IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Vincent Lawrence Phipps, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20050296-CA F I L E D (September 14, 2006) 2006 UT App 372

Seventh District, Moab Department, 041700133
The Honorable Lyle R. Anderson

Attorneys: K. Andrew Fitzgerald, Moab, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

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Before Judges Davis, McHugh, and Thorne.

DAVIS, Judge:

Defendant Vincent Lawrence Phipps appeals his conviction for criminal mischief, a second degree felony. See Utah Code Ann. § 76-6-106(3)(b)(i) (2003). We affirm.

Defendant first challenges the reasonable doubt jury instructions. At the time of Defendant's trial, State v. Robertson required reasonable doubt jury instructions to "specifically state that the State's proof must obviate all reasonable doubt." State v. Robertson, 932 P.2d 1219, 1232 (Utah 1997) (quotations and citation omitted), overruled in relevant part by State v. Reyes, 2005 UT 33, 116 P.3d 305. The reasonable doubt jury instructions given at Defendant's trial complied with Robertson in that they instructed the jury that "[p]roof beyond a reasonable doubt is . . . enough to eliminate reasonable doubt." However, after Defendant's trial, the Utah Supreme Court expressly abandoned "the obviate all reasonable doubt" requirement of the Robertson test, stating that "'the obviate all reasonable doubt' element of the Robertson test carries with it the substantial risk of causing a juror to find guilt based on a degree of proof below beyond a reasonable doubt." Reyes, 2005 UT 33 at ¶30. Relying on Reyes, Defendant now asserts that the

reasonable doubt jury instructions given at his trial violated his due process rights.[1]

We disagree. When assessing the validity of reasonable doubt jury instructions, "we need only ask whether the instructions, taken as a whole, correctly communicate[d] the principle of reasonable doubt" to the jury. State v. Cruz, 2005 UT 45,¶21, 122 P.3d 543; see also State v. Halls, 2006 UT App 142,¶16, 134 P.3d 1160. In Cruz, the Utah Supreme Court held that jury instructions containing the phrase "dispel all reasonable doubt" were not erroneous. See Cruz, 2005 UT 45 at ¶¶11, 22. And in Halls, we determined that reasonable doubt jury instructions almost identical to those at issue here "correctly communicated the principle of reasonable doubt to the jury." Halls, 2006 UT App 142 at ¶20 (quotations, citation, and alteration omitted).[2] We therefore hold that the reasonable doubt jury instructions at issue here were not in error.

Defendant next argues that the trial court erred in failing to reduce the level of his offense and his concomitant sentence pursuant to Utah Code section 76-3-402. See Utah Code Ann. § 76-

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[1]Defendant did not preserve this issue at trial, but instead asked the trial court to instruct the jury that "the State must obviate or eliminate all reasonable [doubt]." The State therefore argues that the "invited error" doctrine precludes us from addressing this matter on appeal. However, we will not apply the invited error doctrine here because "a change in law or the settled interpretation of law colored the failure to have raised [the] issue at trial." State v. Halls, 2006 UT App 142,¶13 n.1, 134 P.3d 1160 (quotations and citation omitted).

Defendant, on the other hand, requests that we review this matter based on "exceptional circumstances." "Exceptional circumstances" is not a precise doctrine, but is instead "a descriptive term used to memorialize an appellate court's judgment that even though an issue was not raised below . . . , unique procedural circumstances nonetheless permit consideration of the merits of the issue on appeal." State v. Irwin, 924 P.2d 5, 8 (Utah Ct. App. 1996). Although the concept of exceptional circumstances is "used sparingly," id. at 11, it may be employed "where a change in law or the settled interpretation of law colored the failure to have raised an issue at trial," id. at 10. We therefore consider the merits of the issue on appeal.

[2]Indeed, the reasonable doubt jury instructions in Halls stated that "[t]he [S]tate must eliminate all reasonable doubt" and that "[p]roof beyond a reasonable doubt is . . . enough to eliminate reasonable doubt." Halls, 2006 UT App 142 at ¶18 (second alteration in original).

3-402 (2003) (authorizing court to "enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly"). Defendant concedes that he did not preserve this issue at trial and therefore asks us to review this matter under the plain error doctrine or the ineffective assistance of counsel doctrine. Explaining the plain error standard, the Utah Supreme Court has stated that

> to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

State v. Casey, 2003 UT 55,¶41, 82 P.3d 1106 (quotations and citation omitted). "To prevail on a claim of ineffective assistance of counsel, [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 [Defendant]." State v. Mecham, 2000 UT App 247,¶21, 9 P.3d 777 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 693 (1984)). "The failure of counsel to make . . . 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).

