

2008

Utah v. Christina Lynn Briggs : Brief of Appellee

Utah Court of Appeals

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Case No. 20080567-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Christina Lynn Briggs,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated robbery and aggravated kidnapping, in the Second Judicial District Court of Utah, Weber County, the Honorable Scott M. Hadley presiding.

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IN THE
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State of Utah,
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vs.

Christina Lynn Briggs,
Defendant/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for aggravated robbery and aggravated kidnapping, both first degree felonies. This Court has jurisdiction under the pour-over provision of Utah Code Ann. § 78A-4-103(2)(j) (West 2009).

STATEMENT OF THE ISSUE

1. Did the trial court plainly err when it did not *sua sponte* enter a directed verdict?

Standard of Review. "To show that plain error occurred in the context of a challenge to the sufficiency of the evidence, an appellant must show 'first that the evidence was insufficient to support a conviction of the crime[s] 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. Diaz*, 2002 UT App 288, ¶ 32, 55 P.3d 1131 (quoting *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346).

2. Was counsel ineffective for not moving for a directed verdict?

Standard of Review. “‘An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law,’” which the appellate court “review[s] for correctness.” *State v. Cox*, 2007 UT App 317, ¶ 10, 169 P.3d 806 (quoting *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional provisions, statutes, and rules are included in the **Addendum**:

Utah Code Ann. § 76-1-601 (West Supp. 2008) (definitions)
Utah Code Ann. § 76-5-301 (West 2004) (kidnapping)
Utah Code Ann. § 76-5-302 (West Supp. 2008) (aggravated kidnapping)
Utah Code Ann. § 76-6-301 (West 2004) (robbery)
Utah Code Ann. § 76-6-302 (West 2004) (aggravated robbery)

STATEMENT OF THE CASE

Proceedings below. The State charged Defendant and co-defendant, Brandon Morris, jointly with one count each of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (West 2004), and aggravated kidnapping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (West Supp. 2008). R4-5. At a joint jury trial, both Defendant and Morris were convicted as charged. R40-41; *see also State v. Morris*, 2009 UT App 174U. The trial court sentenced Defendant to concurrent indeterminate prison terms of five years to life on the

aggravated robbery count and fifteen years to life on the aggravated kidnapping count. R117-18.

Proceedings on appeal. Co-defendant Morris appealed his conviction and was represented on appeal by appellate counsel, Randall W. Richards. *See State v. Morris*, Case No. 20080551-CA. Morris claimed both that the trial court plainly erred by failing to *sua sponte* order a directed verdict, and that his trial counsel was ineffective for not moving for a directed verdict at the close of the State's case. *See id.* In a decision filed June 25, 2009, this Court affirmed Morris's convictions. *Morris*, 2009 UT App 174U. The Court rejected both of Morris's claims, holding that the evidence was sufficient to survive a directed verdict motion. *See id.* at ¶ 5.

Defendant also appealed her conviction and is represented by the same appellate counsel, Mr. Richards. R120; *see also* R139-46. Six months after this Court decided *Morris*, Defendant filed her brief of appellant, making the same claims that Morris made on appeal. Defendant's claims, facts, and arguments are an almost verbatim reproduction of those set forth in Morris's brief and rejected by this Court in Morris's case.

STATEMENT OF FACTS¹

John Barlow met Defendant in mid-July 2007. R134:163.² Their relationship became intimate, and they lived together for a few days. R134:165-66. After Barlow moved out, they continued to send text messages to one another. R134:166.

On September 8, 2007, Defendant sent Barlow a text message, and they decided to spend the afternoon together, driving up Ogden Canyon, looping over to Park City and down through Provo Canyon, and finally traveling up to a barbecue in Sandy. R134:167. Defendant proposed that they meet at the Timbermine Restaurant at the mouth of Ogden Canyon. R134:167-68.

Barlow, driving a van, met Defendant outside the restaurant. R134:170. He was surprised to find that Defendant had brought along another individual, Brandon Morris, whom she introduced as her cousin. R134:171-72. Defendant said that her cousin needed a ride up to Huntsville. R134:172. She suggested that they travel in her car. R134:173.

¹ “When reviewing a jury verdict, [the appellate court] recite[s] the facts in the light most favorable to that verdict.” *State v. Carreno*, 2006 UT 59, ¶ 3, 144 P.3d 1152.

