IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Robert Neil Weikert, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20061023-CA F I L E D (December 18, 2008) 2008 UT App 460

Second District, Farmington Department, 061700320
The Honorable Darwin C. Hansen

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

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Before Judges Greenwood, McHugh, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and 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.

We decline to address Defendant's argument that the trial court plainly erred in admitting a videotaped out-of-court statement of the minor victim. We do so because Defendant's trial counsel invited any such error when he stipulated to the admission of the videotaped statement and thus affirmatively represented to the trial court that the videotape was admissible. See generally Pratt v. Nelson, 2007 UT 41, ¶ 16, 164 P.3d 366 ("[U]nder the invited error doctrine, we have declined to engage in . . . plain error review when counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].") (footnote and internal quotation marks omitted) (last two alterations in original). See also id. ¶ 18 ("'Affirmative representations that

a party has no objection to the proceedings fall within the scope of the invited error doctrine because such representations reassure the trial court and encourage it to proceed without further consideration of the issues.'") (footnote omitted).

Defendant's claims that his trial counsel was ineffective in failing to object both to the victim's videotaped statement and to certain statements the State made during closing argument are unavailing because Defendant has not shown prejudice. See Strickland v. Washington, 466 U.S. 668, 694 (1984) (stating that under the prejudice prong of an ineffective assistance of counsel claim, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome"); Parsons v. Barnes, 871 P.2d 516, 523 (Utah) ("[I]t is not necessary for us 'to address both components of the [ineffective assistance of counsel] inquiry if [a defendant] makes an insufficient showing on one.' When it is 'easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,' we will do so without addressing whether counsel's performance was professionally unreasonable.") (citations omitted), cert. denied, 513 U.S. 966 (1994).

Because other evidence strongly supported a conclusion that Defendant committed aggravated sexual abuse of a child, Defendant has not succeeded in undermining our confidence in the outcome of the proceedings with regard to trial counsel's alleged error in failing to object to admission of the videotaped statement. The State's evidence showed that Defendant not only massaged the victim's buttocks over her clothing but also under her clothing; the massages took place in the victim's bedroom; Defendant started closing the victim's bedroom door more and more when he tucked her in at night; Defendant "flick[ed]" the victim's "front private" area when moving his hands and massaged close to her "front privates"; massages of the victim's buttocks never occurred in the presence of the victim's mother; and Defendant admitted to his wife that "he had romantic feelings towards [the victim]" and "loved [the victim] more than he loved [his wife]."[1]

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[1]Although Defendant contends the videotaped statement "bolstered" the victim's trial testimony in some unexplained way, we agree with the trial court that the videotaped statement was actually less persuasive than the victim's in-court testimony, which--by itself--provided more than enough evidence on which to convict Defendant.

See generally Utah Code Ann. § 76-5-404.1(2) (Supp. 2008)[2] ("A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the . . . buttocks . . . of any child . . . with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.").

As to counsel's failure to object to prejudicial comments the State made during closing argument, in addition to the strong evidence against Defendant, see generally State v. Troy, 688 P.2d 483, 486 (Utah 1984) ("'If proof of defendant's guilt is strong, the challenged conduct or remark [by counsel] will not be presumed prejudicial.'") (citation omitted), we note that closing argument was made to the bench, not a jury, and the trial court is presumed to consider only legally permissible evidence and statements in reaching its decision, see In re Estate of Baxter, 16 Utah 2d 284, 399 P.2d 442, 445 (1965) ("[W]hen the trial is to the court, his rulings on evidence need not be subjected to quite such critical scrutiny as when it is to the jury, because in arriving at his conclusions upon the issues he will include in his consideration of them his knowledge and his judgment as to the competency, materiality and effect of evidence."). See also Illinois v. Myatt, 384 N.E.2d 85, 88 (Ill. App. Ct. 1978) ("[I]n a bench trial, where a prosecutor's remarks are in error, the judge is presumed to have disregarded them; there will not be a reversal unless it affirmatively appears that the court was misled or improperly influenced by such remarks.") (citations omitted).

Finally, we conclude that the trial court did not err when it declined to reduce Defendant's conviction to a second degree felony under Utah Code section 76-3-402. See Utah Code Ann. § 76-3-402(1) (2003) (current version at Utah Code Ann. § 76-3-402(1) (Supp. 2008)). We affirm the trial court's decision because the court was prohibited from reducing the degree of the offense and sentence under Utah Code section 76-3-406, see id. § 76-3-406(12), given that Defendant did not admit to committing the offense of which he was convicted, see id. § 76-5-406.5(1)(h). See also Debry v. Noble, 889 P.2d 428, 444 (Utah 1995) ("It is well-settled that an appellate court may affirm a trial court's

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[2]As a convenience to the reader, unless otherwise noted, we cite to the current version of the Utah Code Annotated.

ruling on any proper grounds, even though the trial court relied on some other ground.").

Affirmed.

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Gregory K. Orme, Judge

WE CONCUR:

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Pamela T. Greenwood,
Presiding Judge

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Carolyn B. McHugh, Judge