IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Darren Raymond Coco, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20061051-CA F I L E D (April 10, 2008) 2008 UT App 128

Third District, Salt Lake Department, 051908248
The Honorable J. Dennis Frederick

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

---

Before Judges Thorne, Bench, and McHugh.

THORNE, Associate Presiding Judge:

Darren Raymond Coco appeals his jury conviction of obstruction of justice, see Utah Code Ann. § 76-8-306 (Supp. 2007), as a second degree felony offense, see id. § 76-8-306(3) (setting the penalties for obstruction of justice); id. § 76-3-203.1 (enhancing the penalty for offenses committed in concert with two or more persons). We affirm.

Coco argues that his obstruction of justice conviction should be only a third degree felony, rather than the second degree felony entered by the district court. A person commits obstruction of justice when he or she undertakes various actions "with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense." Id. § 76-8-306(1). Obstruction of justice is an offense that varies in degree of seriousness depending on the severity of the criminal conduct concealed. See id. § 76-8-306(3). With certain enumerated exceptions, obstruction of the investigation of a capital or first degree felony is a second degree felony; obstruction of the investigation of a second or third degree

felony is a third degree felony; and any other violation of section 76-8-306 is a class A misdemeanor. See id.[1]

Coco was charged by amended information with two crimes, second degree felony aggravated assault, see id. § 76-5-103 (2003), and the second degree felony obstruction of justice charge described above.[2] Neither the amended information nor the jury instructions identified the particular criminal conduct that formed the basis, and hence the level of severity, of the obstruction of justice charge. Accordingly, Coco argues, he should only have been convicted of obstruction of justice as a class A misdemeanor, enhanced to a third degree felony by the group enhancement. We do not disagree with Coco's general assertion that the facts and circumstances establishing the severity of a crime must be identified and proven by the State beyond a reasonable doubt. See, e.g., State v. Valdez, 2003 UT App 314, ¶ 16, 78 P.3d 627 (stating that value element, which establishes severity of identity fraud offense, must be proven beyond a reasonable doubt); State v. Lyman, 966 P.2d 278, 283-85 (Utah Ct. App. 1998) (discussing the importance of accurately determining value for purposes of establishing degree of theft offense). However, under the circumstances of this case, we hold that Coco waived any objection to the error asserted on appeal by failing to timely object to the inadequate jury instructions.

"It is axiomatic that, before a party may advance an issue on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon." Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App. 1989); see also State v. Valdez, 2006 UT 39, ¶ 44, 140 P.3d 1219 (discussing "sandbagging" in the context of untimely objections to jury makeup). Here, the record contains no objection by Coco that would have allowed the district court to correct the flawed instructions before they went to the jury. After the close of the State's case-in-chief and the denial of Coco's motion for directed verdict, Coco objected to the jury instruction defining "conduct that constitutes a criminal offense," Utah Code Ann. § 76-8-306(1), but only because it included homicide as one of the crimes that Coco allegedly

---

1. Additionally, in this case, Coco's offense is subject to enhancement by one degree because the jury determined that he was acting in concert with two or more other persons when he committed obstruction of justice. See Utah Code Ann. § 76-3-203.1.

2. Coco was acquitted on the aggravated assault charge.

concealed.[3] Coco's objection stated, in part, that allowing the jury to consider homicide as the underlying criminal conduct would make the obstruction of justice charge "a higher level of offense." This objection was not sufficient to apprise the trial court of the error now asserted on appeal, and the record does not reveal any other objection by Coco to the jury instructions.

There is thus no indication in the record that Coco objected to the jury instructions in such a manner as to give the district court an opportunity to correct the instructions before the case went to the jury, see 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (stating that timely objection "allows for correction at that time in the course of the proceeding"), nor does Coco assert as much on appeal. Rather, Coco asserts that he preserved the issue in a motion to arrest judgment filed prior to sentencing. See Utah R. Crim. P. 23 (governing motions to arrest judgment). Although Coco did raise the obstruction issue in his rule 23 motion, that motion was not filed until after trial. Accordingly, we deem it to be an untimely objection for purposes of preserving any error in the jury instructions. Cf. Valdez, 2006 UT 39, ¶¶ 22-46 (holding that challenge to jury makeup must be raised prior to jury being sworn and remainder of venire being excused, to allow correction of error at the time and avoid mistrial).

Coco does not argue plain error or exceptional circumstances as justification for us to review the unpreserved error now asserted. See State v. Winfield, 2006 UT 4, ¶ 14, 128 P.3d 1171. Accordingly, we need not reach the State's argument that Coco invited the asserted error. See id. (explaining that plain error review is unavailable when a defendant invites the error below); State v. Geukgeuzian, 2004 UT 16, ¶ 9, 86 P.3d 742 (explaining that review for manifest injustice is unavailable in light of invited error). However, we note that the record in this case does not appear to indicate the kind of affirmative approval of the jury instructions that would justify resort to the invited error doctrine. See Geukgeuzian, 2004 UT 16, ¶¶ 8-12. The vast bulk of the jury instruction negotiations took place off the record, and we will not speculate that Coco approved of the instructions any more than we will speculate that he objected to them.

---

3. The challenged instruction stated, "'Conduct that constitutes a criminal offense' means any conduct that would be punishable as a crime, including the following crimes," and then specifically listed aggravated assault, burglary, homicide, and abuse or desecration of a dead human body.

Nevertheless, it is clear that Coco waived the issue he now asserts on appeal by failing to preserve the issue with a timely objection. Although we cannot say from the record that Coco invited the error below, that is of no import because Coco has not argued plain error or exceptional circumstances justifying review of his unpreserved issue. Accordingly, we affirm Coco's conviction of second degree felony obstruction of justice.

_____
William A. Thorne Jr.,
Associate Presiding Judge

WE CONCUR:

_____
Russell W. Bench, Judge

_____
Carolyn B. McHugh, Judge