IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Zachery Don Zaelit, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20090405-CA F I L E D (July 29, 2010) 2010 UT App 208

Third District, West Jordan Department, 081401776
The Honorable Stephen L. Roth

Attorneys: Linda M. Jones and Heather Chesnut, Salt Lake City, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

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Before Judges Davis, McHugh, and Orme.

McHUGH, Associate Presiding Judge:

Zachery Don Zaelit appeals his conviction of theft by receiving stolen property, a second degree felony, see Utah Code Ann. § 76-6-408 (Supp. 2009); id. § 76-6-412(1)(a)(ii) (2008). Zaelit argues that the out-of-court statements of three witnesses, later repudiated by those witnesses at trial, were insufficient to support his conviction. We affirm.

Zaelit's conviction was based on his participation in the theft of a vehicle. Three companions accompanied Zaelit on the night of the theft, one of whom pleaded guilty to his own participation in the crime. At trial, two law enforcement officers provided testimony establishing that all three of Zaelit's companions had made statements implicating Zaelit in the theft. However, at trial, each of the companions either denied having made the statements or asserted that his or her original statement to law enforcement was not true. Nevertheless, the jury found Zaelit guilty.

Because Zaelit's claim that these out-of-court prior inconsistent statements are insufficient to support the verdict is not preserved, he raises it on appeal based on plain error. To establish plain error, Zaelit must show that "(i) [a]n 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 defendant]." State v. Cruz, 2005 UT 45, ¶ 16, 122 P.3d 543 (first alteration in original) (internal quotation marks omitted).[1] To establish the first two elements of a plain error claim based on insufficiency of the evidence, "a defendant 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. "An error is obvious when the law governing the error was clear at the time the alleged error was made." State v. Low, 2008 UT 58, ¶ 41, 192 P.3d 867.

Zaelit first contends that the out-of-court statements could not support the verdict because the permissible use of a prior inconsistent statement under rule 801(d)(1) of the Utah Rules of Evidence is limited to impeachment. We disagree. The State correctly notes that rule 801(d)(1), which provides that prior inconsistent statements of a witness who testifies at trial are not hearsay, see Utah R. Evid. 801(d)(1), "deviates from the federal rule in that it allows use of [unsworn] prior [inconsistent] statements as substantive evidence," id. R. 801(d)(1) advisory committee note (emphasis added). Thus, the out-of-court statements of the three witnesses could properly be used as substantive support for the verdict.

Next, Zaelit argues that his conviction could not be supported solely by prior inconsistent statements admitted under rule 801(d)(1). Zaelit asserts that such statements are inferior evidence that can never support a verdict absent other corroborating evidence. While Zaelit relies on authority from our appellate courts for this position, including a single published opinion, see State v. Ramsey, 782 P.2d 480, 484 (Utah 1989), we conclude that the law governing the sufficiency of multiple prior inconsistent statements to support a conviction is not so clear that the alleged error would have been obvious to the trial court.

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1. Relying on State v. Labrum, 881 P.2d 900 (Utah Ct. App. 1994), rev'd on other grounds by 925 P.2d 937 (Utah 1996), the State urges us to reject Zaelit's plain error argument, suggesting that a plain error claim is necessarily undermined by the lack of an accompanying ineffective assistance of counsel claim. However, the Labrum court noted only that "a claim of ineffective assistance of counsel typically is raised in conjunction with alleging plain error." Id. at 906 (emphasis added). Nothing in the opinion suggests that a plain error claim cannot be evaluated in the absence of an ineffective assistance claim.

First, the reasoning of State v. Ramsey, 782 P.2d 480 (Utah 1989), the primary authority relied upon by Zaelit,[2] is not controlling. The lead opinion's assertion in Ramsey that "a conviction that is based entirely on a single, uncorroborated hearsay out-of-court statement that is denied by the declarant in court under oath cannot stand," id. at 484, was adopted only by two of the five justices, see id. at 487. A third justice concurred in the result only. See id. The other two justices dissented, specifically asserting that the lead opinion's "analyses and conclusions regarding . . . hearsay rules[and] corroborative and substantive evidence . . . do not command a majority and are not to be considered the view of the [c]ourt." Id. at 489 (Hall, J., concurring and dissenting).[3] Thus, Ramsey's precedential value is limited.[4]

