

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20050134-CA
v.	)	
	)	
Graham Woodruff Austin,	)	F I L E D
	)	(May 4, 2006)
	)	
Defendant and Appellant.	)	<u>2006 UT App 184</u>

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Seventh District, Moab Department, 041700101  
The Honorable Lyle R. Anderson

Attorneys: William L. Schultz, Moab, for Appellant  
Mark L. Shurtleff and Erin Riley, Salt Lake City, for Appellee

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Before Judges Bench, Greenwood, and Davis.

BENCH, Presiding Judge:

Defendant Graham Woodruff Austin argues, under the standard set forth in State v. Reyes, 2005 UT 33, ¶30, 116 P.3d 305, that part of the reasonable doubt jury instruction--"[i]t is the burden of the State to eliminate all reasonable doubt"--violated his due process rights. Because Defendant did not object to the reasonable doubt jury instruction at trial, he asserts plain error on appeal. See State v. Halls, 2006 UT App 142, ¶¶13-14. "Under the first prong of the plain error standard, Defendant must show that '[a]n error exists.'" Id. at ¶15 (alteration in original) (citation omitted). "[I]f Defendant's reasonable doubt jury instruction, taken as a whole, . . . correctly convey[ed] the concept of reasonable doubt to the jury, then it was not erroneous." Id. at ¶16 (omission and second alteration in original) (quotations and citations omitted).

In the instant matter, the "reasonable doubt jury instruction given at Defendant's trial did not convey the message that the State must only eliminate those doubts that are sufficiently defined; neither did the State argue that the juror need articulate and eliminate specific doubts." Id. at ¶19. As we held in Halls, "we are not persuaded that the use of 'eliminate all reasonable doubt' constitutes plain error. Id.

at ¶20. We conclude that the jury instruction, "taken as a whole, correctly communicate[d] the principle of reasonable doubt." State v. Cruz, 2005 UT 45, ¶21, 122 P.3d 543.

Defendant also asserts that the trial court erred by (1) imposing consecutive sentences without the benefit of a presentence investigation report (PSI) and (2) failing to adequately consider Defendant's history, remorse, and rehabilitative needs in violation of Utah Code section 76-3-401(2), see Utah Code Ann. § 76-3-401(2) (2003).

"Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence . . . for the purpose of obtaining a [PSI] . . . or information from other sources about the defendant." Utah Code Ann. § 77-18-1(5)(a) (Supp. 2005) (emphasis added).<sup>1</sup> This statute gives the trial court discretion to impose a sentence without ordering a PSI. See State v. Madsen, 2002 UT App 345, ¶¶13-15, 57 P.3d 1134. Additionally, Defendant specifically requested that the trial court "waive his time for sentencing and be sentenced today," knowing that no PSI would be completed. The trial court granted Defendant's request and sentenced him immediately after the trial concluded. Therefore, the trial court did not err in sentencing Defendant without the benefit of a PSI.

Further, in determining whether to impose consecutive sentences, the trial court is required to "consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant." Utah Code Ann. § 76-3-401(2). Defendant asserts that the trial court was unable to sufficiently consider "his history, his remorse, and his rehabilitative needs," in large part because a PSI had not been completed.

"Although the trial court did not explicitly address the enumerated factors in section [76-3-401(2)], there is ample evidence in the record that the court considered these factors at the time of Defendant's sentencing." State v. Valdovinos, 2003 UT App 432, ¶30, 82 P.3d 1167. The trial court here received evidence concerning Defendant's drug addiction, the recent hospitalization of his mother, his failing marriage, his recent unemployment, and his car braking down. The trial court also received evidence concerning Defendant's immediate remorse, his

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<sup>1</sup>There have been no relevant amendments to the applicable statutes since Defendant's commission of the crimes in this matter. For convenience, we therefore cite to the most recent version of the statutes.

apology to the victim's family at trial, and the victim impact statements. As a result, we hold that the trial court sufficiently considered all of the sentencing factors and did not abuse its discretion by imposing consecutive sentences. Furthermore, Defendant's claim of ineffective assistance of counsel is without merit because counsel was not "objectively deficient" in not objecting to the lack of a PSI and to the imposition of consecutive sentences. State v. Mecham, 2000 UT App 247, ¶21, 9 P.3d 777.

Accordingly, we affirm.

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Russell W. Bench,  
Presiding Judge

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WE CONCUR:

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Pamela T. Greenwood,  
Associate Presiding Judge

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James Z. Davis, Judge