

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040301-CA
v.)	
)	F I L E D
Jacob Bennett,)	(April 10, 2008)
)	
Defendant and Appellant.)	2008 UT App 126

Second District, Farmington Department, 031702062
The Honorable Darwin C. Hansen

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Greenwood, Davis, and Orme.

GREENWOOD, Presiding Judge:

Jacob Bennett appeals his convictions for burglary, a second degree felony, see Utah Code Ann. § 76-6-202 (2003), and theft, a class B misdemeanor. See id. § 76-6-404. We affirm.

Defendant first argues that the trial court committed plain error by submitting instruction thirty-three because it "undermine[d] the jury's responsibility to find the ultimate facts beyond a reasonable doubt and shift[ed] the burden of persuasion to Defendant." The State responds that this court should not review this argument, even under plain error, because Defendant invited the alleged error of which he now complains.

In State v. Hamilton, 2003 UT 22, 70 P.3d 111, the Utah Supreme Court stated that "if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction, [the appellate court] will not review the instruction under the manifest injustice exception." Id. ¶ 54. This court has applied the Hamilton holding to the plain error exception. See State v. Cox, 2007 UT App 317, ¶ 19, 169 P.3d 806 ("A defendant may not obtain plain error review of an alleged instructional error when 'counsel, either by statement or act, affirmatively represented to the court that he or she had

no objection to the jury instruction.'" (quoting Hamilton, 2003 UT 22, ¶ 54)); Moore v. Smith, 2007 UT App 101, ¶¶ 30-31, 158 P.3d 562 (applying Hamilton to the plain error exception); State v. Harper, 2006 UT App 178, ¶ 12, 136 P.3d 1261 (same). At trial, the trial court asked defense counsel whether he had "any exception with respect to the proposed instruction," and defense counsel responded in the negative. Thus, because counsel represented to the court that he approved the jury instructions, we are precluded from reviewing Defendant's claim, even under the plain error exception.

Alternatively, Defendant argues that he was deprived of his Sixth Amendment rights because his trial counsel was ineffective for failing to object to instruction thirty-three. To establish that counsel was ineffective, Defendant must show both "that his counsel rendered a deficient performance . . . , which performance fell below an objective standard of reasonable professional judgment and . . . that counsel's performance prejudiced the defendant." Bundy v. Deland, 763 P.2d 803, 805 (Utah 1988). Failure "to make motions or objections [that] would be futile if raised does not constitute ineffective assistance." State v. Whittle, 1999 UT 96, ¶ 34, 989 P.2d 52 (internal quotation marks omitted).

Defendant specifically takes issue with counsel's failure to object to instruction thirty-three because, he asserts, it raised a presumption of guilt and impermissibly placed the burden on Defendant to prove his innocence. In State v. Smith, 726 P.2d 1232 (Utah 1986), a defendant challenged his conviction based on a similar jury instruction and a similar argument. See id. at 1234-36. The Utah Supreme Court determined that the challenged instruction merely allowed the jury to reach a permissible inference; it did not force the jury to reach a specific conclusion. See id.; Francis v. Franklin, 471 U.S. 307, 314 (1985) ("A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved."). In refusing to overturn the defendant's conviction, the court explained: "[I]t is elementary that we read the language of an instruction in light of its immediate context and the context of the instructions as a whole." Smith, 726 P.2d at 1234. In doing just that, the Utah Supreme Court concluded that the instruction at issue could not be deemed reversible error "in light of the clear explanatory instructions that all that the jury could make of the term 'prima facie' was a permissible inference." Id. at 1236; see also Francis, 471 U.S. at 314 ("A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion."). In this case, we conclude, as the Smith

court did, that there was no error with instruction thirty-three because it merely instructed the jury on a permissible inference. Furthermore, instruction thirty-three was accompanied by other instructions regarding the State's burden to establish guilt beyond a reasonable doubt.

In summary, because instruction thirty-three only provided for a permissible inference, and it was accompanied by more specific instructions referencing the State's burden to prove Defendant's guilt beyond a reasonable doubt, there was no error with the instruction. Thus, any objection to instruction thirty-three would have been futile, and Defendant has therefore failed to establish the necessary first prong of ineffective assistance--that counsel performed below an objective standard of reasonable professional judgment.

Consequently, we affirm.

Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

James Z. Davis, Judge

Gregory K. Orme, Judge