

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040324-CA
v.)	
)	F I L E D
Joseph Delee Atencio,)	(September 29, 2005)
)	
Defendant and Appellant.)	2005 UT App 417

First District, Brigham City Department, 021100094
The Honorable Ben H. Hadfield

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Brett J. Delporto, Salt Lake
City, for Appellee

Before Judges Billings, McHugh, and Orme.

PER CURIAM:

Joseph Delee Atencio appeals his conviction of one count of burglary in violation of Utah Code section 76-6-202. Atencio argues that his conviction should be reversed because the district court committed plain error by failing to enter a directed verdict in favor of Atencio and that his trial counsel was ineffective. We affirm.

To prevail on a claim that the district court erred in failing to sua sponte order a directed verdict, Atencio must demonstrate that the district court committed plain error. See State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993) (concluding that plain error standard of review applies to issues not preserved for appeal). To establish plain error when a defendant alleges that the district court failed to direct a verdict in his favor, he "must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." State v. Holgate, 2000 UT 74, ¶17, 10 P.3d 346.

Instead of marshaling the evidence and explaining how that evidence was insufficient to support the burglary conviction,

Atencio argues that the district court should have directed a verdict in his favor because the jury eventually convicted him of burglary but acquitted him of theft. He alleges that these are inconsistent verdicts. While such a post-judgment rationale could be relevant to an allegation that the district court failed to grant a judgment notwithstanding the verdict, it has no relevance to the issue of whether the case should have been taken from the jury before it even had an opportunity to deliberate the facts presented at trial.

With that being said, there was sufficient evidence for the district court to allow the case to be sent to the jury. The State presented evidence that Atencio's fingerprint was found on a desk that was cleaned weekly since the date Atencio was terminated by his former employer eleven months earlier. A crime scene investigator testified that the print would have disappeared if cleaned in the manner testified to by an employee of the former employer. Further, the crime scene investigator also testified that under optimum conditions, he believed that the print would stay intact for only approximately two months (among other things, this assumed that the desk was not cleaned). Finally, a boot print found at the scene matched the sole of a boot owned by Atencio. As for the intent element of burglary, Utah courts recognize that intent need not be proven by direct evidence. Specifically, "[w]here the breaking and entering are clearly established and not controverted, the intent to steal may be sufficiently established by inference fairly deducible from all the circumstances and need not be established by direct proof." State v. Porter, 705 P.2d 1174, 1177 (Utah 1985). The evidence, if believed by a jury, was sufficient to support a conviction of burglary.

To the extent Atencio argues that the conviction of burglary and acquittal on theft were inconsistent, and that the district court should have granted a sua sponte judgment notwithstanding the verdict, his argument is equally unavailing. First, the verdicts were not inconsistent. Burglary merely requires the unlawful presence in a building with the intent to commit theft or some other enumerated activity. See Utah Code Ann. § 76-6-202 (Supp. 2005). It does not require theft. Because the jury can infer intent from the circumstances, see Porter, 705 P.2d at 1177 (Utah 1985), a finding that the State failed to prove the actual theft has no relevance to the inquiry as to whether a burglary occurred. Thus, a jury could conclude that a burglary occurred without concluding that a theft occurred. Second, even if the verdicts were inconsistent, without more, that is insufficient to set aside a conviction. See State v. Hancock, 874 P.2d 132, 134 (Utah Ct. App. 1994) ("In Utah, 'it is generally accepted that the inconsistency of verdicts is not, by itself, sufficient ground to set the verdicts aside.'" (citation omitted)).

Atencio next claims that he was afforded ineffective assistance by his trial counsel due to his counsel's failure to make a motion for a directed verdict or a motion for a judgment notwithstanding the verdict. In order to demonstrate that a defendant was denied effective assistance of counsel, he must prove "(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness, and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome . . . would have been different." State v. Montoya, 2004 UT 5, ¶23, 84 P.3d 1183 (citations and quotations omitted). As demonstrated in the discussion above, Atencio fails to prove either of these elements. First, any motion would have been futile because there existed sufficient evidence to support the jury's verdict. Further, because any motion would have been futile, Atencio fails to prove any prejudice associated with his counsel's actions.

Accordingly, we affirm.

Judith M. Billings,
Presiding Judge

Carolyn B. McHugh, Judge

Gregory K. Orme, Judge