IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Michael Ray Clegg, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040426-CA F I L E D (February 9, 2006) 2006 UT App 44

Fifth District, St. George Department, 011501283
The Honorable James L. Shumate

Attorneys: Margaret P. Lindsay and Aaron Dodd, Orem, for Appellant
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake City, for Appellee

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Before Judges Bench, Greenwood, and Thorne.

BENCH, Presiding Judge:

Michael Clegg appeals a conviction of theft by deception, a third degree felony, in violation of Utah Code section 76-6-405. See Utah Code Ann. § 76-6-405 (2003). We affirm.

Clegg first asserts that the evidence was not sufficient to sustain his conviction of theft by deception. "To demonstrate that the evidence is insufficient to support [a] jury verdict, [Clegg] must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." State v. Hopkins, 1999 UT 98,¶14, 989 P.2d 1065 (quotations and citations omitted).[1]

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[1]Clegg did not preserve this issue below, and therefore, now claims plain error and ineffective assistance of counsel on review. See State v. Weaver, 2005 UT 49,¶18, 122 P.3d 566. Under the plain error doctrine, after an adequate showing of insufficient evidence, Clegg must then show "that the insufficiency was so obvious and fundamental that the trial court (continued...)

"[T]hree separate components of the 'by deception' element are imbedded in that language." State v. LeFevre, 825 P.2d 681, 685 (Utah Ct. App. 1992). Clegg asserts that the evidence does not support a finding of the first and third components. The first component is that the "defendant's acts satisfied the statutory definition of deception." Id. "'Deception' occurs when a person intentionally: . . . [c]reates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction." Utah Code Ann. § 76-6-401(5) (2003) (emphasis added).

Clegg argues that his actions were unlikely to affect the judgment of his cashier because she failed to follow Wal-Mart procedures. The "likely to affect the judgment of another" language, however, is a "separate inquiry from that used to determine the victim's reliance." LeFevre, 825 P.2d at 686 n.9.

> The sole purpose of section 76-6-401 is to define those words or actions that may be considered a 'deception.' As such, the language 'and is likely to affect the judgment of another in the transaction' is meant only to test the relationship between the falsehood and the transaction, so as to determine if a deception exists.

Id. Therefore, the definition turns not on the cashier's actions, but on Clegg's. When viewing Clegg's actions in the light most favorable to the verdict, the evidence was sufficient to satisfy "the statutory definition of deception." Id. at 685.[2]

The third component of the "by deception" element is "that the victim relied upon the deception, at least to some extent, in parting with property." Id. Clegg asserts that because the cashier failed to follow proper procedures in accepting Clegg's

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[1](...continued)
erred in submitting the case to the jury." State v. Holgate, 2000 UT 74,¶17, 10 P.3d 346 (footnote omitted). Because we conclude that the evidence was sufficient to support the conviction, any further analysis of plain error or ineffective assistance of counsel is unnecessary.

[2]Further, whether Clegg knew that his misrepresentations were false is a question of credibility, a determination left to the jury's judgment. See State v. Workman, 852 P.2d 981, 984 (Utah 1993) (holding that a jury serves as the exclusive judge of the credibility of witnesses).

representation of the price, "her reliance was inappropriate." The appropriateness of the reliance, however, is not the relevant inquiry. Rather, the necessary level of reliance is determined using a materiality test. See id. at 687. "'Materiality seems to require that the victim to some extent must believe the pretense to be true, but the greater focus is the objective issue of whether the misrepresentation was instrumental in effecting the transfer of [property].'" Id. (quoting State v. Schneider, 715 P.2d 297, 300 (Ariz. Ct. App. 1986)). The evidence reflects that, though the cashier had doubts, she still relied upon Clegg's misrepresentation of the price in completing the transaction. The evidence was therefore sufficient to show reliance.

Clegg next contends that his actions constituted puffing. He argues that the court therefore erred in not instructing the jury on Utah Code section 76-6-405(2), which provides:

> Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

Utah Code Ann. § 76-6-405(2) (2003). Clegg's actions, however, did not constitute puffing. He did not overstate the value of the items but rather misrepresented the price by presenting an incorrect price tag. Because Clegg's actions did not constitute puffing, the court did not err in omitting section 76-6-405(2) from the jury instructions. Thus, Clegg's plain error claim fails.[3]

Finally, Clegg argues that the court committed plain error by making improper statements in the jury's presence. First, Clegg asserts that the court's statements about his wife's employment as a pharmacist at Wal-Mart put into question the court's impartiality. These statements were gratuitous, but

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[3]Clegg also argues that his trial counsel rendered ineffective assistance of counsel for failing to request the instruction. Clegg's trial counsel did not perform deficiently by not insisting upon an irrelevant jury instruction, and therefore, Clegg's ineffective assistance of counsel claim also fails. See State v. Litherland, 2000 UT 76,¶¶16-17, 12 P.3d 92 (stating that a claim of ineffective assistance of counsel requires a showing of deficient performance).

counsel did not file a motion to recuse. In any event, because Clegg did not show that "there is a reasonable likelihood of a more favorable outcome," absent the court's statements, he did not establish plain error. State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993). Clegg further contends that the court improperly admonished the defendant in the jury's presence, and by doing so "demonstrated bias against him which influenced the jury." Such an admonishment should generally be done outside the jury's presence. However, the "[m]ere expressions of impatience, dissatisfaction, annoyance, and even anger, are insufficient to establish the existence of bias or partiality." Campbell, Maack & Sessions v. DeBry, 2001 UT App 397,¶25, 38 P.3d 984 (quotations and citation omitted). Because the court's statements did not rise to the level of bias, there was no plain error.

Accordingly, we affirm.

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Russell W. Bench,
Presiding Judge

WE CONCUR:

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Pamela T. Greenwood,
Associate Presiding Judge

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William A. Thorne Jr., Judge