felony, see id. § 76-6-202 (2003). We affirm.

Defendant first appeals the trial court's denial of his motion to withdraw his guilty plea to aggravated assault, arguing that the trial court failed to comply with rule 11 of the Utah Rules of Criminal Procedure "because the legal elements and factual basis for the plea [were] inadequate." "In the context of rule 11 colloquies, the ultimate question of whether the trial court strictly complied with . . . procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness." State v. Hittle, 2004 UT 46,¶4, 94 P.3d 268 (quotations and citation omitted). When reviewing this issue, we may consider the plea colloquy and affidavit as well as other parts of the record. See Utah R. Crim. P. 11(k) ("Compliance with [rule 11] shall be determined by examining the record as a

whole.");[1] State v. Corwell, 2005 UT 28,¶12, 114 P.3d 569 (holding that strict compliance with rule 11 may be accomplished through "questioning of the defendant on the record," "a plea affidavit," "contents of other documents" in the record, and defendant's "personal trial experience" (quotations and citations omitted)); State v. Visser, 2000 UT 88,¶12, 22 P.3d 1242 (holding that strict compliance with rule 11 "can be accomplished by multiple means, including the contents of other documents such as the information, presentence reports, [and] exhibits" (quotations and citation omitted)).

Defendant argues that the legal elements of his aggravated assault plea were inadequate because the required element of intent was missing. Under rule 11(e)(4)(A), a trial court may not accept a guilty plea unless "the defendant understands the nature and elements of the offense." Utah R. Crim. P. 11(e)(4)(A); see also State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993) (stating that plea-taking proceedings governed by rule 11(e) "must demonstrate that the defendant understands the nature of each element of the offense charged"). And although a trial court has a duty of strict compliance with rule 11(e), strict compliance does not require a trial court to follow a "particular script or any other specific method of communicating" the requirements of that rule. Corwell, 2005 UT 28 at ¶12 (quotations and citation omitted); see also Visser, 2000 UT 88 at ¶11. Therefore, the test for whether a trial court strictly complies with rule 11(e) "is not whether the court recites the phrases found in that rule. Rather, the test is whether the record adequately supports the [trial] court's conclusion that the defendant had a conceptual understanding of each of the elements of rule 11(e)." Corwell, 2005 UT 28 at ¶18.

Here, Defendant pleaded guilty to aggravated assault, the elements of which are assault committed with the intent to cause serious bodily injury. See Utah Code Ann. § 76-5-103. The plea affidavit and the plea colloquy failed to include the necessary element of intent, but instead simply stated that Defendant committed an assault and caused serious bodily injury. However, during the plea hearing, the State informed the trial court that the parties had reached a plea agreement wherein the State would dismiss eight of the nine charges in the original information and add an additional charge of aggravated assault. The State then informed both the trial court and Defendant of the elements of

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1. Subdivision (k) was added to rule 11 of the Utah Rules of Criminal Procedure in April 2005. See Utah R. Crim. P. 11 amendment notes. Defendant's motion to withdraw his guilty plea was filed in March 2005. However, the amendments to rule 11 were "intended to reflect current law without any substantive changes." Utah R. Crim. P. 11 advisory committee's note.

such charge, stating that the amended information would charge that Defendant "intended to cause serious bodily injury" while committing an assault. Immediately thereafter, Defendant confirmed that he had no objection to the amended information and pleaded guilty. The trial court's failure to include the intent element in the plea affidavit and colloquy was not fatal because the elements of aggravated assault were correctly given to Defendant immediately before he pleaded guilty thereto. See Corwell, 2005 UT 28 at ¶12 (holding that strict compliance with rule 11(e) does not require a trial court to "follow a particular script or any other specific method of communicating" the requirements of that rule (quotations and citation omitted)). We therefore hold that the trial court strictly complied with rule 11(e)(4)(A) in the entry of Defendant's plea to aggravated assault. See Utah R. Crim. P. 11(e)(4)(A).

Defendant also contends that there was no factual basis to support his guilty plea to the aggravated assault charge because he did not intentionally inflict harm upon the victim and because that harm did not amount to serious bodily injury. Under rule 11(e)(4)(B), a trial court may not accept a guilty plea unless "there is a factual basis for the plea." Utah R. Crim. P. 11(e)(4)(B). To satisfy the factual basis requirement,

> the record must reveal either facts that would support the prosecution of a defendant at trial or facts that would suggest a defendant faces a substantial risk of conviction at trial. Thus, a sufficient factual basis requires that the record contain evidence that the crime was committed and that defendant likely committed the crime.

