IN THE UTAH COURT OF APPEALS

----ooOoo----

| | | |
|---|---|---|
| State of Utah, | ) | MEMORANDUM DECISION<br>(Not For Official Publication) |
| Plaintiff and Appellee, | ) | Case No. 20070749-CA |
| v. | ) | F I L E D<br>(March 19, 2009) |
| Sergio Bolivar Herrera, | ) | |
| Defendant and Appellant. | ) | 2009 UT App 80 |

-----

Fourth District, Provo Department, 051402878
The Honorable Steven L. Hansen

Attorneys: Margaret P. Lindsay, Spanish Fork, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

-----

Before Judges Greenwood, Thorne, and McHugh.

GREENWOOD, Presiding Judge:

Defendant Sergio Bolivar Herrera appeals his jury conviction of one count of rape, arguing that (1) there was insufficient evidence to establish that the sexual intercourse was not consensual and (2) the trial court committed plain error in instructing the jury as to the element of consent, or alternatively, that his counsel was ineffective for failing to object to the instruction or provide a correct instruction. We affirm.

Defendant first argues that the evidence was insufficient to establish that the sexual intercourse between himself and the victim (Victim) was without her consent. Review of a challenge to the sufficiency of the evidence "is highly deferential to a jury verdict." State v. Workman, 2005 UT 66, ¶ 29, 122 P.3d 639. Our analysis begins with a review of "the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict." Id. After reviewing the evidence in this light, "[w]e will reverse a jury verdict for insufficient evidence only if we determine that reasonable minds could not have reached the verdict." Id. (internal quotation marks omitted). And, where the insufficiency claim is not preserved, as here, we will reverse only if Defendant is able to

demonstrate not only "that the evidence was insufficient to support a conviction of the crime charged" but also "that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." State v. Holgate, 2000 UT 74, ¶ 17, 10 P.3d 346.

As an initial matter, Defendant contends that because the physical evidence was neutral,[1] he "was convicted solely on [Victim's] testimony, which left ample room for reasonable doubt." Accordingly, Defendant argues that we must take it upon ourselves to reassess the credibility of Victim's testimony. Generally, reviewing courts are precluded from reassessing witness credibility except in rare circumstances, such as where the testimony is "inherently improbable" because there "exist[s] either a physical impossibility of the evidence being true, or its falsity [is] apparent, without any resort to inferences or deductions." State v. Workman, 852 P.2d 981, 984 (Utah 1993) (internal quotation marks omitted).

Although Defendant concedes that Victim's testimony alone is not "inherently improbable," he nevertheless urges us to reassess it, especially when viewed in "combin[ation] with the events [leading up to] and even during the [alleged rape]." Defendant argues that, despite her history with Defendant and his many unwanted sexual advances, Victim "said nothing and did nothing to keep [Defendant] from following her into her apartment, and then into her bedroom" on the night of the alleged rape.

We do not agree that Victim's desire to maintain a friendly relationship with Defendant, in spite of Defendant's repetitive unwanted sexual advances, makes her testimony that she did not consent to sexual intercourse with Defendant physically impossible or apparently false. See id. Lack of consent is established when "the victim expresses lack of consent through words or conduct" or "the actor overcomes the victim through the actual application of physical force or violence." Utah Code Ann. § 76-5-406(1), (2) (2008). Victim testified that she rejected Defendant's sexual advances "millions of times" by saying "No" and by trying "to get away from [him]." She further testified that, despite her attempts to prevent Defendant from being physically able to have intercourse with her, Defendant pushed and pulled her into a position in which he could, and ultimately did, complete the sexual act. In addition, the trial

---

[1] Dr. Shay Johnson, who examined Victim following the incident at issue, testified that although Victim's abrasions and redness could be consistent with consensual intercourse, in his opinion, what he observed was consistent with Victim's story of forcible intercourse.

court was presented with testimony from Victim's reviewing physician detailing the physical trauma resulting from Defendant's assault as well as testimony from Detective Joshua Backus stating that Defendant's friends had told Defendant that "he should just run away." In light of this testimony we conclude that reasonable minds could have reached the same result that the jury did in this case. See Workman, 2005 UT 66, ¶ 29.

Defendant also argues that the trial court plainly erred in instructing the jury with regard to the element of consent. In particular, Defendant argues that the trial court erred by including instruction number 5 because, as Defendant contends for the first time on appeal, it misstated the law. However, "a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction." State v. Geukgeuzian, 2004 UT 16, ¶ 9, 86 P.3d 742 (internal quotation marks omitted). Although Defendant's counsel proposed a slightly different version of instruction number 5, that instruction was rejected because the court determined that it was "given in substance in other instructions." When then asked if Defendant had any objections to the trial court's jury instructions, Defendant's counsel responded in the negative. Consequently, we do not further review Defendant's challenge to the legal adequacy of the instructions because we conclude that Defendant invited the error, if any, in the jury instructions. See id.

We also review Defendant's instruction challenge in the context of ineffective assistance of counsel. Defendant can prevail on his ineffective assistance claim only if he can "show that his trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the outcome of the trial." State v. Bryant, 965 P.2d 539, 542 (Utah Ct. App. 1998) (internal quotation marks omitted). Although an ineffective assistance claim raised for the first time on appeal presents a question of law, "appellate review of counsel's performance must be highly deferential; otherwise the distorting effects of hindsight would produce too great a temptation for courts to second-guess trial counsel's performance on the basis of an inanimate record." Id. (internal quotation marks omitted). And, Defendant can only overcome the strong presumption of counsel's competence if the conduct complained of "cannot be considered sound strategy under the circumstances." Menzies v. Galetka, 2006 UT 81, ¶ 89, 150 P.3d 480.

Jury instruction number 4 provided the statutory definition of lack of consent. Instruction number 5 provided a context in which the jury could evaluate the presence or absence of consent

based, in part, on the reasonableness of Victim's resistance to Defendant. For the first time on appeal, Defendant argues that instruction number 5 misstates the law because reasonable resistance is no longer statutorily required by the victim to secure a rape conviction. Defendant did not object to instruction number 5 on this ground and his proposed alternative did nothing to cure this misstatement. In fact, Defendant's failure to object may well have been sound trial strategy because, as Defendant concedes, instruction number 5 required more of Victim than does the current statute. Moreover, because Utah law does not require a showing that Victim reasonably resisted Defendant in order to show her lack of consent, see Utah Code Ann. § 76-5-406, we determine that any possible error resulting from inclusion of instruction number 5 was harmless. See generally State v. Otterson, 2008 UT App 139, ¶ 16, 184 P.3d 604 ("[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." (alteration in original) (internal quotation marks omitted)). We therefore hold that Defendant's counsel was not ineffective because Defendant has failed to overcome the presumption of counsel's competence, and has also failed to show resulting prejudice.

For the foregoing reasons, we affirm.

______________________________

Pamela T. Greenwood,
Presiding Judge

-----

WE CONCUR:

______________________________

William A. Thorne Jr.,
Associate Presiding Judge

______________________________

Carolyn B. McHugh, Judge