² Although the pleadings file in this case includes document pages numbered from 1 to 159, the transcripts (which were prepared for *State v. Morris*, Case No. 20080551) have not been given new numbers for this case. They are numbered 133-37. When the State references the transcripts, it uses this format: R133:11-12. When it references the pleadings file it uses this format: R133 or R133-35.

Barlow, however, offered to drive his van, and Defendant agreed. R134:174. As Barlow started to climb inside the van, he felt a hand on his shoulder and a sharp point in his back. *Id.* Morris said to him, "One wrong move, you're going to get this jammed up in you." R134:175. Morris had a knife in his hand. R134:176.

Morris opened the passenger door lock for Defendant and told Barlow to give him his keys, wallet, and phone. *Id.* Barlow gave the keys and wallet to Morris. *Id.* Defendant, holding a pipe wrench in her hand, asked for the cell phone, and Barlow gave it to her. R134:176-77. Morris had Barlow sit on a metal folding chair between the driver's and passenger's seats. R134:175. Morris, claiming to be an undercover police officer, read Barlow his rights. R134:176. Defendant referred to Morris as "Sarge." R134:177-78.

Steering with his left hand and holding the knife to Barlow's back with his right hand, Morris drove up Ogden Canyon. R134:177-78. While traveling, Defendant and Morris threatened Barlow. R134:180. As they traveled, Defendant and Morris talked about taking Barlow "to the [police] station" in Huntsville. R134:179. They made some comments about Barlow having sexually assaulted Defendant's cousin. *Id.* Barlow asked that they take him to the police station, but they did not. R134:180.

After arriving in Huntsville, Defendant and Morris took the road going north on the east side of the reservoir, then drove east on 9500 or 9800 East to where it

connected with State Road 39. R134:181. At that juncture, Defendant threw Barlow's cell phone out the window. *Id.* At approximately mile marker 33.2, they turned onto a dirt road and proceeded another 100 to 120 yards. R134:183. During the drive, Defendant had tied Barlow's hands with a "hoody string." R134:185.

Defendant and Morris stopped, ordered Barlow out of the car, and had him walk twenty feet or so into the woods. R134:183-84. Barlow, hands still tied, complied. R134:184. Morris followed him; Defendant stood by the van. *Id.* Morris took a roll of soldering wire and tied Barlow to a tree. R134:185. Defendant and Morris then jumped into the van and drove off. R134:187-88. Almost immediately, Barlow heard a loud bang. R134:188.

After only a couple of minutes, Barlow loosed himself from the tree and ran down the canyon. R134:188-89. Running down the road, he saw where a large boulder had been ripped out of the dirt road and had been dragged ten to fifteen feet. R134:189. Transmission fluid was all over the place. *Id.* The fluid led back to State Road 39, where Barlow saw the van "kind of banked off the side of the road." *Id.* He could see Defendant and Morris farther down the road, climbing into a white Ford pickup. R134:190.

Barlow later flagged down a Suburban on State Road 39. R134:191-92. The occupants offered to contact the county sheriff's office as soon as they had cell phone service. R134: 192. A deputy arrived within twenty minutes. *Id.* Barlow told

him what had happened and showed the deputy “probably close to 20 pretty good-sized scratch marks” and “a couple of puncture marks which were deeper than scratches” that had been made by the knife. R134:212. The detective also saw red lines on Barlow’s wrists that were “consistent with soldering wire” and red stripes all the way around his wrists. R134:213.

Barlow pointed the deputy to an empty solder roll. R134:192. Barlow and the deputy located Barlow’s cell phone at the corner of 9500 East and State Road 39. R134:193. Barlow’s wallet was later found and returned. R134:194. Only his cash was missing. *Id.*

Detective Dewain Sorenson subsequently took Defendant into custody. R135:77. Defendant claimed that she had gone camping with Morris, her cousin Sierra, and a “hippy girl” named Lennie. R135:70. She later stated that another male was with them, but that she did not know his name. *Id.* She then claimed that this male, Barlow, sexually assaulted her, that she telephoned Morris, and that Morris came and saved her. R135:72. Detective Sorenson found her claimed telephone call “implausible,” because there is no cell phone service in the area where the alleged assault occurred. R135:72. Moreover, the details of her account “didn’t make sense.” *Id.*

SUMMARY OF ARGUMENT

The evidence sufficed to show robbery and aggravated robbery. Defendant held a pipe wrench in her fist when Morris, using a knife, forced Barlow into the car. Defendant took Barlow's cell phone from him when Morris took his wallet and keys. Defendant joined Morris in threatening Barlow. This sufficed to show robbery – the taking of Barlow's property from him against his will by use of force or fear. It also sufficed to show aggravated robbery because both Defendant and Morris used dangerous weapons. Moreover, the evidence showed aggravated robbery because Morris and Defendant took Barlow's operable vehicle in the course of committing and fleeing from the robbery.

