IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Brodie Larry Spell, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060472-CA F I L E D (October 18, 2007) 2007 UT App 339

Second District, Ogden Department, 041900701
The Honorable Ernest W. Jones

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Erin Riley, Salt Lake City, for Appellee

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Before Judges Greenwood, Orme, and Thorne.

GREENWOOD, Associate Presiding Judge:

Defendant Brodie Larry Spell was convicted of one count of felony murder and one count of aggravated robbery, both first degree felonies. See Utah Code Ann. §§ 76-5-203, 76-6-203 (2003). He appeals, claiming that the trial court committed reversible error by refusing to allow him to argue imperfect self defense and present the jury with an instruction on the same at his trial. We affirm.

Anticipating that Defendant was going to argue self defense or imperfect self defense to the jury, the State filed a motion in limine to prevent Defendant from so doing. In briefing and at the hearing on the motion in limine, Defendant asserted that he was entitled to argue self defense or imperfect self defense because the victim attacked him. More specifically, Defendant claimed that shortly after he initiated the robbery, the victim resisted, Defendant tried to retreat, and a fight ensued. Under Utah statutory law, these defenses are not available to Defendant because, by Defendant's own admission at the time the trial court ruled on the motion, the robbery attempt provoked the victim's attack. Utah Code section 76-2-402(2) states that a person is not justified in using force, under a perfect or an imperfect self defense theory, if he or she "initially provokes the use of

force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant; [or] . . . is attempting to commit [or is] committing . . . a felony." Id. § 76-2-402(1)-(2)(b) (2003). Thus, under the facts described by Defendant in response to the State's motion in limine, the trial court did not err in refusing to allow Defendant to argue self defense or imperfect self defense to the jury because Defendant asserted that he had initiated the robbery, which provoked the victim's attack.[1] See Sutton v. State, 776 A.2d 47, 71 (Md. Ct. Spec. App. 2001) ("[A]ppellant's theory [is] that the use of any force by the victim in a robbery to protect his or her self would now make the victim the aggressor. The premise of an accused being permitted to raise the defense of self-defense to the charge of robbery borders on the absurd . . . .").

During trial, Defendant presented evidence supporting an alternative theory of the case which, Defendant argues, entitled him to argue imperfect self defense and obtain a jury instruction on that theory. However, Defendant is precluded from appellate review on this issue because after the evidence was admitted at trial, Defendant did not renew his objection to the trial court's ruling on the motion in limine,[2] nor did he request a jury instruction on imperfect self defense. Moreover, Defendant affirmatively approved the instructions without requesting any instructions regarding self defense. See State v. Bolson, 2007 UT App 268, ¶ 13, 583 Utah Adv. Rep. 14 (stating that an affirmative representation to the trial court approving the jury instructions "prevents a defendant from receiving appellate review of the jury instruction, even under the manifest injustice doctrine"). In fact, when the trial court stated that it was giving every instruction the State and Defendant had asked for, defense counsel stated, "That's correct, your honor. And based on that and the other modifications we made, the defense accepts the instructions." The trial court then stated, "So there's no objection. And both sides have a copy of the jury instructions?" Again, defense counsel affirmed the instructions. The trial court even asked, "Is there anything else we need to cover before

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1. Our decision is further influenced by the fact that, notwithstanding the trial court's ruling, Defendant was afforded the opportunity to present his self defense theory to the jury via his own testimony.

2. At the hearing on the motion in limine, defense counsel stated that he did not "believe the court c[ould] rule on this motion at least in its entirety until all the evidence is heard." However, there is no record of counsel formally requesting the trial court to reserve a ruling, and he did not ask the court to revisit its ruling after evidence was admitted at trial.

I bring in the jury?" In response, defense counsel stated, "Not from the defense, your honor." Thus, we decline to review this issue because Defendant never requested a self defense or imperfect self defense instruction, and trial counsel affirmatively approved the instructions as given.

Affirmed.

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Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

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Gregory K. Orme, Judge

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William A. Thorne Jr., Judge