

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050870-CA
v.)	
)	F I L E D
Aliki Kaumavae,)	(November 9, 2006)
)	
Defendant and Appellant.)	2006 UT App 456

Third District, Salt Lake Department, 031904490
The Honorable Robin W. Reese

Attorneys: Linda M. Jones, Salt Lake City, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Bench, Billings, and Davis.

BILLINGS, Judge:

Defendant Aliki Kaumavae appeals his convictions for two counts of aggravated sexual abuse of a child and one count of forcible sexual abuse. See Utah Code Ann. §§ 76-5-404.1, -404 (2003). Defendant argues the trial court abused its discretion in admitting the videotape of his confession into evidence. Defendant also contends that there was insufficient evidence to support two counts of aggravated sexual abuse of a child. See id. § 76-5-404.1. We affirm.

Defendant first argues that the trial court abused its discretion in allowing the videotape of his confession into evidence because the confession was improper rebuttal evidence, unfairly prejudicial, and misleading. See State v. Whittle, 1999 UT 96, ¶20, 989 P.2d 52 (explaining that it is well-settled that a "trial court has broad discretion" in determining whether to admit or exclude evidence). Defendant maintains that the trial court abused its discretion in admitting the videotape into evidence because the videotape constituted improper rebuttal evidence. We decline to reach this issue because Defendant failed to properly preserve the issue below. See State v. Dean, 2004 UT 63, ¶13, 95 P.3d 276. To preserve an issue for appeal, a

defendant's objection "must be sufficiently raised to a level of consciousness before the trial court." Id. (quotations and citation omitted). This requires the defendant to raise an objection that is both "timely and specific." State v. Rangel, 866 P.2d 607, 611 (Utah Ct. App. 1993). Because at trial Defendant only objected to the evidence on grounds that the videotape confession was "redundant" and "prejudicial," we conclude that Defendant failed to object with the requisite specificity. See id. And because Defendant does not articulate an appropriate justification for appellate review under the plain error or exceptional circumstances exceptions, we refuse to consider Defendant's contention on appeal that the videotape of his confession constituted improper rebuttal evidence. See State v. Pinder, 2005 UT 15, ¶45, 114 P.3d 551 (quotations and citations omitted).¹

Additionally, Defendant claims that the trial court abused its discretion in admitting the videotaped confession as evidence because it was unduly prejudicial and misleading. Under the Utah Rules of Evidence, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Utah R. Evid. 403. This court has interpreted rule 403 to "presume[] the admission of all relevant evidence except where the evidence has an unusual propensity to unfairly prejudice, inflame, or mislead the jury." State v. Kooyman, 2005 UT App 222, ¶26, 112 P.3d 1252 (quotations and citations omitted), cert. denied, 125 P.3d 102 (Utah 2005). Importantly, "[e]vidence is not unfairly prejudicial simply because it is detrimental to a party's case." Id. (alteration in original) (quotations and citation omitted). Here, the videotape did not have an unusual propensity to unfairly prejudice, inflame, or mislead the jury. The videotape did not introduce evidence that the jury had not already heard. Prior to viewing the videotape, the jury heard, without objection, Detective Baird's testimony as to the contents of the videotaped interview and confession. Moreover, because the videotaped confession contradicted Defendant's trial testimony, the confession enabled the jury to better determine whether Defendant was telling the truth at trial.

¹We also reject Defendant's argument that we should address the issue on appeal because trial counsel was ineffective in failing to object below. Although Defendant is critical of his trial counsel's failure to specifically object to the videotape on improper rebuttal grounds, Defendant fails to demonstrate that such failure actually constituted deficient performance and that this alleged deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

Defendant's second claim on appeal is that the evidence was insufficient to support the two counts of aggravated sexual abuse of a child. Defendant concedes he failed to preserve this issue below. A defendant who fails to preserve his insufficient evidence claim below may only raise the claim on appeal if he demonstrates that plain error occurred or exceptional circumstances exist. See State v. Holgate, 2000 UT 74, ¶¶15-17 & n.5, 10 P.3d 346.

To demonstrate that plain error occurred in the context of a challenge to the sufficiency of the evidence, an appellant must show first that the evidence was insufficient to support a conviction of the crime[s] charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.

State v. Diaz, 2002 UT App 288, ¶32, 55 P.3d 1131 (quotations and citation omitted); see also Holgate, 2000 UT 74 at ¶17.

Defendant asserts under the doctrine of plain error that the State failed to provide sufficient evidence to demonstrate that two illegal touchings occurred before the victim turned fourteen. See Utah Code Ann. § 76-5-404.1. On appeal, evidence is deemed insufficient if "after viewing the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict, the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime[s]." Diaz, 2002 UT App 288 at ¶33 (alteration in original) (quotations and citations omitted). Here, the record establishes that the victim turned fourteen on January 3, 2003. Defendant confessed to at least two incidents of illegal touching occurring sometime between August 2002 and November 2002--during which time the victim was under the age of fourteen. Thus, "[f]rom this evidence, and the reasonable inferences that result from examining the evidence, we see nothing to suggest that 'reasonable minds must have entertained a reasonable doubt that [Defendant] committed the crime[s].'" Id. at ¶36 (quoting Holgate, 2000 UT 74 at ¶18).

Concerning the exceptional circumstances exception to the preservation rule, Defendant essentially argues that counsel was ineffective in failing to move to dismiss the charges at the end of trial. This argument fails because Defendant does not show that trial counsel's failure to move to dismiss was objectively deficient. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Nor does Defendant demonstrate a reasonable probability

that but for such failure Defendant "would have obtained a more favorable outcome at trial." State v. Clark, 2004 UT 25, ¶6, 89 P.3d 162; see also Strickland, 466 U.S. at 687.

Accordingly, we affirm.

Judith M. Billings, Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

James Z. Davis, Judge