

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	
Plaintiff and Appellee,)	Case No. 20090854-CA
)	
v.)	FILED
)	(August 4, 2011)
Lucia Arnold and Vanessa Arnold,)	
)	
Defendants and Appellants.)	2011 UT App 255

Fourth District, Provo Department, 081401347
The Honorable David N. Mortensen
The Honorable Gary D. Stott

Attorneys: Margaret P. Lindsay and Matthew Morrise, Provo, for Appellants
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City, for Appellee

Before Judges McHugh, Orme, and Thorne.

THORNE, Judge:

¶1 Lucia Arnold and Vanessa Arnold appeal from their convictions of retail theft, a third degree felony. *See* Utah Code Ann. §§ 76-6-602 (Supp. 2010), 76-6-412 (2008). We affirm.

¶2 On May 7, 2008, the Arnolds were caught shoplifting merchandise at a Dillard's department store in Provo. At their preliminary hearing on retail theft charges, they asserted that a Utah County deputy sheriff had threatened Vanessa Arnold with a gun following her arrest and demanded that she drop a pending civil lawsuit against him.

The district court granted a State motion to exclude evidence regarding the alleged threat incident (the threat evidence).

¶3 At trial, several Dillard's security guards testified to observing the Arnolds entering the store's dressing rooms with clothing and shopping bags from other stores and then emerging some time later with no clothing and with their bags appearing noticeably heavier than before. Video tapes from security cameras corroborated the guards' testimony. The guards then testified to finding shoe boxes full of bundled clothing inside the bags as the Arnolds attempted to leave the store. Police officers testified to finding similarly bundled clothing in the Arnolds' vehicle. The jury convicted the Arnolds, and they appeal.

¶4 On appeal, the Arnolds present a single argument of ineffective assistance of counsel, arguing that the State opened the door to the threat evidence when it asked witnesses why store personnel would want to hurt the Arnolds and that counsel was ineffective in failing to thereafter seek release from the exclusion order. To prevail on a claim of ineffective assistance of counsel, the Arnolds "must first demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment," and then that "counsel's deficient performance was prejudicial--i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶5 In this case, counsel's failure to seek release from the exclusion order did not fall below an objective standard of professional judgment. "To overcome [the] presumption of effectiveness, there must be a demonstrable 'lack of any conceivable tactical basis for counsel's actions.'" *State v. C.D.L.*, 2011 UT App 55, ¶ 13, 250 P.3d 69 (quoting *State v. Bryant*, 965 P.2d 539, 542 (Utah Ct. App. 1998)), *cert. denied*, No. 20110348 (Utah June 27, 2011). The admission of the threat evidence would have opened the door for the State to present further evidence, which defense counsel was aware of prior to trial, that the deputy sheriff who allegedly threatened the Arnolds was out of the country at the time of the Arnolds' arrest. The Arnolds' defense was entirely reliant on the credibility of their own trial testimony, and evidence that the threat could not have happened as they alleged would have reflected negatively on that credibility. There was therefore a sound tactical reason for counsel to not seek release from the order excluding the threat evidence.

¶6 Furthermore, the Arnolds have failed to demonstrate prejudice arising from counsel's failure to seek release from the exclusion order. The State presented overwhelming evidence of the Arnolds' guilt, *see generally State v. Tanner*, 2011 UT App 39, ¶ 11, 248 P.3d 61 (holding error harmless in light of overwhelming evidence of guilt), including security video suggesting that they concealed merchandise while in the store's dressing rooms and testimony that they attempted to leave the store with the concealed merchandise. In light of this overwhelming evidence, as well as the tangential nature of the threat evidence and its likely effect of damaging the Arnolds' credibility, the Arnolds have failed to show "a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *State v. Vos*, 2007 UT App 215, ¶ 12, 164 P.3d 1258 (internal quotation marks omitted).

¶7 The Arnolds have established neither professionally deficient performance by their trial counsel nor any prejudice arising from counsel's decisions. Accordingly, their claim of ineffective assistance of counsel cannot prevail, and we affirm their convictions.

William A. Thorne Jr., Judge

¶8 WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

Gregory K. Orme, Judge