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2. Zaelit also cites cases such as Sandy State Bank v. Brimhall, 636 P.2d 481 (Utah 1981), which hold that administrative agency findings "cannot be based solely on hearsay evidence, but must be supported by a residuum of legal evidence competent in a court of law," id. at 486 (internal quotation marks omitted). This "residuum rule" is not applicable here, however, because it governs the use of inadmissible hearsay evidence that is nevertheless permitted in administrative proceedings. See Prosper, Inc. v. Department of Workforce Servs., 2007 UT App 281, ¶ 11, 168 P.3d 344 ("[T]he residuum rule requires that findings be supported by a residuum of legally competent evidence, not that they be supported by 'non-hearsay' evidence. Certain hearsay is admissible in a court of law and is therefore legally competent." (citation and internal quotation marks omitted)). By contrast, the evidence challenged by Zaelit as insufficient in this case is specifically exempt from the definition of hearsay and qualifies as admissible substantive evidence. See Utah R. Evid. 801(d)(1) & advisory committee note.

3. The unsettled status of the law in Utah on this point is highlighted by the fact that the two unpublished decisions relied upon by the parties reach contrary conclusions about the precedential value of Ramsey. Compare State v. Hamilton, 2007 UT App 130U, para. 2 n.4 (mem.), with In re C.L., 2005 UT App 221U, para. 5 (mem.).

4. At oral argument, Zaelit's counsel asserted that the lead opinion in Ramsey had been relied on in State v. Robbins, 2009 UT 23, 210 P.3d 288, and State v. Span, 819 P.2d 329 (Utah 1991). However, the Robbins court was concerned only with the reliability of in-court testimony and was not faced with the question of whether an out-of-court statement constituted sufficient evidence. See Robbins, 2009 UT 23, ¶¶ 13-14. Indeed, the Robbins court never addressed the conclusion of the lead opinion in Ramsey that Zaelit relies on here. While the court in

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Second, even if corroboration is necessary, there is no case law from this state to suggest that the admissible out-of-court statements of three different witnesses could not corroborate each other and thus constitute sufficient evidence for a conviction. Even the two justices in Ramsey who concluded that the conviction could not stand did so because it was based "entirely on a single, uncorroborated hearsay out-of-court statement." Id. at 484 (lead opinion) (emphasis added). Because an error is obvious for purposes of the plain error doctrine only "when the law governing the error was clear at the time the alleged error was made," State v. Low, 2008 UT 58, ¶ 41, 192 P.3d 867 (internal quotation marks omitted), Zaelit cannot prevail on grounds of plain error.

Zaelit also contends that the out-of-court statements of the three witnesses are unreliable and cannot, therefore, sustain the verdict. While Zaelit is correct that evidence may be insufficient to support a verdict where it consists solely of testimony that is "inherently improbable," see State v. Robbins, 2009 UT 23, ¶ 16, 210 P.3d 288, his argument confuses the reliability standard for sufficiency with the reliability standard for admissibility. In determining whether evidence is reliable enough to be admissible, a number of factors relating to the general trustworthiness of the evidence may be considered. See, e.g., State v. Mauchley, 2003 UT 10, ¶ 52, 67 P.3d 477 (discussing reliability factors to consider in admitting confessions); State v. Webster, 2001 UT App 238, ¶ 27, 32 P.3d 976 (discussing reliability factors to consider in admitting hearsay under the residual hearsay exception).[5] As a general rule, however, once evidence is admitted, "the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence" and "a reviewing court may not reassess credibility or reweigh the evidence." State v. Workman, 852 P.2d 981, 984 (Utah 1993).

While there are circumstances where the court can properly consider the reliability of testimony in a sufficiency of the evidence context, the grounds for deeming testimony insufficient

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Span did acknowledge the lead opinion's holding in Ramsey in a footnote, it found its facts distinguishable and did not apply the Ramsey holding because the defendant in Span partly corroborated his prior statement at trial. See Span, 819 P.2d at 333 n.2. We conclude that this reference is not sufficient to establish plainly that the lead opinion in Ramsey constitutes binding precedent or to decide the question here: whether multiple out-of-court statements may corroborate one another.

