IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. William Ervin Reed IV, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080570-CA F I L E D (October 16, 2009) 2009 UT App 296

Third District, Salt Lake Department, 071901139
The Honorable Sheila K. McCleve

Attorneys: Herschel Bullen, Salt Lake City, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

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Before Judges Thorne, Bench, and Davis.

BENCH, Judge:

Defendant William Ervin Reed IV appeals his conviction for assault and aggravated sexual assault, claiming that (1) counsel's failure to object to allegedly erroneous jury instructions constituted ineffective assistance of counsel and (2) the district court abused its discretion by failing to dismiss a prospective juror for cause.[1] We affirm.

Defendant first claims that his trial counsel was ineffective by failing to object to two allegedly erroneous jury

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[1]Defendant also claims manifest injustice under rule 19(e) of the Utah Rules of Criminal Procedure due to the allegedly erroneous jury instructions. See generally Utah R. Crim. P. 19(e) ("Unless a party objects to an instruction . . . , the instruction may not be assigned as error except to avoid a manifest injustice."). We will not address Defendant's manifest injustice claims because any potential error was invited when Defendant's counsel affirmatively represented to the district court that he agreed to the jury instructions. See State v. Hamilton, 2003 UT 22, ¶ 54, 70 P.3d 111 (stating that "if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction, we will not review the instruction under the manifest injustice exception" because the error was invited).

instructions. Defendant alleges that jury instruction seven, listing the elements for aggravated sexual assault, could allow the jury to find him guilty of a reckless attempt. See generally Utah Code Ann. § 76-4-101 (2008) (requiring an attempt be committed either intentionally or knowingly and omitting a reckless mens rea). Defendant also alleges that jury instruction thirty-one does not properly instruct the jury that it must unanimously agree on the underlying criminal conduct of either rape, object rape, or forcible sexual abuse as an essential element in finding Defendant guilty of aggravated sexual assault. See generally State v. Saunders, 1999 UT 59, ¶ 60, 992 P.2d 951 (stating that jury verdicts must be unanimous "as to each element of the crime").

To prevail on his ineffective assistance of counsel claim, Defendant must show "'that counsel's performance was deficient' and 'that the deficient performance prejudiced the defense' . . . [creating] 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Eyre, 2008 UT 16, ¶¶ 16-17, 179 P.3d 792 (quoting Strickland v. Washington, 466 U.S. 668, 687, 694 (1984)). "'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,'" we may do so without deciding whether counsel's performance was deficient. State v. Santana-Ruiz, 2007 UT 59, ¶ 19, 167 P.3d 1038 (quoting Strickland, 466 U.S. at 697).

Without deciding whether counsel's performance was deficient, we conclude that Defendant was not prejudiced because there is sufficient evidence in the record to support Defendant's conviction for aggravated sexual assault. Given the victim's injuries, no reasonable jury would have found that Defendant acted only recklessly. See generally Utah Code Ann. § 76-2-103(3). Rather, the victim's extensive injuries indicate that Defendant acted either intentionally, see generally id. § 76-2-103(1), or knowingly, see generally id. § 76-2-103(2). The portion of jury instruction seven regarding recklessness is, therefore, merely superfluous. And Defendant "cannot show prejudice where . . . the allegedly erroneous instructions were superfluous and not the basis of the jury's verdict." See State v. Malaga, 2006 UT App 103, ¶ 14, 132 P.3d 703 (internal quotation marks omitted). Further, there is sufficient evidence in the record to lead a reasonable jury to unanimously agree that Defendant is guilty of, at the very least, the underlying offense of forcible sexual abuse. Specifically, the victim's injuries show that Defendant repeatedly punched her breasts, causing extensive bruising. See generally Utah Code Ann. § 76-5-404(1) ("A person commits forcible sexual abuse if . . . the actor . . . touches the breast of a female, or otherwise takes indecent liberties with another . . . with intent to cause substantial . . . bodily pain . . . ."). Accordingly, Defendant's conviction is supported by sufficient evidence in the record and there is no reasonable probability that, but for the allegedly erroneous jury

instructions, the result of the proceeding would have been different.

Defendant next claims that the district court abused its discretion by failing to remove a prospective juror for cause. See generally Utah R. Crim. P. 18(e)(14); State v. Wach, 2001 UT 35, ¶ 25, 24 P.3d 948. However, a district court's failure to remove a prospective juror for cause constitutes reversible error only if the defendant can demonstrate prejudice by showing that he was convicted by a biased, partial jury. See Wach, 2001 UT 35, ¶ 36 (stating that any claim of prejudice must focus "on the jury ultimately seated"); State v. Menzies, 889 P.2d 393, 398 (Utah 1994). Defendant, here, used a peremptory challenge to remove the contested juror, and use of "a peremptory challenge to remove a jury member that the trial court erroneously failed to remove for cause" is insufficient to show prejudice. Wach, 2001 UT 35, ¶ 24; see also Menzies, 889 P.2d at 398, 400. Defendant must show that "as a result of the loss of his peremptory challenge he was not able to remove another . . . [biased, partial] juror who ultimately sat on the jury." Wach, 2001 UT 35, ¶ 36. Although Defendant now identifies two jurors he would have removed if he had another peremptory challenge, he has not shown that he ever objected to these jurors, nor has he shown that these jurors were biased or partial. As a result, Defendant has not shown that he was prejudiced in being convicted by a biased, partial jury.

Accordingly, we affirm.

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Russell W. Bench, Judge

I CONCUR:

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William A. Thorne Jr.,
Associate Presiding Judge

I CONCUR IN THE RESULT:

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James Z. Davis, Judge