The evidence also sufficed to show kidnapping and aggravated kidnapping. Defendant tied Barlow's hands while Morris held the knife to him. They then took Barlow from the mouth of Ogden Canyon up to Huntsville and beyond to a remote location. This sufficed to show that the detention or restraint was for a substantial period and thus to show kidnapping. The evidence also sufficed to show aggravated kidnapping because both Defendant and Morris possessed and used dangerous weapons in committing the kidnapping.

Finally, even had the evidence been insufficient to show that Defendant committed these crimes as a principal, it sufficed to show that she intentionally

encouraged and aided Morris in committing the crimes and therefore to support her conviction as an accomplice to aggravated robbery and aggravated kidnapping.

Because the evidence sufficed, the trial court did not plainly err by not *sua sponte* entering a directed verdict at the close of the State's evidence. Moreover, because the evidence sufficed, defense counsel was not ineffective for not moving for a directed verdict.

ARGUMENT

This Court has already held that the evidence in this case sufficed to support Morris's convictions for aggravated robbery and aggravated kidnapping, rejecting Morris's plain error and ineffective assistance of counsel claims. Defendant, raising the same claims as Morris did, does not acknowledge this Court's decision in *Morris*, 2009 UT App 174U, or reference any evidence that might distinguish her culpability from that of Morris. As this Court rejected the claims in Morris's appeal, it should reject them here.

I.

BECAUSE THE EVIDENCE SUFFICED TO SUPPORT DEFENDANT'S CONVICTIONS, THE TRIAL COURT DID NOT ERR, LET ALONE PLAINLY ERR, WHEN IT DID NOT *SUA SPONTE* ENTER A DIRECTED VERDICT

Defendant claims that that the trial court committed plain error when it failed to *sua sponte* "enter a directed verdict of acquittal at the close of the prosecution's case for reasons that there was insufficient evidence to support a conviction." Br.

Appellant at 24 (boldface and capitalization omitted). Defendant cannot prevail on her plain error claim because she has not shown that the evidence was insufficient to support the convictions.

Relevant law. When reviewing any challenge to a trial court's denial of a motion for directed verdict, the appellate court reviews "the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the party moved against." *State v. Jensen*, 2004 UT App 467, ¶ 7, 105 P.3d 951 (quotation and citation omitted). The Court then "appl[ies] the same standard used when reviewing a jury verdict." *State v. Hamilton*, 2003 UT 22, ¶ 41, 70 P.3d 111. The trial court's decision will be affirmed if "'some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.'" *State v. Montoya*, 2004 UT 5, ¶ 29, 84 P.3d 1183 (citation omitted).

Where no motion for directed verdict is made, but the claim is that the trial court plainly erred for not *sua sponte* directing a verdict, an appellant must show "'first that the evidence was insufficient to support a conviction of the crime[s] 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. Diaz*, 2002 UT App 288, ¶ 32, 55 P.3d 1131 (quoting *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346).

- A. In its case-in-chief, the State presented evidence from which a reasonable jury could find that the elements of aggravated robbery had been proven beyond a reasonable doubt.**

Elements of robbery and aggravated robbery. To prove robbery, the State must prove that a defendant “unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property.” Utah Code Ann. § 76-6-301.³

³ Alternatively, a person commits robbery if “the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.” *Id.* An act is “in the course of committing a theft or wrongful appropriation” if it occurs “in the course of an attempt to commit theft or wrongful appropriation,” “in the commission of theft or wrongful appropriation,” or “in the immediate flight after the attempt or commission.” *Id.*

The State also presented evidence from which the jury could reasonably have found Defendant guilty of both robbery and aggravated robbery under this definition. Defendant wrongfully appropriated cell phone. *See* R134:176. She also wrongfully appropriated Barlow’s van. *See* R134:175-78, 180. Defendant intentionally or knowingly used force or fear in the course of committing the wrongful appropriations and in the immediate flight after committing the wrongful appropriation. *See* R134:175-80. She brandished a pipe wrench, took and threw out Barlow’s cell phone, tied Barlow’s hands, and threatened him. *See* R134:176-77, 180-81, 185.