5. Zaelit does not challenge the admissibility of the evidence on appeal.

due to unreliability are narrow. A witness's testimony may be considered insufficient on grounds of reliability only when "it is (1) physically impossible or (2) apparently false," Robbins, 2009 UT 23, ¶ 16, that is, when a witness's testimony is "inherently improbable, inconsistent, uncorroborated," id., and "incredibly dubious" to the extent that "the court is convinced that the credibility of the witness is so weak that no reasonable jury could find the defendant guilty beyond a reasonable doubt" based solely on that testimony, id. ¶ 18.

Here, the jury was presented with multiple statements made by the three witnesses, some of which were made to police and some of which were testified to in court. There was nothing more inherently improbable about the witnesses' admissible out-of-court statements indicating that Zaelit participated in the theft than their in-court testimony that Zaelit was not involved in the criminal activity. The jury had to decide whether these witnesses lied in their statements to the officers or whether they perjured themselves at trial. Both Zaelit and the State had the opportunity to highlight inconsistencies in the witnesses' testimony and to make arguments about their motives to lie initially or at trial. It was then the jury's prerogative to weigh the evidence and to determine which version of events they found most credible.

Because there is no settled rule in Utah indicating that admissible substantive evidence of prior inconsistent statements from multiple witnesses cannot sustain a verdict, the error alleged by Zaelit was not obvious and thus cannot be raised for the first time on appeal under the plain error doctrine, see State v. Holgate, 2000 UT 74, ¶ 17, 10 P.3d 346 (holding that in order for an insufficiency of the evidence claim to be considered for the first time on appeal, the insufficiency must be "so obvious and fundamental that the trial court erred in submitting the case to the jury").[6] Consequently, we do not consider

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6. The decisions of other jurisdictions cited by Zaelit on appeal are also insufficient to support reversal on grounds of plain error. Most of these decisions are not on point, as they considered the sufficiency of only a single out-of-court statement, see, e.g., State v. White Water, 634 P.2d 636, 637 (Mont. 1981), and several of them come from jurisdictions where prior inconsistent statements are not substantive evidence, see, e.g., People v. Collins, 274 N.E.2d 77, 85-87 (Ill. 1971). One of the cases cited by Zaelit actually suggested that multiple prior inconsistent statements might be used to corroborate one another, see Roby v. State, 495 N.E.2d 721, 721 (Ind. 1986) (noting, in addition to other corroborating evidence, that the repudiated out-of-court statements of two witnesses "were in substantial agreement regarding various facts"), and another

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whether the prior inconsistent statements of the three witnesses were adequate to corroborate one another and, therefore, sufficient to support the verdict.[7] Furthermore, the trial court did not commit plain error in permitting the jury to weigh the credibility of the out-of-court statements, as they were not inherently improbable.

Affirmed.

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Carolyn B. McHugh,
Associate Presiding Judge

WE CONCUR IN THE RESULT:

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James Z. Davis,
Presiding Judge

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Gregory K. Orme, Judge

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6. (...continued)
suggested that two repudiated out-of-court statements might have been sufficient if a cautionary jury instruction had been given, see Acosta v. State, 417 A.2d 373, 377-78 (Del. 1980). The few cases suggesting that multiple out-of-court statements might be insufficient to corroborate one another, see, e.g., State v. Pierce, 906 S.W.2d 729, 733-35 (Mo. Ct. App. 1995), do not create the kind of well-established rule that might make an error obvious. With no controlling appellate decision on the issue in Utah and no settled rule across the country, any alleged error in this case could not have been obvious to the trial court. See generally State v. Ross, 951 P.2d 236, 239 (Utah Ct. App. 1997) (considering the existence of Utah law and consensus across other jurisdictions in determining whether an error is plain).

7. Zaelit's objection to the sufficiency of the evidence is based solely on the quality of the evidence supporting the conviction, not its substance. While he maintains that prior inconsistent statements can never be sufficient alone to sustain a conviction, he does not allege that the statements made by the witnesses to police in this case did not contain evidence that could have substantively supported the jury's verdict.