

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20040120-CA
v.	)	
	)	F I L E D
Jerime H. Anderson,	)	(November 3, 2005)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2005 UT App 468</span>

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First District, Brigham City Department, 021100144  
The Honorable Ben H. Hadfield

Attorneys: Randall W. Richards, Ogden, for Appellant  
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake  
City, for Appellee

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Before Judges Davis, McHugh, and Orme.

PER CURIAM:

Jerime H. Anderson appeals from his conviction and sentence of one count of conspiracy to commit murder, a second degree felony in violation of Utah Code sections 76-4-201 and 76-5-203. See Utah Code Ann. §§ 76-4-201, 76-5-203 (2003).

Anderson alleges that his trial counsel was ineffective because he did not move for a directed verdict after the State presented its evidence. Similarly, Anderson alleges that the district court committed plain error by not unilaterally issuing a directed verdict after the State's case. In order to prevail on either claim, Anderson would have to demonstrate that the evidence was insufficient to support the jury's verdict. See State v. Holgate, 2000 UT 74, ¶17, 10 P.3d 346 (concluding that to establish plain error based on court's failure to unilaterally direct verdict in favor of defendant, defendant must first demonstrate that the evidence was insufficient to support the verdict); State v. Montoya, 2004 UT 5, ¶23, 84 P.3d 1183 (concluding that to prevail on ineffective of assistance claim, defendant must prove reasonable probability of different outcome).

"[A] trial court may arrest a jury verdict when the evidence, viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element." State v. Workman, 852 P.2d 981, 984 (Utah 1993). In so doing, this court defers to the fact finding abilities of the jury, especially in regard to conflicting evidence and truthfulness of witnesses. "When the evidence presented is conflicting or disputed, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence." Id. Thus, "[o]rdinarily, a reviewing court may not reassess credibility or re-weigh the evidence, but must resolve conflicts in favor of the jury verdict." Id. However, in some limited and unusual circumstances "a reviewing court may reassess witness credibility. For example, 'testimony which is inherently improbable may be disregarded, . . . but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions.'" Id. (citations omitted) (alteration in original).

The record reveals that if the jury believed the testimony of Jared Mendoza, there was sufficient evidence to support Anderson's conviction. Accordingly, because this case turns on how the jury judged the credibility of Mendoza vis-a-vis the testimony of Anderson, which was admitted by way of his taped interview with police, this court cannot reassess the credibility of either witness unless the testimony is "inherently improbable." See id. Anderson neither points us to, nor can the court locate, any testimony of Mendoza that is inherently improbable. Accordingly, sufficient evidence existed to support Anderson's conviction. As a result, Anderson's counsel was not ineffective for failing to make a motion for a directed verdict, and the district court did not commit plain error by failing to sua sponte enter a directed verdict of acquittal at the close of the State's case.

Anderson next claims that his trial counsel was ineffective for failing to object to the admission of certain evidence regarding prior drug use and incarceration. Similarly, Anderson claims that the district court committed plain error by allowing this evidence to be admitted at trial. Because Anderson cannot demonstrate that the evidence was erroneously entered into evidence, both claims fail. See State v. Bradley, 2002 UT App 348, ¶41, 57 P.3d 1139 (concluding that to establish plain error a defendant must demonstrate that error actually occurred); Montoya, 2004 UT 5 at ¶23. Anderson argues that the evidence should have been excluded under rule 404(b) of the Utah Rules of Evidence.

When determining whether evidence of other bad acts is admissible under Rule 404(b), the trial court must conduct a three-part test. . . . It must inquire, whether such evidence is being offered for a proper, noncharacter purpose under 404(b), (2) whether such evidence meets the requirements of rule 402, and (3) whether this evidence meets the requirements of rule 403.

State v. Miller, 2004 UT App 445, ¶17, 104 P.3d 1272 (citations and quotations omitted). The evidence at issue passes this test.

While rule 404(b) precludes evidence of bad acts to prove the character of a person, evidence demonstrating a noncharacter purpose "is not precluded so long as the evidence is offered for a legitimate purpose other than to show the defendant's propensity to commit the crime charged." State v. Allen, 2005 UT 11, ¶17, 108 P.3d 730. In this regard, "the prosecutor is entitled to paint a factual picture of the context in which the events in question transpired." State v. Morgan, 813 P.2d 1207, 1210 n.4 (Utah Ct. App. 1991). The record reveals that the testimony of which Anderson complains was not admitted to demonstrate Anderson's propensity to commit a crime. The evidence was admitted to show motive, preparation, plan, and to give context to the events that led to the murder of the victim. The evidence concerning drug use gave context to the road trip taken by Anderson, Mendoza, and the victim. The reference to a "prison look" explained Mendoza's behavior and why he feared Anderson. In sum, the evidence was admitted for purposes other than showing Anderson's propensity to commit a crime. Furthermore, for these same reasons, the information was clearly relevant to the jury's determination of the issues involved in the case. See Miller, 2004 UT App 445 at ¶17 (stating that in rule 404(b) inquiry, evidence must also be relevant to be admissible under rule 404(b)).

Finally, the danger of undue prejudice does not substantially outweigh the probative value of the evidence. Besides general statements, Anderson does not explain why the chance of undue prejudice substantially outweighs the probative value of the evidence. He does argue that the testimony unduly placed Anderson in a bad light. However, the testimony of which he complains also tended to place Mendoza, the prime witness for the prosecution, and the victim in that same bad light. Because the evidence was appropriately admitted to provide context to the jury, and there was not a substantial likelihood of undue prejudice, the evidence was admissible under rule 403 of the Utah Rules of Evidence.

Therefore, because the evidence of which Anderson complains was admissible, both his claim of ineffective assistance of counsel and his claim of plain error must fail. Further, even if the evidence was inadmissible, Anderson has failed to demonstrate the likelihood of a substantially different result. This too would cause both his claim of ineffective assistance of counsel and his claim of plain error to fail.

Affirmed.

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge

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Gregory K. Orme, Judge