

IN THE UTAH COURT OF APPEALS

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| State of Utah, |) | MEMORANDUM DECISION |
| |) | (Not For Official Publication) |
| Plaintiff and Appellee, |) | |
| |) | Case No. 20040597-CA |
| v. |) | |
| |) | F I L E D |
| Darwin Thompson, |) | (November 17, 2005) |
| |) | |
| Defendant and Appellant. |) | 2005 UT App 502 |

Fourth District, Provo Department, 011404391
The Honorable Claudia Laycock

Attorneys: Margaret P. Lindsay, Orem, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake
City, for Appellee

Before Judges Bench, Greenwood, and McHugh.

PER CURIAM:

Darwin Thompson appeals his conviction of witness tampering after a jury trial. He asserts there was insufficient evidence to support the verdict and that the trial court erred when it excluded testimony from two witnesses.

A jury verdict will be reversed for insufficiency of the evidence only if, "after viewing the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict, the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt." State v. Holgate, 2000 UT 74, ¶18, 10 P.3d 346 (quotations and citation omitted). Evidence is sufficient if "the evidence and all inferences that can be reasonably drawn from it [establish that] some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.'" State v. Spainhower, 1999 UT App 280, ¶5, 988 P.2d 452 (alteration in original) (quoting State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989)). Here, evidence exists regarding each element of witness tampering, permitting the jury to find Thompson guilty.

It is undisputed that Thompson was at the dance in question and that both a civil and a criminal case were pending against him at the time of the incident. Thompson argues that there was no evidence that he intentionally or knowingly struck the victim in retaliation for her role in the pending cases, and that the blow did not constitute assault. Much of Thompson's argument attacks the circumstantial nature of the evidence, however, rather than the sufficiency. It is well settled that a conviction may be based on circumstantial evidence. See State v. Lyman, 966 P.2d 278, 282 (Utah Ct. App. 1998). "'Circumstantial evidence need not be regarded as inferior evidence if it is of such quality and quantity as to justify a jury in determining guilt beyond a reasonable doubt, and is sufficient to sustain a conviction.'" Id. (quoting State v. Nickles, 728 P.2d 123, 127 (Utah 1986)).

There is sufficient evidence, including logical inferences, to support the verdict. See Spainhower, 1999 UT App 280 at ¶5. Both the victim (Christensen), and a witness (Cook), saw Thompson close by Christensen at the time of or immediately after the blow. Cook testified that Thompson passed directly behind Christensen and noted that it could not have been any one other than Thompson who struck the blow. Additionally, the evidence supported that the blow was intentional based on the force of the blow. Furthermore, the blow was sufficiently strong to permit the jury to find that it was an assault. Finally, the jury could infer that the blow was retaliation for the ongoing cases based on the history between Thompson and Christensen and her role as witness. In sum, evidence was presented sufficient to find each element of witness tampering.

Thompson asserts that the trial court erred in excluding the testimony of Michael Briden and Sylvia Demuir regarding Thompson's conduct at other dances. The trial court determined that the testimony was not within the scope of rule 608(a), permitting testimony regarding truthfulness in some circumstances, and was inadmissible under rule 404(a) as character evidence. See Utah R. Evid. 404(a), 608(a). The trial court did not err in excluding the testimony.

Briden's and Demuir's testimony regarded Thompson's conduct and demeanor at other dances. Before the State objected, Briden testified that Thompson was relaxed and mellow at other dances. Demuir was also questioned about Thompson's demeanor. Testimony about conduct and demeanor at dances does not come within the scope of rule 608(a). Rule 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these

limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Utah R. Evid. 608(a).

"Opinion testimony concerning credibility must be limited to testimony addressing a witness's general reputation for truthfulness, leaving the resolution of credibility for the fact-finder. As long as the testimony relates only to the general reputation for truthfulness of a witness, it is admissible under [rule 608(a)]." Glauser Storage, L.L.C. v. Smedley, 2001 UT App 141, ¶28, 27 P.3d 565 (quotations and citation omitted).

Testimony about Thompson's supposedly mellow disposition at dances does not reflect on his reputation for truthfulness. On the contrary, the excluded testimony is irrelevant and is prohibited under rule 404(a). Rule 404(a) excludes evidence of a person's character offered "for the purpose of proving action in conformity therewith on a particular occasion." Utah R. Evid. 404(a). Thompson's offer of testimony regarding his appropriate conduct at other dances is just this type of character evidence, offered for the proposition that, if he behaved well at other dances, he behaved well at the dance in question. As a result, it was properly excluded.¹

Thompson also asserts for the first time on appeal that the testimony was improperly excluded because it was admissible as evidence of bias, prejudice, or motive to misrepresent under rule 608(c). See Utah R. Evid. 608(c). Generally, this court will not address issues raised for the first time on appeal absent plain error. See Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996). Thompson has not argued plain error. Regardless, just as demeanor at past dances is not relevant to Thompson's reputation

¹To the extent Thompson asserts that the trial court excluded testimony regarding his reputation for truthfulness, his assertion is unsupported. Thompson did not ask any witness about his reputation for truthfulness. Moreover, the trial court indicated that it would permit such inquiry under Utah Rule of Evidence 608(a).

for truthfulness, neither is it relevant to any bias or prejudice on Christensen's part.

Affirmed.

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge

Carolyn B. McHugh, Judge