No error occurred here. When construing the language of a statutory provision, we "presume that the legislature used each word advisedly" and "will not infer substantive terms into the text that are not already there." Associated Gen. Contractors v. Board of Oil, Gas & Mining, 2001 UT 112,¶30, 38 P.3d 291 (quotations and citations omitted). Under Utah Code section 76-6-106(3)(b), a defendant who commits criminal mischief is guilty of a second degree felony if his conduct "causes or is intended to cause pecuniary loss equal to or in excess of $5,000 in value," Utah Code Ann. § 76-6-106(3)(b)(i), or a third degree felony if his 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," id. § 76-6-106(3)(b)(ii). In determining the "value of damages" under Utah Code section 76-6-106, "the value of any item . . . includes . . . the measurable cost to replace or restore the items." Id. § 76-6-106(4). Here, Defendant was convicted of criminal mischief, a second degree felony in violation of Utah Code section 76-6-106(3)(b)(i), because it would have cost the

victims approximately $6347 to repair all of the damage to their vehicles. The fact that the victims chose not to repair all of the damage to their vehicles, and the trial court ordered only $4658 in restitution, is irrelevant to "pecuniary loss" or "value of damages" caused by Defendant's actions. Id. § 76-6-106(3)(b)(i), (4). Indeed, restitution can be "full," "partial," or even "nominal" payment for pecuniary damages to a victim. Id. § 76-3-201(1)(d) (2003). We therefore hold that the trial court did not err in failing to reduce the level of Defendant's offense and sentence, nor was Defendant's counsel ineffective for failing to request such reduction.[3]

Defendant finally asserts that the trial court erred by admitting into evidence an uncertified police transcript of a telephone message from Defendant. A tape recording of the phone message was received into evidence without objection. However, Defendant contends that the admission of the police transcript of that tape "gave an unfair advantage to the State to present its version of what was said" when better evidence--the tape itself--was available. "A trial court has broad discretion to admit or exclude evidence and its determination typically will only be disturbed if it constitutes an abuse of discretion." In re L.N., 2004 UT App 120,¶9, 91 P.3d 836 (quotations and citation omitted), cert. denied, 98 P.3d 1177 (Utah 2004). We will conclude that the trial court abused its discretion only "if the ruling was beyond the limits of reasonability." State v. Lindgren, 910 P.2d 1268, 1271 (Utah Ct. App. 1996) (quotations and citation omitted). Moreover, "even if we conclude the court's decision regarding admissibility was error, we will not reverse unless the error was harmful, that is, if absent the error there is a reasonable likelihood of an outcome more favorable to the defendant." Id. (quotations and citation omitted).

Here, the trial court admitted the transcript only as an aid to the jury in determining what was actually said.[4] We therefore

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[3]The restitution ordered--$4658--was for damage done to the vehicles' windows. The remaining damage--$1689--was for body damage to one of the vehicles. In his reply brief, Defendant argues that "[n]o evidence was presented linking [Defendant] to the body damage." However, because Defendant addresses the sufficiency of the evidence for the first time in his reply brief on appeal, we decline to review the issue. See State v. Weaver, 2005 UT 49,¶19, 122 P.3d 566; Coleman v. Stevens, 2000 UT 98,¶9, 17 P.3d 1122.

[4]The trial court, in admitting the transcript, stated:
(continued...)

cannot say that the trial court's ruling was "beyond the limits of reasonability." Id. Furthermore, given Defendant's history with the victims, the blood evidence, and the tape recording itself, there is no reasonable likelihood that the admission of the uncertified police transcript affected the outcome of the trial. See id. We therefore affirm Defendant's conviction.[5]

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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Carolyn B. McHugh, Judge

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William A. Thorne Jr., Judge

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[4](...continued)

> I'm going to receive [the transcript], but I want to make sure the jury understands. The primary evidence is the tape itself. I'm going to admit [the transcript] just as a possible aid to you in understanding what's on the tape. But ultimately it's what you hear on the tape that matters, not [the transcript].

[5]In his opening brief, Defendant also alleged that his counsel was ineffective for failing to argue for the admission of an exhibit for impeachment purposes. There is some controversy between the parties regarding whether Defendant's argument was withdrawn. Regardless, we hold that the failure to receive such exhibit into evidence did not affect the outcome of the trial and therefore was harmless. See State v. Lindgren, 910 P.2d 1268, 1271 (Utah Ct. App. 1996).