State v. Tarnawiecki, 2000 UT App 186,¶13, 5 P.3d 1222 (quotations and citation omitted); see also Utah R. Crim. P. 11(e)(4)(B) ("A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant . . . ."); Stilling, 856 P.2d at 672.

Here, the victim found Defendant burgling his motor home in the middle of the night. A confrontation ensued, during which the victim tore his rotator cuff when Defendant fell on top of him. Despite Defendant's contention that he did not intentionally hurt the victim, "a person is presumed to intend the natural and probable consequences of his acts." State v. Sisneros, 631 P.2d 856, 859 (Utah 1981) (quotations and citation omitted); see also State v. Colwell, 2000 UT 8,¶43, 994 P.2d 177 ("We have held that intent to commit a crime may be inferred from the actions of the defendant or from surrounding circumstances." (quotations and citation omitted)); 6 Am. Jur. 2d Assault &

Battery § 78 (1999) ("The specific intent to cause serious bodily injury, as required to support an aggravated assault conviction, can be inferred from . . . the reasonable apprehension of bodily harm such an act produces in a victim."); 6A C.J.S. Assault § 95 (2004) (stating that accused may be held liable for injuries that are "the natural and probable consequence of the wrongful act"). Therefore, any argument that Defendant did not intend to injure the victim during the victim's struggle to protect his property is meritless. Furthermore, a torn rotator cuff--which required surgery, caused significant pain, and took over a year to heal--could certainly be considered serious bodily injury under Utah law. See Utah Code Ann. § 76-1-601(10) (2003) (defining serious bodily injury as "bodily injury that creates or causes . . . protracted loss or impairment of the function of any bodily member or organ"); State v. Leleae, 1999 UT App 368,¶20, 993 P.2d 232 ("[A] broken jaw that is wired shut for six weeks with resulting eating difficulties, weight loss, extraction and later replacement of a tooth, and continuing pain is a 'protracted loss or impairment of the function of [a] bodily member.'" (second alteration in original) (quoting Utah Code Ann. § 76-1-601(10) (1999))).[2] Because "the record contain[ed] evidence that the crime [of aggravated assault] was committed and that [D]efendant likely committed the crime," Tarnawiecki, 2000 UT App 186 at ¶13, the factual basis for Defendant's guilty plea for such crime was adequate. We therefore hold that the trial court strictly complied with rule 11(e)(4)(B) when entering Defendant's guilty plea for aggravated assault. See Utah R. Crim. P. 11(e)(4)(B).[3]

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2. There is some ambiguity regarding whether the victim's elbow was also broken during the scuffle. However, we decline to address this issue because we have determined that the victim's torn rotator cuff alone constituted serious bodily injury. See Utah Code Ann. § 76-5-103 (2003) (governing aggravated assault); id. § 76-1-601(10) (2003) (defining serious bodily injury).

3. Defendant also argues that his aggravated assault plea was unconstitutional because its inadequate legal elements and factual basis rendered such plea not knowing and voluntary. See Salazar v. Warden, 852 P.2d 988, 991 (Utah 1993) ("[A] guilty plea is not valid unless it is knowing and voluntary."); Moench v. State, 2004 UT App 57,¶17, 88 P.3d 353 (holding that defendant seeking to show constitutional violation must demonstrate that "guilty plea was in fact not knowing and voluntary" (quotations and citation omitted)). The State similarly argues that Defendant's guilty plea may be withdrawn only if "it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2)(a) (Supp. 2004). We need not address either of these issues because "[s]trict compliance with rule 11(e) creates a presumption that the plea was voluntarily entered." State v. Gamblin, 2000 UT

(continued...)

Second, Defendant appeals the trial court's denial of his motion to withdraw his guilty plea to burglary, arguing that his attorney was ineffective because he failed to inform Defendant of certain defense strategies thereto. "To prevail on a claim of ineffective assistance of counsel, [a defendant] must show that (1) trial counsel's performance was objectively deficient and (2) there exists a reasonable probability that absent the deficient conduct, the outcome would likely have been more favorable to [the defendant]." State v. Mecham, 2000 UT App 247,¶21, 9 P.3d 777. "The failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance." State v. Whittle, 1999 UT 96,¶34, 989 P.2d 52 (quotations, citation, and alteration omitted).

