

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20050874-CA	
v.)		
)	F I L E D	
Brian Lee Wood,)	(February 22, 2008)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2008 UT App 46</td></tr></table>	2008 UT App 46
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Second District, Ogden Department, 041900083
The Honorable Scott M. Hadley

Attorneys: Ryan Bushell, Ogden, for Appellant
Mark L. Shurtleff and Brett J. DelPorto, Salt Lake
City, for Appellee

Before Judges Greenwood, Billings, and Davis.

GREENWOOD, Presiding Judge:

Defendant appeals his convictions for three counts of attempted aggravated murder, a first degree felony; one count of discharging a firearm from a vehicle, a third degree felony; and one count of possession of a dangerous weapon by a restricted person, a second degree felony. We affirm.

Defendant argues that his trial counsel was ineffective because he failed to file a motion to sever the possession of a weapon by a restricted person charge and he stipulated to prior bad acts. To prove that counsel was ineffective, "[f]irst, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). Failure to establish either prong precludes this court from determining that counsel's performance was deficient. See id. When evaluating the first prong of the ineffective assistance test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689 (internal quotation marks omitted); see also State v. Litherland, 2000 UT 76, ¶ 19, 12 P.3d 92.

Thus, we have previously held that a defendant must demonstrate "that there was a lack of any conceivable tactical basis for counsel's actions." State v. Irvin, 2007 UT App 319, ¶ 23, 169 P.3d 798 (internal quotation marks omitted).

In this instance, Defendant argues that his trial counsel was ineffective because he failed to file a motion to sever the felon in possession charges. Doing so, Defendant asserts, would have shielded the jury from learning that Defendant was a convicted felon. Further, Defendant argues that counsel was deficient for stipulating to the fact that Defendant was wanted for questioning in a stabbing case and that Defendant had absconded from parole.¹ We disagree.

In State v. Nelson, 777 P.2d 479 (Utah 1989), the Utah Supreme Court explained that while

[i]t is true that as a general rule, evidence of other crimes, wrongs or acts is not admissible against a defendant in a criminal case , there are many exceptions to the general rule. One of those exceptions is that evidence of other crimes, wrongs or bad acts is admissible where those other crimes [or bad acts] are so linked with the crime charged in point of time and circumstances that one cannot be shown without proving the other.

Id. at 481 (citation omitted). Here, defense counsel stipulated to the prior bad act evidence and failed to file a motion to sever because those facts were so interconnected with Defendant's current charges. For example, without that information it would have been difficult to explain to the jury why a police officer and an adult probation and parole officer were looking for Defendant, why they went to such great lengths to organize a plan for Defendant's arrest, and why they engaged in an extensive high speed chase with multiple officers in order to apprehend Defendant. Moreover, the record demonstrates that defense counsel also stipulated to the evidence in order to blunt its impact on the jury and limit Defendant's negative exposure. Because counsel's decisions constitute sound trial strategy, counsel was not ineffective.

1. To clarify, defense counsel stipulated to Defendant's involvement with a felony, not a stabbing. The parties also state that counsel stipulated to the fact that there was an outstanding warrant for Defendant's arrest, but it is unclear whether this is because Defendant was wanted for questioning in the felony assault case or because he had absconded from parole.

Defendant next argues that the trial court erred by allowing evidence to be presented to the jury that depicted one of Defendant's tattoos. "In determining whether bad acts evidence is admissible,² the trial court must first determine whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b)." State v. Nelson-Waggoner, 2000 UT 59, ¶ 18, 6 P.3d 1120. "Second, the court must determine whether the bad acts evidence meets the requirements of rule 402, which permits admission of only relevant evidence." Id. ¶ 19. And "[f]inally, the trial court must determine whether the bad acts evidence meets the requirements of rule 403 of the Utah Rules of Evidence."³ Id. ¶ 20.

Prior to trial, the court analyzed the aforementioned evidentiary rules as well as the Shickles factors, see State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), to conclude that while the "[t]attoo is relevant, [t]he probative value of the [t]attoo, in the [State's] case in chief and before the Defendant has opened the door, is substantially outweighed by the danger of unfair prejudice to Defendant." The court further explained that "once the Defendant attempts to belie the act portrayed in the [t]attoo, the potential for distortion of the truth overcomes the danger of unfair prejudice to the Defendant and the [t]attoo becomes admissible."

In opening statement, defense counsel stated that Defendant had not intended to kill the police officers but rather, was only shooting at their vehicles and the pavement in front of the same in an effort "to get away to get them to stop and not chase him anymore." The trial court impliedly determined that Defendant had opened the door to the tattoo evidence, thus, the State moved for its admission during its case in chief. Although we are not necessarily convinced that Defendant himself opened the door to the tattoo evidence or that the trial court's prior conclusion that the tattoo was inadmissible under the Shickles factors was no longer determinative, we are convinced that any alleged error was harmless.

"Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." State v. Spillers,

2. Neither party disputes the trial court's conclusion that the act portrayed in the tattoo qualifies as prior bad act evidence.

3. Rule 403 of the Utah Rules of Evidence states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R. Evid. 403.

2007 UT 13, ¶ 24, 152 P.3d 315 (alterations and internal quotation marks omitted). In other words, the admission of the tattoo "must be sufficiently prejudicial that there is a reasonable likelihood of a more favorable result for the defendant in its absence." State v. Featherston, 781 P.2d 424, 431 (Utah 1989). Based on the overwhelming evidence indicating Defendant's guilt, we cannot conclude that, in the absence of the tattoo evidence, it is reasonably likely that Defendant would have received a more favorable result at trial.

For instance, the jurors witnessed a video of at least one of the shootings taken from inside one of the police officer's cars. They also heard testimony from the officers who were in Defendant's line of fire. Officer Valencia testified that there was "no doubt in [his] mind" that Defendant was directing shots at him, and Agent Holden, the Adult Probation and Parole officer involved in Defendant's arrest, testified that she "absolutely" felt like her life was in danger while Defendant was firing at her vehicle. Agent Holden also testified that a few days after the arrest, Defendant said to her, "I'm sorry I tried to shoot you." Furthermore, a nurse from the hospital where Defendant was treated after his arrest testified that while she was treating Defendant, he said, "I should have killed a couple of them."

Based on this overwhelming evidence, we conclude that any alleged error resulting from the tattoo's admission was harmless. Moreover, any potential prejudice resulting from the admission of the tattoo was minimized by a curative instruction, which required the jury to rely on the tattoo only for its noncharacter purpose. See State v. Leber, 2007 UT App 273, ¶ 14, 167 P.3d 1091, cert. granted, (Utah Jan. 11, 2008) (No. 20070820) ("If prior bad acts evidence is admitted under rule 404(b), a jury instruction limiting the jury's use of the admitted evidence is recommended." (citing R. Collin Mangrum & Dee Benson, Mangrum & Benson on Utah Evidence 150 (2006-07 ed.))). In addition, portions of a photograph of the tattoo were redacted before being shown to the jury to eliminate some of the negative depictions.

Defendant's final argument is that the trial court erred in concluding that he comes within the habitual offender statute. Under Utah Code section 76-3-203.5, a defendant's penalty may be enhanced if the defendant "on at least two previous occasions has been convicted of a violent felony and committed to either prison in Utah or an equivalent correctional institution of another state" Utah Code Ann. § 76-3-203.5(1)(b) (Supp. 2007).⁴

4. In relevant part, the 2007 version of Utah Code section 76-3-203.5 is identical to the statute that was in effect at the time the trial court ruled on Defendant's motion to dismiss the habitual violent offender enhancement. See Utah Code Ann. § 76-3-203.5 amendment notes (Supp. 2007) (describing the 2005 and
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The statute further identifies several violent felonies, one of which is the purchase or possession of a dangerous weapon by a restricted person. See id. § 76-3-203.5(1)(c)(i)(II). Defendant asserts that he does not qualify as a habitual offender because even though "he had been convicted on two separate occasions for possession of a weapon by a restricted person[,] . . . he was only sent to prison one time for the two offenses." Defendant further asserts that the statute requires sentencing on two separate occasions.

When interpreting a statute, this court looks first to its plain language to evince the legislature's intent. See Grappendorf v. Pleasant Grove City, 2007 UT 84, ¶ 9, 173 P.3d 166. "In conducting a textual analysis, we consider the literal meaning of each term and 'avoid interpretations that will render portions of a statute superfluous or inoperative.' The plain language of any specific provision should be read in harmony with other provisions in the same statute." Id. (citation omitted) (quoting Hall v. State Dep't of Corr., 2001 UT 34, ¶ 15, 24 P.3d 958). Defendant was convicted of possession of a firearm by a restricted person on two separate occasions. After his probation was revoked in the first case, his cases were consolidated for sentencing and he received concurrent prison terms for both convictions. Based on the statute's plain language, we conclude that Defendant qualifies under the habitual criminal offender statute because he was convicted on two previous occasions and he was sentenced to prison for both of those convictions.

Consequently, we affirm.

Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

Judith M. Billings, Judge

James Z. Davis, Judge

4. (...continued)
2007 amendments). For convenience, we cite to the statute's most recent version.