

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050212-CA
v.)	
)	
Rodney Ham,)	F I L E D
)	(July 7, 2006)
)	
Defendant and Appellant.)	2006 UT App 278

Fourth District, Provo Department, 001402157
The Honorable Leslie D. Brown

Attorneys: Lee Fisher and Jere Reneer, Spanish Fork, for
Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
City, for Appellee

Before Judges Billings, Greenwood, and Thorne.

GREENWOOD, Associate Presiding Judge:

Defendant Rodney Ham was convicted of forcible sexual abuse, a second degree felony. See Utah Code Ann. § 76-5-404 (2003). Defendant appeals the trial court's denial of his motion for new trial. We affirm.

I. Jury Misconduct

Defendant first argues that he was denied his right to a fair and impartial jury under the Sixth Amendment of the United States Constitution and Article I, Section 12 of the Utah Constitution. Defendant relies on his trial counsel's affidavit, which states that at the close of evidence on the second and last day of trial the bailiff delivered a note to the trial court with a list of questions from the jury. The bailiff informed the court and counsel that the jury had asked her the same questions on the first day of trial. Defendant maintains that the jury therefore predeliberated on the first day of trial and had improper contact with the bailiff.

Under the invited error doctrine, we are prevented from reaching the merits of Defendant's argument because after being notified of the jury's alleged predeliberation,¹ Defendant failed to move for a mistrial. See State v. Winfield, 2006 UT 4, ¶14, 128 P.3d 1171 ("[U]nder 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." (alterations, quotations, and citation omitted)); see also State v. Day, 815 P.2d 1345, 1349-50 (Utah Ct. App. 1991) (holding that defendant waived right to new trial when he affirmatively declined to object after learning of juror's contact with a bailiff and a witness).

Defendant also argues that the trial court abused its discretion when it denied his motion for new trial, which was based on his claim that the jury had improper contact with the bailiff. "When reviewing a district court's denial of a motion for a new trial, we will not reverse absent a clear abuse of discretion by the district court." State v. Allen, 2005 UT 11, ¶50, 108 P.3d 730 (alterations, quotations, and citation omitted), cert. denied, 126 S. Ct. 60 (2005). "At the same time, however, we review the legal standards applied by the district court in denying the motion for correctness." Id. (alteration, quotations, and citation omitted).

The Utah Supreme Court has held that "a rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, and brief contact." State v. Pike, 712 P.2d 277, 280 (Utah 1985). In State v. Jonas, 793 P.2d 902 (Utah Ct. App. 1990), where the bailiff relayed information to the jury that the reason another juror was excused was due to the juror's sister's death, we observed that the contact was not prohibited because "no 'conversation' took place, in the normal sense of an 'oral exchange of sentiments, observations, opinions, [or] ideas.'" Id. at 909 (alteration in original) (quoting Webster's Third International Dictionary 458 (1986)).

¹ In one of the few Utah cases pertaining to jury predeliberation, State v. Johnson, 784 P.2d 1135 (Utah 1989), the supreme court described predeliberation as "jurors deliberat[ing] among themselves and arriv[ing] at conclusions prior to the end of trial," as opposed to a single juror "weighing, balancing, thinking about, and comparing elicited evidence to his personal experience, [which] is part of the human thought process." Id. at 1145.

Here, although the record does not contain the bailiff's exact exchange with the jury, defense counsel's recollection was that the jury had asked the bailiff questions, to which she responded that they would have to "wait until the evidence was closed and see if that answered their questions." Similar to Jonas, no conversation took place because there was no "'oral exchange of sentiments, observations, opinions, [or] ideas.'" Id. (alteration in original) (quoting Webster's Third International Dictionary 458). As a result, we conclude that the bailiff's contact with the jury, while intended, was incidental and brief.