All of the defense strategies proposed by Defendant would have been futile if raised. Defendant first alleges that the burglary he perpetrated upon the victim's motor home was at most burglary of a vehicle, a class A misdemeanor. See Utah Code Ann. § 76-6-204 (2003). But under Utah Code section 76-6-202, burglary is a second degree felony if "it was committed in a dwelling," id. § 76-6-202(2), and a dwelling is defined as "a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present," id. § 76-6-201(2) (2003). "The term 'usually occupied' refers to the purpose for which the structure is used. If the structure is one in which people typically stay overnight, it fits within the definition of dwelling under the burglary statute." State v. Cox, 826 P.2d 656, 662 (Utah Ct. App. 1992) (quoting Utah Code Ann. § 76-6-201 (1990)). Because a motor home is "[a] structure . . . in which people typically stay overnight," id., any argument that Defendant's burglary of the victim's motor home did not constitute burglary in a dwelling is untenable.

Defendant's second defense strategy to the burglary charge would have been equally unsuccessful. Defendant contends that he should have been convicted of a class A misdemeanor under the Shondel doctrine because the burglary statute and the burglary of a vehicle statute, as applied to the facts of this case, punish the exact same conduct. See State v. Shondel, 22 Utah 2d 343, 453 P.2d 146, 148 (1969); State v. Green, 2000 UT App 33,¶6, 995 P.2d 1250 ("The Shondel doctrine requires that when two different statutory provisions define the same offense, a defendant must be sentenced under the provision carrying the lesser penalty."). However, the Shondel doctrine applies "only when the two statutory provisions proscribe precisely the same conduct."

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3. (...continued)
44,¶11, 1 P.3d 1108; see also State v. Martinez, 2001 UT 12,¶22, 26 P.3d 203 (same).

State v. Jensen, 2004 UT App 467,¶16, 105 P.3d 951, cert. denied, 123 P.3d 815 (Utah 2005). If the elements of the crime are not identical and the relevant statutes require "proof of some fact or element not required to establish the other," the statutes do not proscribe the same conduct and Defendant "may be charged with the crime carrying the more severe sentence." State v. Clark, 632 P.2d 841, 844 (Utah 1981); see also State v. Kent, 945 P.2d 145, 147 (Utah Ct. App. 1997) (same). Therefore, "the question is whether the two statutes at issue proscribe exactly the same conduct, i.e., do they contain the same elements?" State v. Gomez, 722 P.2d 747, 749 (Utah 1986). Here, the two statutes clearly do not contain the same elements. Namely, the burglary of a vehicle statute proscribes the unlawful entry into a vehicle, see Utah Code Ann. § 76-6-204, whereas the burglary statute proscribes the unlawful entry into a dwelling, see id. § 76-6-202(2). The fact that a motor home may constitute a dwelling under Utah Code section 76-6-201 does not make the elements of the two crimes the same. See id. § 76-6-201(2). Therefore, the Shondel doctrine is inapplicable to this case and would have been futile if raised by defense counsel.

Defendant's third defense strategy to the burglary charge also would have failed. Defendant argues that he should have been convicted of a class A misdemeanor because the burglary of a vehicle statute is more specific than the burglary statute, and it therefore governs his conduct. Although "[s]pecific statutes control over more general ones," State v. Lowder, 889 P.2d 412, 414 (Utah 1994),

> [i]t is not unconstitutional for a state to impose a more severe penalty for a particular type of crime than the penalty which is imposed with respect to the general category of crimes to which the special crime is related . . . .
>
> As long as the legislative classifications are not arbitrary, the fact that conduct may violate both a general and a specific provision of the criminal laws does not render the legislation unconstitutional, even though one violation is subject to a greater sentence.