To prove aggravated robbery, the State must, in addition, prove that in the course of committing the robbery the person “uses or threatens to use a dangerous weapon” or “causes serious bodily injury upon another” or “takes or attempts to take an operable motor vehicle.” Utah Code Ann. § 76-6-302. A “dangerous weapon” is “any item capable of causing death or serious bodily injury.” Utah Code Ann. § 76-1-601.

Evidence presented. Here, the State presented evidence from which a reasonable jury could find that the elements of robbery had been proven beyond a reasonable doubt. The State presented evidence to meet these elements primarily through the testimony of the victim, Barlow. Barlow testified that Defendant took the cell phone from him. R134:176-77. He also testified that Morris took his key and wallet. R134:176. He testified that Morris used a knife, that Defendant held a pipe wrench, and that they both threatened him during the incident. R134:176-77. Moreover, while Morris drove, Defendant facilitated the robbery by tying Barlow’s hands and throwing away the cell phone he might have used to get help. R134:185.

This evidence sufficed to support a finding that Defendant intentionally took personal property from Barlow against his will by means of force or fear and with intent to deprive Barlow permanently or temporarily of this property. It is evidence sufficient to prove robbery.

The State also presented evidence from which a reasonable jury could find that Defendant committed *aggravated* robbery. Barlow testified that Defendant held a pipe wrench during the incident and that Morris held a knife during the entire trip. R134:175-85. As explained, Morris used the knife to force Barlow into the van, where Barlow was isolated from any passers-by and where Morris could demand the wallet and keys. *See* R134:174-76. Moreover, Morris and Defendant used the van to get away after the robbery had been committed. R134:175-76, 185, 187-88. This is evidence that Defendant used or threatened the use of a dangerous weapon and that she took an operable vehicle during the robbery. *See* Utah Code Ann. § 76-6-302.

B. In its case-in-chief, the State presented evidence from which a reasonable jury could find that the elements of aggravated kidnapping had been proven beyond a reasonable doubt.

Elements of kidnapping and aggravated kidnapping. To prove kidnapping, the State must prove that an “actor intentionally or knowingly, without authority of law, and against the will of the victim ... detains or restrains the victim for any substantial period of time” or “detains or restrains the victim in circumstances exposing the victim to risk of bodily injury” or “moves the victim any substantial distance.” Utah Code Ann. § 76-5-301. To prove aggravated kidnapping, the State must, in addition, prove that the actor “possesses, uses, or threatens to use a dangerous weapon” or “acts with intent to facilitate the commission, attempted

commission, or flight after commission or attempted commission of a felony” or “to hinder or delay the discovery of or reporting of a felony” or “to inflict bodily injury on or to terrorize the victim.” Utah Code Ann. § 76-5-302; *see also* Utah Code Ann. § 76-1-601.

Evidence presented. Here, the State presented evidence from which a reasonable jury could find that the elements of kidnapping had been proven beyond a reasonable doubt. Again, the State presented evidence to meet these elements primarily through the Barlow’s testimony. Barlow testified that Defendant and Morris forced him into his van at knifepoint. RR134:175-77. Barlow also testified that Defendant tied his hands together while Morris held him at knife-point. R134:185-86. Barlow further testified that Defendant and Morris transported him from the restaurant at the mouth of Ogden Canyon where they first met, R134:169-71, through Ogden Canyon, R134:177, and past the Huntsville area, R134:181-82. While traveling, Morris kept the knife pressed to Barlow’s back. R134:178-79. Once they reached the area of mile-marker 33.2, Morris ordered Barlow from the vehicle and used soldering wire to tie him to a tree some distance off the main road and out of sight. R134:183-87.

During the trip, Defendant continued to threaten Barlow. R134:80. She also called Morris “Sarge,” assisting in the ruse that Morris was acting in a law enforcement capacity. R134:177-78. Further, Defendant threw out Barlow’s cell

phone, making it more difficult for him to get help and thus facilitating both the unlawful detention and the flight afterward. R134:81.

This evidence presented during the State's case-in-chief shows that Morris and Defendant "intentionally or knowingly, without authority of law, and against the will of the victim ... detain[ed] or restrain[ed] the victim for [a] substantial period of time" or "detain[ed] or restrain[ed] the victim in circumstances exposing the victim to risk of bodily injury." Utah Code Ann. § 76-5-301. Moreover, these acts were "not ... slight, inconsequential[,] and merely incidental" to the robbery, were not inherent in the nature of the robbery, and had "some significance independent of" the robbery in that they made the robbery "substantially easier of commission" and "substantially lessen[ed] the risk of detection." *State v. Finlayson*, 2000 UT 10, ¶ 19, 994 P.2d 1243; *cf. State v. Lee*, 2006 UT 5, ¶ 34, 128 P.3d 1179 (dragging victim across the highway sufficient to support kidnapping charge). Consequently, the State met its burden to provide evidence for each element of the crime of kidnapping.

