

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040955-CA
v.)	
)	
Devon Kinne,)	F I L E D
)	(April 20, 2006)
)	
Defendant and Appellant.)	2006 UT App 156

Seventh District, Monticello Department, 041700014
The Honorable Lyle R. Anderson

Attorneys: K. Andrew Fitzgerald, Moab, for Appellant
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake
City, for Appellee

Before Judges Bench, Greenwood, and Billings.

BILLINGS, Judge:

Defendant Devon Kinne appeals his convictions for one count each of receiving or transferring a stolen motor vehicle, a second degree felony, see Utah Code Ann. § 41-1a-1316 (2005); possession of drug paraphernalia, a class B misdemeanor, see id. § 58-37a-5(1) (2002); burglary, a second degree felony, see id. § 76-6-202 (2003); and theft, a second degree felony, see id. §§ 76-6-412, -404 (2003). We affirm.

First, Defendant argues that the trial court's reasonable doubt jury instruction incorrectly stated the law and thus violated his due process rights. At Defendant's trial, the court's reasonable doubt jury instruction complied with State v. Robertson, 932 P.2d 1219 (Utah 1997), overruled in relevant part by State v. Reyes, 2005 UT 33, 116 P.3d 305. The instruction informed the jury that "[t]he State must eliminate all reasonable doubt." However, following Defendant's conviction, the Utah Supreme Court expressly abandoned the "obviate all reasonable doubt" requirement of the Robertson test. See Reyes, 2005 UT 33 at ¶30 (quotations omitted).

Although the phrases "obviate all reasonable doubt" and "eliminate all reasonable doubt" are similar, we conclude the language of the instruction in the present case was not fatal to the reasonable doubt instruction. In eliminating the "obviate all reasonable doubt" requirement, see id., the Utah Supreme Court essentially adopted the test enunciated by the United States Supreme Court in Victor v. Nebraska, 511 U.S. 1 (1994). In Victor, the Court stated that reasonable doubt jury instructions are adequate if "taken as a whole, the[y] . . . correctly convey the concept of reasonable doubt to the jury." 511 U.S. at 22. In State v. Cruz, 2005 UT 45, 122 P.3d 543, and in State v. Halls, 2006 UT App 142, jury instructions containing the phrases "dispel all reasonable doubt," Cruz, 2005 UT 45 at ¶11, and "eliminate all reasonable doubt," Halls, 2006 UT App 142 at ¶12, were held to not constitute error. See Cruz, 2005 UT 45 at ¶22; Halls, 2006 UT App 142 at ¶20. Both instructions complied with the test enunciated in Victor, see 511 U.S. at 22, and expressly adopted in Cruz, see 2005 UT 45 at ¶21, that a reasonable doubt jury instruction must "correctly communicate the principle of reasonable doubt" to the jury. Id.; Halls, 2006 UT App 142 at ¶20. In this case, as in Cruz and Halls, the reasonable doubt jury instruction "correctly communicate[d] the principle of reasonable doubt" to the jury. Cruz, 2005 UT 45 at ¶21; Halls, 2006 UT App 142 at ¶20.

Defendant also argues he was denied effective assistance of counsel when his attorney failed to file a motion for a directed verdict following the denial of his motion to dismiss. To demonstrate ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defendant." Strickland v. Washington, 466 U.S. 668, 687 (1984).

Defendant argues that although his counsel moved to dismiss the counts charged against him, his counsel's performance was deficient when she failed to also move for a directed verdict because Utah appellate courts have imposed different standards for granting motions for directed verdicts than for granting motions to dismiss. We disagree.

"If the State fails to produce 'believable evidence of all the elements of the crime charged,' the trial court must dismiss the charges." State v. Hamilton, 2003 UT 22, ¶40, 70 P.3d 111 (quoting State v. Clark, 2001 UT 9, ¶13, 20 P.3d 300). Believable evidence is evidence that is "capable of supporting a finding of guilt beyond a reasonable doubt." Id. at ¶41 (quotations and citation omitted).

In a motion for a directed verdict at the end of the State's case, the trial court must decide if "the State . . . establish[ed] a prima facie case against the defendant by producing 'believable evidence of all the elements of the crime charged.'" Clark, 2001 UT 9 at ¶13 (quoting State v. Emmett, 839 P.2d 781, 784 (Utah 1992)).

In the present case, the trial judge denied a motion to dismiss at the close of the State's case. Accordingly, the trial court found there was believable evidence for each element of the crimes charged "capable of supporting a finding of guilt beyond a reasonable doubt." Hamilton, 2003 UT 22 at ¶41 (quotations and citation omitted). Therefore, a motion for a directed verdict would have been futile because if the trial court believed there was evidence capable of supporting a verdict of guilt beyond a reasonable doubt, the trial court would also find the jury capable of finding Defendant guilty beyond a reasonable doubt.

Defendant argues that, even if the court finds that the motion to dismiss could be construed as functionally equivalent to a motion for a directed verdict, the motion was deficient in its content when it failed to argue that there was no reliable evidence tying Defendant to the crime. However, the State presented a witness whose testimony directly tied Defendant to the crimes charged. The outcome of this case hinged largely on the credibility given to the State's key witness. Determinations of witness credibility are the exclusive province of the jury. See State v. Workman, 852 P.2d 981, 984 (Utah 1993). Therefore, Defendant has not shown that the failure to argue this issue constitutes ineffective assistance of counsel.

We affirm.

Judith M. Billings, Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

Pamela T. Greenwood,
Associate Presiding Judge