IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Christopher Thomas Gill, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060444-CA F I L E D (June 28, 2007) 2007 UT App 227

First District, Logan Department, 051101011
The Honorable Thomas Willmore

Attorneys: David M. Perry, Logan, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

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Before Judges Davis, McHugh, and Orme.

McHUGH, Judge:

Christopher Thomas Gill appeals from convictions for possession or use of a controlled substance in a correctional facility, see Utah Code Ann. § 58-37-8(2)(e) (Supp. 2006), and distributing a controlled substance to an inmate in a correctional facility, see Utah Code Ann. § 58-37-8(1)(a)(ii). We affirm.

Gill first argues there was insufficient evidence to support his convictions, and that, therefore, the trial court committed plain error in submitting the case to the jury instead of entering a directed verdict of acquittal sua sponte. Because Gill did not preserve his insufficiency claim at trial, he must show plain error to prevail on appeal. See State v. Holgate, 2000 UT 74,¶¶16-17, 10 P.3d 346. "[T]o establish plain error, a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." Id. at ¶17.

We first consider whether there was sufficient evidence to sustain Gill's conviction for possession or use of a controlled substance in a correctional facility. To convict Gill of the possession count, the State was required to prove that Gill knowingly and intentionally possessed or used a controlled substance in a correctional facility. See Utah Code Ann. § 58-37-8(2)(a)(i), (2)(e). The record contains sufficient evidence to support Gill's conviction on this count. First, Jonathan Chavez, Gill's cell mate at the Cache County Jail, testified that he witnessed Gill holding "a baggie of meth in his hand" and that the bag contained about "two eight balls" of methamphetamine. Chavez further testified that Gill had said that he stored the methamphetamine in his anal cavity, and Deputy Lucas, the officer who strip-searched Gill at the jail, testified that he observed a petroleum jelly-like substance around Gill's anus. Deputy Heusser, another officer at the jail, testified that while Gill was confined in a cell without a toilet, he witnessed Gill push his feces through the grate of a catch drain in the floor of the cell. Deputy Ramirez then testified that officers retrieved a plastic bag from the fecal matter Gill pushed into the drain. Finally, Gill tested positive for methamphetamine while in jail and, at trial, admitted to using methamphetamine while in jail. From this evidence, a jury could reasonably have concluded that Gill intentionally and knowingly possessed methamphetamine while in jail. Thus, the trial court did not commit plain error in submitting the matter to the jury.

We next consider the sufficiency of the evidence supporting Gill's conviction for distributing a controlled substance to an inmate in a correctional facility. See Utah Code Ann. § 58-37-8(1)(a)(ii). To convict Gill on this count the State was required to prove that Gill knowingly and intentionally distributed a controlled substance or agreed, consented, offered, or arranged to distribute a controlled substance. See id. Again, there is sufficient evidence in the record to support Gill's conviction. First, Gill was admitted to the A block section of the jail on the evening of October 28, 2005.[1] His cell mate, Chavez, testified that Gill gave him "a little line" of methamphetamine which he snorted up his nose, and that Gill gave him methamphetamine two other times while they were

[1]Gill testified that he was admitted to the G block of the jail on October 25, and that he moved from G block to A block about five days later on a Friday evening. At trial it was established that the Friday in question was October 28, 2005.

incarcerated together.[2] Chavez tested positive for a substance identified as methamphetamine on November 1, 2005.

Further, inmate Salcido also tested positive for a substance identified as methamphetamine on November 1, 2005. He testified that Gill offered him methamphetamine on October 29, 2005, and arranged for Chavez to deliver the drugs to Salcido later that day.[3] Inmate Ware also testified that on October 31, 2005, he watched his cell mate, inmate Diamond, enter Gill's cell and return ten minutes later with methamphetamine, which Diamond then gave to Ware. Ware tested positive for a substance identified as methamphetamine on November 1, 2005. From this evidence, a jury could reasonably have concluded that Gill intentionally and knowingly distributed methamphetamine while in jail. Thus, the trial court did not commit plain error in submitting the matter to the jury.

Gill's final argument on appeal is that his counsel was constitutionally ineffective in failing to move for a dismissal or directed verdict after the State rested. Because we have already determined that there was sufficient evidence to allow the case to be submitted to the jury, we cannot find that Gill's attorney was constitutionally ineffective for failing to move for a directed verdict or to make a motion to dismiss. See State v. Duran, 2004 UT App 492U, para.2 (mem.) (per curiam) (denying appellant's ineffective assistance of counsel claim because the case did not involve the prosecutor's "failure to present evidence on the elements of the offense, and there was no

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[2]Chavez also testified that he was in jail serving a sentence for possession of methamphetamine, he knew what methamphetamine looked like, he had used methamphetamine over the course of a few years, and he was familiar with how much methamphetamine was in an "eightball."

[3]Salcido also testified that from the time he was incarcerated in the A block section of the jail he had not seen anyone take drugs nor had he been offered drugs until Gill was admitted to that block.

reasonable probability that the charge would have been dismissed"), cert. denied, 124 P.3d 251 (Utah 2005).

Affirmed.

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Carolyn B. McHugh, Judge

WE CONCUR:

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James Z. Davis, Judge

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Gregory K. Orme, Judge