IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Clint L. Colvin, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20050869-CA F I L E D (November 24, 2006) 2006 UT App 469

Second District, Farmington Department, 031700926
The Honorable Glen R. Dawson

Attorneys: Gregory G. Skordas, Salt Lake City, for Appellant
Mark L. Shurtleff and Erin Riley, Salt Lake City, for Appellee

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Before Judges Bench, McHugh, and Thorne.

THORNE, Judge:

Defendant Clint L. Colvin appeals from the trial court's order denying his motion for new trial. Defendant asserts that the trial court should have granted him a new trial because he received ineffective assistance of counsel and because the jury was improperly instructed on the reasonable doubt standard.

Defendant claims his trial attorney rendered ineffective assistance by failing to investigate potentially exculpatory witnesses and present an alternative defense theory based on the evidence gathered from these witnesses. Defendant also asserts that his trial attorney failed to obtain and review various discovery documents. To demonstrate ineffective assistance of counsel, Defendant must show that his trial counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment, and . . . counsel's deficient

performance prejudiced him."[1] State v. Hernandez, 2005 UT App 546,¶17, 128 P.3d 556 (quotations and citation omitted).

Defendant asserts that he gave his trial attorney pertinent witness information and that his trial attorney decided not to call those witnesses because "they wouldn't prove his innocence." Defendant also asserts that his trial attorney failed to present an alternative defense theory based on the evidence to be gathered from those witnesses, i.e., the absence of mens rea. However, no information was presented by Defendant or his trial attorney to indicate whether the trial attorney actually interviewed any of the witnesses or what information, if any, was gathered pertaining to the alternate defense theory. Because there is insufficient information before us to determine either what actions were taken or the result of actions not taken, we decline to address these issues.

Defendant next argues that his trial attorney failed to obtain and review approximately thirty-five boxes of discovery documents. "[D]efense counsel . . . has an affirmative duty to conduct a reasonable investigation." State v. Kallin, 877 P.2d 138, 143 (Utah 1994). Defendant argues that his trial attorney should have reviewed the contents of the boxes as part of the required reasonable investigation. However, defendants who base ineffective assistance claims on their counsels' failure to obtain crucial discovery documents must proffer evidence demonstrating that proper discovery would have yielded exculpatory evidence. See Parsons v. Barnes, 871 P.2d 516, 526 (Utah 1994). "Speculation that [exculpatory evidence] exists is not sufficient to meet the prejudice component of the [ineffective assistance of counsel] test." Id. In this case, Defendant failed to proffer evidence on appeal to show that any

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[1]We note that "'in certain Sixth Amendment contexts, prejudice is presumed.'" Parsons v. Barnes, 871 P.2d 516, 523 (Utah 1994) (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)). "These circumstances include the '[a]ctual or constructive denial of the assistance of counsel altogether,' as well as 'various kinds of state interference with counsel's assistance.'" Id. (alteration in original) (quoting Strickland, 466 U.S. at 692). The supreme court in Parsons declined to apply the presumption of prejudice to an ineffective assistance of counsel claim based on defense counsel's failure to conduct a reasonable investigation. See id. As a result, there is no presumption of prejudice and Defendant must affirmatively prove prejudice to prevail on his ineffective assistance of counsel claim.

of the boxes contained exculpatory information. Therefore, Defendant's ineffective assistance claim fails.

Finally, Defendant contends that the reasonable doubt jury instruction unconstitutionally lowered the State's burden of proof because it contained the phrase "obviate all reasonable doubt." See State v. Reyes, 2005 UT 33,¶¶24-30, 116 P.3d 305 (abandoning the phrase "obviate all reasonable doubt" as a requirement in reasonable doubt jury instructions). Defendant admits that he did not object to the reasonable doubt jury instruction at trial.[2] When a defendant fails to object to a jury instruction at trial, we will only remand for a new trial if any error in the instruction constitutes a manifest injustice.[3] See State v. Halls, 2006 UT App 142,¶13, 134 P.3d 1160, cert. granted, No.20060541, 2006 Utah LEXIS 184 (Utah July 28, 2006).

In State v. Cruz, 2005 UT 45, 122 P.3d 543, the supreme court enunciated the standard for assessing the validity of reasonable doubt jury instructions. See id. at ¶21. "[W]e need only ask whether the instructions, taken as a whole, correctly

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[2]The record does not include a transcript of the jury instruction portion of the trial. Because we do not know whether Defendant also expressly agreed to the reasonable doubt jury instruction, we do not consider the invited error doctrine in our analysis. However, we note that this court declined to apply the invited error doctrine in State v. Halls, 2006 UT App 142, 134 P.3d 1160, cert. granted, No.20060541, 2006 Utah LEXIS 184 (Utah July 28, 2006), "where a change in law or the settled interpretation of law colored the failure to have raised an issue at trial." Id. at ¶13 n.1. The defense counsel in Halls not only failed to object to the reasonable doubt instruction, but expressly agreed to it. See id. Conversely, this court applied the invited error doctrine in State v. Wareham, 2006 UT App 327, 143 P.3d 302, wherein defense counsel "not only affirmatively approved of the use of the word obviate, but actually insisted that it be inserted into the instructions." Id. at ¶16. However, the distinction drawn in Wareham does not affect our refusal to apply the invited error doctrine in this case.

[3]To establish manifest injustice or plain error Defendant must show that "(i) an 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], or phrased differently, our confidence in the verdict is undermined." Halls, 2006 UT App 142 at ¶14 (alteration omitted) (quotations and citation omitted).

communicate the principle of reasonable doubt . . . ." Id. The reasonable doubt jury instruction given at Defendant's trial did not instruct, nor did the State argue at trial, that the State must only eliminate those doubts that are sufficiently defined.[4] Rather, the jury instruction taken as a whole,[5] correctly communicated the principle of reasonable doubt to the jury and did not unconstitutionally lower the State's burden in this case. We therefore affirm the trial court's ruling denying Defendant's motion for new trial.

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William A. Thorne Jr., Judge

WE CONCUR:

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Russell W. Bench,
Presiding Judge

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[4]This was the concern in State v. Reyes, 2005 UT 33,¶¶24-30, 116 P.3d 305.

[5]The jury instruction provided, in pertinent part:

> Proof beyond a reasonable doubt does not require proof to an absolute certainty. "Reasonable doubt" means a doubt that is based on reason and one which is reasonable in view of all the evidence. It must be a reasonable doubt and not a doubt which is merely fanciful or imaginary or based on wholly speculative possibility.
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> Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it and obviates all reasonable doubt. A reasonable doubt is a doubt which reasonable men and women would entertain, and it must arise from the evidence or lack of evidence in this case.

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Carolyn B. McHugh, Judge