In addition, the State presented evidence sufficient to prove *aggravated* kidnapping. The State presented evidence to show that in the course of committing the kidnapping Morris possessed and used a knife, a dangerous weapon; that Defendant possessed and used a pipe wrench, also a dangerous weapon; and that Defendant and Morris committed the kidnapping with the intent to facilitate the

commission of a robbery and flight after the commission of the robbery. R134:175-86; *see also* Utah Code Ann. § 76-5-302. Thus the evidence sufficed to support defendant's conviction of aggravated kidnapping.

C. The evidence was also sufficient to show that Defendant was guilty as an accomplice.

Finally, even assuming the evidence was not sufficient to show that Defendant acted as a principal in committing the aggravated robbery or the aggravated kidnapping, the evidence sufficed to show that she intentionally aided Morris in the commission of these offenses. "Every person acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code Ann. § 76-2-202 (West 2004).

Here, as this Court has already found, the evidence sufficed to support Morris's convictions for aggravated robbery and aggravated kidnapping. *See Morris*, 2009 UT App 174U. The evidence also sufficed to show that Defendant encouraged and aided Morris in committing those two crimes. Defendant arranged for the meeting and the meeting location. *See* R134:167-69. Defendant introduced Morris to Barlow, saying that Morris was her cousin. R134:171-72. After Morris, holding a knife to Barlow, forced him into the vehicle, Defendant held up a pipe wrench, another means to instill fear of force. *See* R134:175-77. Defendant

threatened Barlow during the incident. R134:180. Defendant referred to Morris as “Sarge,” thereby joining in Morris’s ruse that he was a law enforcement officer. R134:176-78. After Morris took Barlow’s wallet and keys, Defendant took Barlow’s cell phone, depriving him of it and making it harder for him to get help or report the ongoing crime. R134:176-77.

This evidence also sufficed to show that Defendant acted with the mental state required for aggravated robbery and aggravated kidnapping—i.e., that she acted intentionally. *See* Utah Code Ann. § 76-5-301 & 302. Specifically, the evidence showed that Defendant knew that Morris was taking Barlow’s property and transporting him against his will and that, knowing this, she intentionally aided Morris.

Thus, the evidence also sufficed to support Defendant’s conviction as an accomplice.

D. Defendant’s insufficiency claims are without support.

In challenging the sufficiency of this evidence, Defendant raises the same arguments rejected by this Court in Morris’s appeal. *Compare* Br. Appellant at 21-23 *with Morris*, 2009 UT App 174U, ¶ 4. Defendant claims that the evidence was insufficient to prove robbery because no wallet was found. Br. Appellant at 21. But Barlow testified that Morris took the wallet from him at knifepoint and that Defendant was brandishing a pipe wrench while he did so. R134:175-77. That

testimony sufficed to show aggravated robbery. It was not, therefore, necessary to show that the investigators recovered the knife, the pipe wrench, or the wallet.

Defendant also claims that the State failed to prove that she took an operable vehicle because Barlow volunteered to drive up the canyon. Br. Appellant at 21. Barlow testified that he volunteered to drive up the canyon, but that before he could voluntarily begin the drive, Morris pressed a knife against his back, forced him into a folding chair inside the van, and took control of the car, driving it to the woods where he tied Barlow to the tree and then drove away. R134:174-76, 181, 185-88. That testimony sufficed to show aggravated robbery. *See* Utah Code Ann. § 76-6-302. Morris, by using his knife, and Defendant, by using the pipe wrench, prevented the voluntary drive Barlow had proposed and took Barlow's operable vehicle from him. That also sufficed to show aggravated robbery. *See id.*

Defendant further claims that the evidence was insufficient to prove kidnapping or aggravated kidnapping. Br. Appellant at 24. First, she claims that the State did not show that Barlow was detained for any substantial period of time or transported any substantial distance or that the circumstances exposed Barlow to any risk of bodily injury. *Id.* But Barlow testified that Morris and Defendant took him from the mouth of Ogden Canyon to Huntsville and beyond. R134:177-85. Barlow also testified that Morris left him tied to a tree, alone in the woods. R134:185. This testimony sufficed to prove that Morris and Defendant detained

Barlow for a substantial period of time, moved him a substantial distance, and restrained him in circumstances exposing him to the risk of bodily injury. *See* Utah Code Ann. § 76-6-301. Moreover, this was evidence of time and distance that was more than “slight, inconsequential[,] and merely incidental to” the robbery and thus sufficient to show kidnapping. *See Finlayson*, 2000 UT 10, ¶ 23.