Clark, 632 P.2d at 843-44; see also Kent, 945 P.2d at 147 (holding that when two statutes do not proscribe the same conduct, "defendant may be charged with the crime carrying the more severe sentence, even if the defendant could have been charged with the crime carrying the less severe sentence, so long as there is a rational basis for the legislative classification" (quotations, citation, and emphasis omitted)). Here, the "second

degree burglary statute is intended to protect people while in places where they are likely to be living and sleeping overnight," Cox, 826 P.2d at 662, whereas the burglary of a vehicle statute is intended to protect people's vehicles, see Utah Code Ann. § 76-6-204. Therefore, Defendant was appropriately convicted of burglary in a dwelling, a second degree felony. See id. § 76-6-202(2). Because all of the defense strategies proposed by Defendant would have been futile if raised, we do not believe that Defendant's attorney was ineffective. See Whittle, 1999 UT 96 at ¶34.

Third, Defendant appeals the trial court's denial of his motion to withdraw his guilty plea to both aggravated assault and burglary, arguing that his attorney was ineffective because he failed to inform Defendant of the defense of voluntary intoxication. See Utah Code Ann. § 76-2-306 (2003) ("Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense . . . ."). To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his attorney's performance was objectively deficient. See Mecham, 2000 UT App 247 at ¶21. Here, Defendant provided no evidence, and indeed did not even allege, that he informed his counsel before his plea that he was drunk on the evening he broke into the victim's motor home. Instead, his allegations of intoxication arose only upon his motion to withdraw his guilty plea. We cannot say that the performance of Defendant's attorney was deficient because he failed to raise a defense of which he had no knowledge. See State v. Perry, 899 P.2d 1232, 1239-40 (Utah Ct. App. 1995) (rejecting claim of ineffective assistance of counsel when defendant never informed counsel of purported alibi and witnesses).

Defendant lastly appeals the trial court's refusal to appoint substitute counsel, contending first that the trial court committed error per se by failing to inquire into Defendant's purported conflict with his attorney. See State v. Vessey, 967 P.2d 960, 962-63 (Utah Ct. App. 1998) ("[A] trial court's failure to investigate a defendant's timely substitution request is per se error . . . ."). When a defendant expresses dissatisfaction with appointed counsel, the trial court "must make some reasonable, non-suggestive efforts to determine the nature of the defendant's complaints." State v. Pursifell, 746 P.2d 270, 273 (Utah Ct. App. 1987). Here, the trial court inquired into Defendant's complaints about his attorney on two separate occasions--first at the hearing on April 11, 2005, and again at the hearing on May 16, 2005. Indeed, at one hearing, the trial court went so far as to state to Defendant: "Tell me about anything, any other concerns that you have." And at both hearings, Defendant had ample opportunity to give detailed explanations about his purported conflict with his attorney.

Quite simply, the trial court made "reasonable, non-suggestive efforts" to determine the nature of Defendant's complaints, id., and therefore adequately inquired into the purported conflict between Defendant and his counsel.

Defendant also argues that the trial court erred by refusing to appoint substitute counsel. "Under established law, an indigent defendant does not have a right under either the United States or the Utah Constitution to reject court-appointed counsel in order to force the court to appoint new counsel unless the defendant shows 'good cause.'" State v. Scales, 946 P.2d 377, 382 (Utah Ct. App. 1997). "To successfully show 'good cause' for rejecting court-appointed counsel, a defendant must meet a heavy burden," and good cause for substitution of counsel "may not be based solely on the defendant's illegitimate complaints or subjective perception of events." Id.; see also Pursifell, 746 P.2d at 274. Indeed, we have held that a disagreement between a defendant and his attorney about a defense strategy does not rise to the level of good cause. See State v. Pando, 2005 UT App 384,¶¶28-30, 122 P.3d 672, cert. denied, 132 P.3d 683 (Utah 2006); cf. State v. Classon, 935 P.2d 524, 533-34 (Utah Ct. App. 1997) ("'The accused is entitled to the assistance of a competent member of the Bar, who demonstrates a willingness to identify himself with the interests of the defendant and who will assert such defenses as are available to him under the law and consistent with the ethics of the profession.'" (emphasis added) (citation omitted)). Here, Defendant has alleged nothing more than a disagreement with his attorney over defense strategies--namely, Defendant wanted his counsel to propound defense strategies that we have determined here to be inapplicable. We therefore hold that the trial court did not err by refusing to appoint substitute counsel.

Affirmed.

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James Z. Davis, Judge

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I CONCUR:

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Pamela T. Greenwood,
Associate Presiding Judge

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I CONCUR IN THE RESULT:

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Russell W. Bench,
Presiding Judge