IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Joseph Craig Peterson, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070169-CA F I L E D (April 17, 2008) 2008 UT App 137

Second District, Ogden Department, 061902882
The Honorable Scott M. Hadley

Attorneys: John T. Caine, Ogden, for Appellant
Teral L. Tree, Ogden, for Appellee

Before Judges Bench, Davis, and Orme.

BENCH, Judge:

Defendant Joseph Craig Peterson argues that the trial court committed plain error by submitting his case to a jury because the evidence was insufficient to sustain a conviction for violation of a protective order. To establish plain error on the basis of insufficient evidence, "a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime 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. Holgate, 2000 UT 74, ¶ 17, 10 P.3d 346. Evidence is insufficient "when, 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 for which he . . . was convicted.'" Id. ¶ 18 (quoting State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993)). The crime of violating a protective order essentially requires evidentiary proof on three elements: (1) the defendant was subject to a protective order; (2) the defendant was properly served with the protective order; and (3) the defendant

"intentionally or knowingly violate[d] th[e] order." Utah Code Ann. § 76-5-108(1) (Supp. 2007).

The evidence in this case, as well as the reasonable inferences drawn therefrom, shows that it was not plain error for the trial court to submit the case to the jury. At trial, the State introduced into evidence the protective order that prohibited Defendant from "directly or indirectly contacting, harassing, telephoning, e-mailing, or otherwise communicating with" his wife. Defendant challenges the sufficiency of the evidence regarding his intent to violate this protective order and knowledge of the violation. Defendant testified that he did not intend to violate the law when he sent Valentine's Day cards and a rose to his wife because he believed that a subsequent order, entered as part of the divorce proceedings between himself and his wife, made it permissible to contact his wife. In support of his testimony, Defendant demonstrated that the subsequent order only specifically prohibited contact between Defendant and his wife's parents, and he claimed that his divorce attorney told him that the subsequent order permitted contact.

Although Defendant's divorce attorney was not subpoenaed to testify at trial, the subsequent order was admitted into evidence. This subsequent order did not explicitly forbid contact between Defendant and his wife, but it also did not contain language stating that the previously issued protective order had been revoked or otherwise modified. Most importantly, the only paragraph in the subsequent order that referenced the protective order states: "Consistent with the Protective Order . . . Petitioner shall not pick up the children from Respondent's home nor return the children to Respondent's home but shall utilize acceptable third parties to do so." (Emphasis added.) Thus, language in the subsequent order itself specifically contemplates the continued efficacy of the original protective order. The jury could easily view this language as dispelling Defendant's claims that he lacked either intent or knowledge. Although the language in the subsequent order conflicted with Defendant's own testimony, the conflict did not render the evidence so obviously and fundamentally insufficient that submitting the case to the jury was plain error. At most, the existence of conflicting evidence that Defendant highlights on appeal shows that the jury did not find Defendant's testimony credible or assign it much weight in light of the evidence that contradicted it.[1]

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1. "[T]he existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict. . . . [because] it is within the exclusive province of the jury to

(continued...)

Defendant also contends that his conviction should be overturned due to ineffective assistance of defense counsel. "When an ineffective assistance of counsel claim 'is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.'" State v. Holbert, 2002 UT App 426, ¶ 26, 61 P.3d 291 (quoting State v. Bryant, 965 P.2d 539, 542 (Utah Ct. App. 1998)). "To prove ineffective assistance of counsel, [a] defendant must show: (1) that counsel's performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." State v. Clark, 2004 UT 25, ¶ 6, 89 P.3d 162. "Failure to satisfy either prong will result in our concluding that counsel's behavior was not ineffective." State v. Diaz, 2002 UT App 288, ¶ 38, 55 P.3d 1131. Further, where a defendant bases his ineffective assistance claim on defense counsel's alleged failure to investigate or call certain witnesses and the defendant "does not offer any evidence about who these potential witnesses are or what their testimony would entail," the record is inadequate. State v. Bradley, 2002 UT App 348, ¶ 65, 57 P.3d 1139; see also Fernandez v. Cook, 870 P.2d 870, 877 (Utah 1993) ("Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality."). "Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." State v. Litherland, 2000 UT 76, ¶ 17, 12 P.3d 92. Additionally, "[s]peculation that [exculpatory evidence] exists is not sufficient to meet the prejudice component of the [ineffective assistance of counsel] test." Parsons v. Barnes, 871 P.2d 516, 526 (Utah 1994).

At trial, Defendant testified that he did not know that his actions were in violation of the protective order because his divorce attorney advised him that the intended actions were permissible. Although Defendant identifies his divorce attorney as one witness that he claims could provide exculpatory evidence, he does not offer any evidence that this potential witness's testimony would be as Defendant claims. Defendant fails to even identify the other witnesses that he asserts his defense counsel should have called. With only these speculative allegations, Defendant has failed to provide an adequate record to demonstrate

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1. (...continued)
judge the credibility of the witness and the weight of the evidence." State v. Hardy, 2002 UT App 244, ¶ 11, 54 P.3d 645 (citation and internal quotation marks omitted).

that defense counsel's conduct was deficient or that Defendant was prejudiced thereby.

Accordingly, we affirm.

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Russell W. Bench, Judge

WE CONCUR:

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James Z. Davis, Judge

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Gregory K. Orme, Judge