IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Lee Meier, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20090337-CA F I L E D (October 21, 2010) 2010 UT App 290

Fourth District, Provo Department, 081401530
The Honorable Darold J. McDade

Attorneys: Michael S. Brown, Provo, for Appellant
Mark L. Shurtleff and Erin Riley, Salt Lake City, for Appellee

---

Before Judges Davis, Orme, and Thorne.

ORME, Judge:

We have determined that "the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Defendant has not preserved his sufficiency of the evidence claim. Rule 24 requires a "citation to the record showing that the issue was preserved in the trial court." Utah R. App. P. 24(a)(5)(A). Defendant fails to identify where this issue was raised before the trial court. "Thus, we are left to guess what [Defendant]'s theory for preservation may be." Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 35, 221 P.3d 256. Nor does Defendant assert that his sufficiency of the evidence claim can properly be pursued on appeal, despite the lack of preservation, under either the "exceptional circumstances" or "plain error" doctrine. See Utah R. App. P. 24(a)(5)(B) (requiring an appellant to provide "a statement of grounds for seeking review of an issue not preserved in the trial court"); State v. Rhinehart, 2007 UT 61, ¶ 21, 167 P.3d 1046 (declining to address appellant's claims on appeal where appellant had not argued that the "exceptional circumstances" or "plain error" exceptions to

the preservation rule applied). Accordingly, we do not reach the merits of the sufficiency claim.

Defendant also alleges that the trial court erred in denying his motion for a mistrial. "A trial court's denial of a motion for a mistrial will not be reversed absent an abuse of discretion." State v. Wach, 2001 UT 35, ¶ 45, 24 P.3d 948. Accordingly, we exercise only limited review of a trial court's decision to deny a motion for a mistrial. See id. "Unless a review of the record shows that the court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, we will not find that the court's decision was an abuse of discretion." State v. Robertson, 932 P.2d 1219, 1231 (Utah 1997), overruled on other grounds by State v. Weeks, 2002 UT 98, ¶ 25 n.11, 61 P.3d 1000. Here, we conclude that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

First, we do not agree that the prosecutor necessarily misstated the law or that her closing argument caused the jury to misapply the "recklessly" standard. In her closing argument, the State's attorney said, "If [Defendant] was reckless and [the touching] was accidental, he's guilty." In no way did this statement indicate that accidental touching alone was sufficient to find Defendant guilty. Rather, this statement indicated that an accidental touching--while the Defendant was acting recklessly--was sufficient to find that he touched the victim's breast with the requisite intent. Moreover, viewed in context, this statement does not encourage the jury, when evaluating the elements of the forcible sexual abuse charge, to apply the "recklessly" standard to the exclusion of all else. The prosecutor made her statement regarding the meaning of "recklessly" while discussing the touching element of forcible sexual abuse. Later in her closing argument, the prosecutor conceded that Defendant also had to have touched the victim "with a sexual intent." Thus, the prosecutor discussed the two mens rea standards separately in her closing argument.

Next, our courts have recognized that appropriate curative instructions generally remedy errors that occur during a trial. See State v. Kohl, 2000 UT 35, ¶ 24, 999 P.2d 7; State v. Harmon, 956 P.2d 262, 271-72 (Utah 1998). Here, the curative instruction to the jury clarified that "recklessly" did not mean the same thing as "accidentally."

Finally, Jury Instruction No. 3 accurately identifies the mens rea requirements of the forcible sexual abuse charge. Specifically, the instruction explains that the jury had to find beyond a reasonable doubt that Defendant touched the victim "[i]ntentionally, knowingly, or recklessly." Additionally, the

instruction states that the jury also had to find beyond a reasonable doubt that Defendant touched the victim "[w]ith intent to arouse or gratify the sexual desire of any person." Although we acknowledge that the "recklessly" standard was emphasized because of the prosecution's closing argument and the subsequent curative instruction from the court, given the straightforward and accurate nature of Jury Instruction No. 3, it is unlikely that the jury applied the "recklessly" standard inappropriately.

Accordingly, we conclude that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial. Affirmed.

_____
Gregory K. Orme, Judge

WE CONCUR:

_____
James Z. Davis,
Presiding Judge

_____
William A. Thorne Jr., Judge