Defendant also claims that “Barlow volunteered the use of his vehicle and voluntarily entered the vehicle for the drive,” and that the State failed to prove that she used a dangerous weapon. Br. Appellant at 23. But, as explained, Barlow testified that while he had offered to drive the group in his van, Morris pressed a knife into his back as he began to enter the van and threatened him with that knife, and Defendant simultaneously threatened him with a pipe wrench. R134:175-76. Barlow also testified that Morris took his keys and wallet, Defendant took his phone, and Morris and Defendant commandeered the van. R134:175-77. That sufficed to show that Barlow was transported against his will and that Morris and Defendant each used or threatened to use a dangerous weapon in the course of committing the kidnapping. It also sufficed to show that Morris and Defendant kidnapped him with the intent to facilitate the commission of and flight after the commission of the robbery. It thus sufficed to support Defendant’s conviction for aggravated kidnapping. *See* Utah Code Ann. § 76-5-302.

E. Because the evidence sufficed, Defendant has not shown that the trial court erred, let alone plainly erred, by not *sua sponte* entering a directed verdict.

Defendant cannot prevail on her plain error claim. Defendant has not shown that the evidence was insufficient to support her convictions, let alone “that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.” *Diaz*, 2002 UT App 288, ¶ 32 (quotation and citation omitted).

II.

BECAUSE THE EVIDENCE SUFFICED TO SUPPORT DEFENDANT’S CONVICTIONS, DEFENSE COUNSEL DID NOT PERFORM INEFFECTIVELY FOR NOT REQUESTING A DIRECTED VERDICT

Defendant also claims that trial counsel performed ineffectively for not moving for a directed verdict. Br. Appellant at 14-24.

Relevant law. To show ineffective assistance of counsel, a defendant must establish both prongs of the two-part test set forth in *Strickland v. Washington*, which holds that such claims succeed only if the defendant demonstrates: (1) that his counsel’s performance “fell below an objective standard of reasonableness” and (2) that counsel’s performance prejudiced the defendant. 466 U.S. 668, 687-88 (1984); *see also State v. Strain*, 885 P.2d 810, 814 (Utah App. 1994). Moreover, counsel is not deficient for not making futile motions. Counsel’s failure “to make motions or

objections [that] would be futile if raised does not constitute ineffective assistance.”

State v. Whittle, 1999 UT 96, ¶ 34, 989 P.2d 52.


Here, as explained under Point I, the State presented evidence sufficient to support a jury’s finding beyond a reasonable doubt that Defendant committed aggravated robbery and aggravated kidnapping. Because the evidence sufficed, Defendant cannot show that counsel performed deficiently for not moving for a directed verdict. Counsel is not required to make futile motions. *See id.* Moreover, because the evidence sufficed, Defendant cannot show that she was prejudiced. She cannot show that, had counsel moved for a directed verdict, the court would have granted it or that the outcome would have been different.

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant’s convictions.

Respectfully submitted May 5, 2010.

MARK L. SHURTLEFF
Utah Attorney General



JEANNE B. INOUE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on May 5, 2010, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Randall W. Richards
Public Defender Ass'n of Weber Co.
2550 Washington Blvd., Suite 300
Ogden, UT 84401

A digital copy of the brief was also included: ☒ Yes ☐ No

Lee Nakamura

Addenda

Addenda

Addendum A

Title/Chapter/Section:

Go To

Utah Code

Title 76 Utah Criminal Code

Chapter 1 General Provisions

Section 601 Definitions.

76-1-601. Definitions.

Unless otherwise provided, the following terms apply to this title:

- (1) "Act" means a voluntary bodily movement and includes speech.
- (2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.
- (3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.
- (4) "Conduct" means an act or omission.
- (5) "Dangerous weapon" means:
 - (a) any item capable of causing death or serious bodily injury; or
 - (b) a facsimile or representation of the item, if:
 - (i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or
 - (ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.
- (6) "Grievous sexual offense" means:
 - (a) rape, Section **76-5-402**;
 - (b) rape of a child, Section **76-5-402.1**;
 - (c) object rape, Section **76-5-402.2**;
 - (d) object rape of a child, Section **76-5-402.3**;
 - (e) forcible sodomy, Subsection **76-5-403(2)**;
 - (f) sodomy on a child, Section **76-5-403.1**;
 - (g) aggravated sexual abuse of a child, Subsection **76-5-404.1(4)**;
 - (h) aggravated sexual assault, Section **76-5-405**;
 - (i) any felony attempt to commit an offense described in Subsections (6)(a) through (h); or
 - (j) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (6)(a) through (i).
- (7) "Offense" means a violation of any penal statute of this state.
- (8) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.
- (9) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.
- (10) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.

