IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Jack Lynn Flippo, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040711-CA F I L E D (March 9, 2006) 2006 UT App 92

Fourth District, Heber Department, 031500069
The Honorable Donald J. Eyre Jr.

Attorneys: Dana M. Facemyer, Provo, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

---

Before Judges Greenwood, Davis, and Orme.

GREENWOOD, Associate Presiding Judge:

Defendant Jack Lynn Flippo appeals his first degree felony convictions for two counts of sexual abuse of a child and four counts of sodomy on a child. The alleged victims of the offenses were A.K. and A.K.'s brother, J.K. We affirm.

Defendant first claims that the trial court erroneously admitted A.K.'s testimony recounting a medical examination. The "trial court['s] . . . broad discretion to admit or exclude evidence . . . typically will only be disturbed if it constitutes an abuse of discretion." State v. Whittle, 1999 UT 96,¶20, 989 P.2d 52.

During the State's rebuttal, A.K. testified that the medical examiners told him they had located a scar on his anus. Over Defendant's objection, the trial court admitted the evidence under rule 803 of the Utah Rules of Evidence. See Utah R. Evid. 803. On appeal, Defendant argues that the trial court erred by admitting the testimony because it was hearsay and inadmissible

under rules 803(3) and 807 of the Utah Rules of Evidence.[1] See Utah R. Evid. 803(3), 807.

We conclude, however, that regardless of whether the trial court erred in admitting the evidence, any error was harmless. See State v. Vargas, 2001 UT 5,¶48, 20 P.3d 271. A.K. testified that the medical examiners said that they did not know how long the scar had been there, how extensive it was, or how it was caused. A.K. also testified to possible causes of anal injury other than by Defendant's sexual assaults. Defendant has not claimed prejudice and also has failed to demonstrate prejudice. This claim therefore fails.

Next, Defendant contends that the trial court erred by entering a reasonable doubt jury instruction that failed to include language that "the State's proof must obviate all reasonable doubt." State v. Robertson, 932 P.2d 1219, 1232 (Utah 1997) (quotations and citation omitted), overruled on other grounds by State v. Weeks, 2002 UT 98, 61 P.3d 1000. The Utah Supreme Court, however, rejected Robertson's instruction requirement in State v. Reyes, 2005 UT 33,¶34, 116 P.3d 305, and State v. Cruz, 2005 UT 45,¶21, 122 P.3d 543. Utah trial courts are now required only to verify that the "instructions, taken as a whole, correctly communicate the principle of reasonable doubt, namely, that a defendant cannot be convicted of a crime 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Cruz, 2005 UT 45 at ¶21 (quoting In re Winship, 397 U.S. 358, 364 (1970)). The reasonable doubt jury instruction in the instant case complies with Reyes and Cruz and therefore does not constitute error.[2]

---

[1]The State maintains on appeal that the statement is admissible because the defense opened the door to its introduction in its cross-examination during the State's case-in-chief.

[2]We note that State v. Robertson, 932 P.2d 1219 (Utah 1997), overruled on other grounds by State v. Weeks, 2002 UT 98, 61 P.3d 1000, was in effect at the time of Defendant's trial, not State v. Reyes, 2005 UT 33, 116 P.3d 305. However, Defendant did not file a reply brief addressing the State's assumption that Reyes controlled. We therefore follow precedent that has retroactively applied Reyes without any legal analysis. See, e.g., State v. Hernandez, 2005 UT App 546,¶¶14-15 (holding that reasonable doubt jury instructions that purportedly did not comport with Robertson but did comport with Reyes were not erroneous, despite the fact that such instructions were given before Reyes was decided); State v. McCloud, 2005 UT App 466,¶¶25-26, 126 P.3d 775 (same).

Defendant next alleges that his defense counsel rendered ineffective assistance by failing to challenge several jurors for cause. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." State v. Clark, 2004 UT 25,¶6, 89 P.3d 162.

When a party claims that trial counsel rendered ineffective assistance during the jury selection process by failing to remove a prospective juror, the appellate court presumes that it was "the product of a conscious choice or preference." State v. Litherland, 2000 UT 76,¶20, 12 P.3d 92. The defendant can overcome this presumption only by demonstrating:

> (1) that defense counsel was so inattentive or indifferent during the jury selection process that the failure to remove a prospective juror was not the product of a conscious choice or preference; (2) that a prospective juror expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror; or (3) that there is some other specific evidence clearly demonstrating that counsel's choice was not plausibly justifiable.

Id. at ¶25 (footnote omitted).

In the instant matter, Defendant has not rebutted the presumption that defense counsel's decision not to challenge for cause the jurors at issue was anything but the result of a conscious choice. First, the record discloses that defense counsel actively participated in the jury selection process as a whole. See id. at ¶27. Second, Defendant is unable to rebut the presumption that whatever biases the prospective jurors expressed were strong or unequivocal enough to mandate their removal in light of defense counsel's conscious decision to retain them. See id. at ¶28. Defense counsel's decision not to challenge the jurors for cause could well be considered trial strategy. See id. at ¶19. Finally, Defendant has not presented specific evidence that clearly demonstrates that defense counsel's choice was not plausibly justifiable. See id. at ¶25. Consequently, Defendant fails to demonstrate that his defense counsel was deficient for failing to remove certain jurors for cause, and hence, we need not address prejudicial error.

Finally, Defendant argues for the first time on appeal that the trial court erred by failing to sua sponte dismiss for cause a juror he claims was biased. "[A] defendant who fails to

preserve an objection at trial will not be able to raise that objection on appeal unless he is able to demonstrate either plain error or exceptional circumstances." State v. King, 2006 UT 3,¶13, __ P.3d __.

However, "under the doctrine of invited error, we have declined to engage in even plain error review when 'counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].'" State v. Winfield, 2006 UT 4,¶14, __ P.3d __ (alterations in original) (quoting State v. Hamilton, 2003 UT 22,¶54, 70 P.3d 111); see also State v. Lee, 2006 UT 5,¶20, __ P.3d __ (refusing to review trial court's alleged plain error for failing to sua sponte remove for cause two jurors because defendant invited error by affirmatively passing jurors for cause). Similarly, in this matter, because defense counsel affirmatively passed the juror for cause, Defendant is precluded under the invited error doctrine from asserting plain error on appeal.

We affirm.

_____
Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

_____
James Z. Davis, Judge

_____
Gregory K. Orme, Judge