IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Jonathan Hawke, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040803-CA F I L E D (November 10, 2005) 2005 UT App 479

Third District, Tooele Department, 031300030
The Honorable Randall N. Skanchy

Attorneys: David J. Angerhofer, Sandy, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

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Before Judges Bench, Greenwood, and McHugh.

GREENWOOD, Judge:

Defendant Jonathan Hawke appeals his conviction of two counts of sexual exploitation of a minor. We affirm.

Defendant first asserts that the trial judge was biased and improperly failed to sua sponte recuse himself. Because Defendant raises this issue for the first time on appeal, we review for plain error. See State v. Tueller, 2001 UT App 317,¶9, 37 P.3d 1180. To establish plain error, Defendant must show that: "(i) an 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." Id. (quotations and citation omitted).

Specifically, Defendant alleges that the trial judge showed bias against him when the trial judge sentenced Defendant to prison in spite of the fact that Defendant denied he wrote letters to the trial judge threatening the judge and requesting strippers, magazines, and better food for Defendant and his cellmates. "[A] trial judge's failure to recuse based on the appearance of bias may be grounds for reversal if actual prejudice is shown." State v. Alonzo, 973 P.2d 975, 979 (Utah 1998) (citation omitted). "Actual prejudice can be shown when

there exists a reasonable likelihood that the result would have been more favorable for the defendant[] absent the trial judge's appearance of bias." Id. "[A] trial judge's failure to recuse himself based on the appearance of bias does not constitute [reversible] error unless the substantial rights of the accused are affected." State v. Ontiveros, 835 P.2d 201, 204 (Utah Ct. App. 1992).

Defendant's argument is without merit. The record indicates that the trial judge's unwillingness to consider probation in Defendant's case resulted from the serious nature of Defendant's crimes and Defendant's unwillingness to take responsibility for his actions. Furthermore, there is nothing in the record indicating the trial court did not accept Defendant's disavowal of having authored the letters.

Likewise, Defendant's argument that he was prejudiced is equally unavailing because there is nothing in the record to support Defendant's claim that the letters affected the trial judge's decision. At most, the trial judge merely stated his opinion that Defendant was not a candidate for probation. Such a statement does not constitute bias or prejudice. See State v. Thorkelson, 2004 UT App 9,¶14, 84 P.3d 854 (noting that "a court necessarily makes a personal determination whenever it imposes sentence."); see also In re Young, 1999 UT 81,¶35, 984 P.2d 997 (explaining that "neither bias nor prejudice refer[s] to the attitude that a judge may hold about the subject matter of a [case]." (first alteration in original) (quotations and citation omitted)).

Consequently, Defendant has failed to demonstrate that there was obvious error or that he was harmed. His claim of plain error thus fails.

Alternatively, Defendant argues that he received ineffective assistance of counsel because counsel did not move to have the trial judge disqualified pursuant to rule 29 of the Utah Rules of Criminal Procedure. Utah R. Crim. P. 29 (c)(1)(A). Under rule 29 of the Utah Rules of Criminal Procedure, a party seeking to disqualify a judge must file a timely motion, accompanied by a certificate of good faith, supported by an affidavit "stating facts sufficient to show bias or prejudice, or conflict of interest." See id.

To demonstrate ineffective assistance of counsel, "a defendant must (i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstances, and (ii) demonstrate that counsel's error prejudiced the defendant." State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993) (citing Strickland v. Washington, 466 U.S. 668, 690-91 (1984)). "Failure to satisfy either prong will

result in our concluding that counsel's behavior was not ineffective." State v. Diaz, 2002 UT App 288,¶38, 55 P.3d 1131.

Defendant claims that he meets the first prong of the Strickland test because his trial counsel had the duty to preserve the issue of judicial bias for review and failed to meet that duty by remaining silent. Appellate courts necessarily apply a highly deferential standard of review to trial counsel's performance. See State v. Tennyson, 850 P.2d 461, 466 (Utah Ct. App. 1988). To fail to do so "would produce too great a temptation for courts to second-guess trial counsel's performance on the basis of an inanimate record." Id.

In this case, we cannot say that trial counsel's performance failed to meet reasonable professional standards. Furthermore, because there was no "actual bias in the trial judge's actions, we cannot say that trial counsel's failure to attempt to disqualify the judge constitutes performance 'below an objective standard of reasonable professional judgment.'" State v. Tueller, 2001 UT App 317,¶16, 37 P.3d 1180 (quoting Bundy v. Deland, 763 P.2d 803, 805 (Utah 1988)).

Because Defendant cannot satisfy the first prong of Strickland, we need not consider the second prong. See Diaz, 2002 UT App 288 at ¶38. However, even if Defendant could meet the first prong, he would still be unable to satisfy the second prong by demonstrating that counsel's deficient performance prejudiced the trial's outcome. The trial judge stated at Defendant's sentencing hearing that he had considered aggravating circumstances, which included the seriousness of Defendant's conduct and Defendant's unwillingness to take responsibility for his actions. As a result, we find unavailing Defendant's argument that a more favorable outcome for Defendant would have resulted absent trial counsel's deficient performance.

Accordingly, we affirm.

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Pamela T. Greenwood, Judge

WE CONCUR:

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Russell W. Bench,
Associate Presiding Judge

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Carolyn B. McHugh, Judge