(11) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

(12) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

(13) "Writing" or "written" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

Amended by Chapter 339, 2007 General Session

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Title/Chapter/Section:

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[Utah Code](#)

[Title 76 Utah Criminal Code](#)

[Chapter 5 Offenses Against the Person](#)

Section 301 Kidnapping.

76-5-301. Kidnapping.

(1) An actor commits kidnapping if the actor intentionally or knowingly, without authority of law, and against the will of the victim:

- (a) detains or restrains the victim for any substantial period of time;
- (b) detains or restrains the victim in circumstances exposing the victim to risk of bodily injury;
- (c) holds the victim in involuntary servitude;
- (d) detains or restrains a minor without the consent of the minor's parent or legal guardian or the consent of a person acting in loco parentis, if the minor is 14 years of age or older but younger than 18 years of age; or
- (e) moves the victim any substantial distance or across a state line.

(2) As used in this section, acting "against the will of the victim" includes acting without the consent of the legal guardian or custodian of a victim who is a mentally incompetent person.

(3) Kidnapping is a second degree felony.

Amended by Chapter 301, 2001 General Session

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[Title 76 Utah Criminal Code](#)

[Chapter 5 Offenses Against the Person](#)

Section 302 Aggravated kidnapping.

76-5-302. Aggravated kidnapping.

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section **76-1-601**; or

(b) acts with intent:

(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;

(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;

(iii) to hinder or delay the discovery of or reporting of a felony;

(iv) to inflict bodily injury on or to terrorize the victim or another;

(v) to interfere with the performance of any governmental or political function; or

(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.

(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:

(a) Section **76-5-301**, kidnapping; or

(b) Section **76-5-304**, unlawful detention.

(3) Aggravated kidnapping is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (3)(b), (3)(c), or (4), not less than 15 years and which may be for life;

(b) except as provided in Subsection (3)(c) or (4), life without parole, if the trier of fact finds that during the course of the commission of the aggravated kidnapping the defendant caused serious bodily injury to another; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated kidnapping, the defendant was previously convicted of a grievous sexual offense.

(4) If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) for purposes of Subsection (3)(b), 15 years and which may be for life; or

(b) for purposes of Subsection (3)(a) or (b):

(i) 10 years and which may be for life; or

(ii) six years and which may be for life.

(5) The provisions of Subsection (4) do not apply when a person is sentenced under Subsection (3)(c).

(6) Imprisonment under this section is mandatory in accordance with Section **76-3-406**.

Amended by Chapter 339, 2007 General Session

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[<< Previous Section \(76-5-301.1\)](#) [Next Section \(76-5-303\) >>](#)

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Title/Chapter/Section:

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[Utah Code](#)

[Title 76 Utah Criminal Code](#)

[Chapter 6 Offenses Against Property](#)

Section 301 Robbery.

76-6-301. Robbery.

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

(2) An act is considered to be "in the course of committing a theft or wrongful appropriation" if it occurs:

(a) in the course of an attempt to commit theft or wrongful appropriation;

(b) in the commission of theft or wrongful appropriation; or

(c) in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

Amended by Chapter 112, 2004 General Session

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[<< Previous Section \(76-6-206.3\)](#) [Next Section \(76-6-302\) >>](#)

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Title/Chapter/Section:

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[Title 76 Utah Criminal Code](#)

[Chapter 6 Offenses Against Property](#)

Section 302 Aggravated robbery.

76-6-302. Aggravated robbery.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section **76-1-601**;

(b) causes serious bodily injury upon another; or

(c) takes or attempts to take an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Amended by Chapter 62, 2003 General Session

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Addendum B

JUN 25 2009

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20080551-CA
v.)	
)	F I L E D
Brandon Lee Morris,)	(June 25, 2009)
)	
Defendant and Appellant.)	2009 UT App 174

Second District, Ogden Department, 071902063
The Honorable Scott M. Hadley

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges Bench, Orme, and McHugh.