II. Newly Discovered Evidence

In addition, Defendant urges this court to reverse the trial court's denial of his motion for new trial based on allegedly new evidence. "[W]e review the denial of a motion for a new trial based on newly discovered evidence on the same basis as any other denial of a new trial motion--whether the trial court abused its discretion." State v. Montoya, 2004 UT 5, ¶10, 84 P.3d 1183 (quoting State v. Loose, 2000 UT 11, ¶16, 994 P.2d 1237). To constitute grounds for a new trial, evidence must not have been reasonably discoverable or produced at trial, it must not be cumulative, and it must lead to a probable different result on retrial. See id. at ¶11.

Defendant presented a confidential custody evaluation that was prepared after trial. Defendant maintains that statements included in the evaluation could not have been discovered and produced at trial because they were made after trial and were not merely cumulative because they supported Defendant's unrepresented theory of the case. Defendant also maintains that the evidence would have led to a different result at trial because it substantiates his unrepresented theory.

We conclude that because Defendant purportedly attempted to have his theory presented at trial, he has acknowledged that he knew about the substance of the alleged new evidence. In addition, Defendant admitted such knowledge in his affidavit attached to his motion for new trial.

III. Ineffective Assistance of Counsel

Defendant also argues that the trial court erroneously denied his motion for new trial, which was based in part on a claim of ineffective assistance of counsel. "When reviewing the denial of a motion for new trial based on an ineffective assistance of counsel claim, we defer to the trial court's factual findings unless clearly erroneous, but remain 'free to make an independent determination of a trial court's

conclusions.'" State v. Brandley, 972 P.2d 78, 81 (Utah Ct. App. 1998) (quoting State v. Templin, 805 P.2d 182, 186 (Utah 1990)). To demonstrate that his trial counsel rendered ineffective assistance of counsel, Defendant must show that "'counsel's performance was deficient'" and "'that the deficient performance prejudiced the defense.'" Templin, 805 P.2d at 186 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)). Moreover, "a defendant [must] rebut the strong presumption that 'under the circumstances, the challenged action might be considered sound trial strategy.'" State v. Litherland, 2000 UT 76, ¶19, 12 P.3d 92 (quoting Strickland, 466 U.S. at 689) (additional quotations and citation omitted).

First, Defendant asserts that he had continuously insisted that his trial counsel present an alternative defense theory. Defendant also contends that trial counsel failed to respond to the State's motion in limine to exclude certain testimony, despite Defendant's specific request. Defendant maintains that if trial counsel had filed a response, then the statements Defendant needed to advance his theory of his case would have been available. We believe that trial counsel's decision not to pursue Defendant's theory demonstrated sound trial strategy because trial counsel considered the fact that Defendant's allegations were unsupported and that Defendant's theory was not as credible as the one actually presented. Furthermore, trial counsel's performance did not prejudice Defendant because other evidence likely contributed to the jury's determination to convict Defendant, such as D.F.'s testimony that she was physically incapable of initiating the acts she attributed to Defendant.

Second, Defendant contends that his trial counsel failed to zealously defend him. In his motion for new trial, Defendant argued that trial counsel engaged in an improper relationship with his ex-wife's divorce attorney. However, because Defendant failed to provide evidence thereof, his contention is purely speculative. In addition, Defendant failed to raise the other bases for his trial counsel's alleged ineffective assistance of counsel in his motion for new trial. See State v. Winfield, 2006 UT 4, ¶14, 128 P.3d 1171 ("[A] timely and specific objection must be made at trial in order to preserve an issue for appeal." (alteration, quotations, and citation omitted)).

Third, Defendant contends that his trial counsel should have reserved the right to inquire into the jury's predeliberation and contact with the bailiff once the verdict had been returned. Counsel, along with Defendant, reviewed each of the jury's questions and determined that Defendant was likely favored in any

deliberations the jury may have had. Therefore, Defendant's trial counsel's decision not to object or move for mistrial was sound trial strategy.

Accordingly, we affirm.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

Judith M. Billings, Judge

William A. Thorne Jr., Judge