PER CURIAM:

Q1

Defendant Brandon Lee Morris appeals his convictions, following a jury trial, of aggravated robbery and aggravated kidnapping, both first degree felonies. Defendant argues that his trial counsel was ineffective in not moving for a directed verdict because it is the general practice of defense counsel in any case to move for a directed verdict. Defendant therefore argues that "there is simply no reason for trial counsel not to move the court for a directed verdict." The relevant inquiry, however, is whether there was a basis for counsel to move for a directed verdict. Defense counsel would not be ineffective by failing to move for a directed verdict if the motion was unlikely to be successful. Defendant's alternative claim is that the district court committed plain error by failing to sua sponte enter a directed verdict after the State rested.

Q2

We generally will not consider an insufficiency of the evidence claim "if the defendant has failed to raise it before the trial court absent . . . a demonstration by the defendant that the trial court committed plain error by submitting the case to the jury." State v. Diaz, 2002 UT App 288, ¶ 12, 55 P.3d 1131. We must first examine "the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict"

to determine whether "the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crimes for which he or she was convicted." Id. ¶ 33 (citation and internal quotations omitted). "Only then will we undertake an examination of the record to determine 'whether the evidentiary defect was so obvious and fundamental that it was plain error to submit the case to the jury.'" Id. (citation omitted).

43 Defendant essentially claims that the State's evidence was insufficient to support an aggravated kidnapping charge because it was based largely, but not exclusively, on the victim's testimony. Nevertheless, Defendant recounts additional physical evidence, including the string attached to a tree, the empty solder spool, puncture marks and scratches on the victim, lines appearing on the victim's wrists, and the cell phone located where the victim indicated it had been thrown. Defendant argues that no fingerprints were discovered. He also claims that there were discrepancies in the victim's story including discrepancies in describing when he was required to give up his wallet and questions about how his hands were tied. In rebuttal, the victim clarified that although his wrists were tied with a "hoody" string, Defendant used a tail from the string to tie him to the tree and also used soldering wire to wrap around his wrists and then to wrap around the tree. Therefore, the alleged discrepancy was resolved.

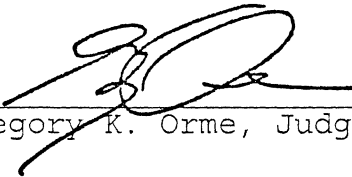
44 Defendant also claims that the evidence indicating he took the victim's property is undermined because the victim's wallet was not found in Defendant's possession. However, witness Steve Stefaniak testified that a friend later found the wallet at the campsite where Defendant had been present, but the victim had not. Defendant also claims that the State produced no knife as the weapon allegedly used in the offense and that there was no proof that the marks on the victim were caused by a knife. This argument simply discounts the victim's testimony because some aspects of it are not supported by physical evidence. Finally, Defendant argues that there was no evidence that he took an operable motor vehicle because the victim volunteered to drive his van. This argument is without merit because the victim testified that Defendant took his keys, placed a knife in the victim's back while Defendant drove the victim's van, and later attempted to drive off in the van after tying the victim to a tree. Thus, the evidence was sufficient to establish the elements of aggravated robbery in order to survive a motion for directed verdict and support submission of the case to the jury. With regard to the aggravated kidnapping count, Defendant argues that the State did not prove that Defendant detained or restrained the victim for any substantial period of time or

exposed him to risk of bodily injury. This argument is without merit and again simply discounts the victim's testimony.

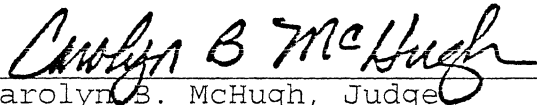
5 We conclude that the evidence was sufficient to survive a motion for directed verdict and the district court did not commit plain error because it did not sua sponte direct a verdict dismissing the State's case. Similarly, Defendant can demonstrate neither deficient performance nor prejudice from trial counsel's failure to move for a directed verdict that was unlikely to have been granted. Accordingly, we affirm.



Russell W. Bench, Judge



Gregory K. Orme, Judge



Carolyn B. McHugh, Judge

CERTIFICATE OF MAILING

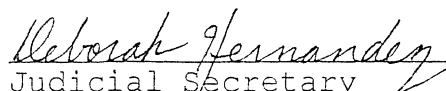
I hereby certify that on the 25th day of June, 2009, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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Judicial Secretary

TRIAL COURT: SECOND DISTRICT, OGDEN DEPT, 071902063
APPEALS CASE NO.: 20080551-CA