IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Vear Leroy Brooks, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080777-CA F I L E D (April 22, 2010) 2010 UT App 97

Third District, Salt Lake Department, 071902046
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

---

Before Judges McHugh, Orme, and Thorne.

McHUGH, Associate Presiding Judge:

Vear Leroy Brooks appeals his conviction for aggravated sexual abuse of a child. Brooks contends that his trial counsel performed ineffectively by failing to request a limiting instruction regarding prior bad acts testimony from two witnesses at trial. We affirm.

"An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." State v. Clark, 2004 UT 25, ¶ 6, 89 P.3d 162. To support an ineffective assistance of counsel claim, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). Because "we presume that counsel has rendered adequate assistance," State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993), "[w]e give trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them," State v. Kooyman, 2005 UT App 222, ¶ 43, 112 P.3d 1252 (internal quotation marks omitted).

Trial counsel's decision to forgo an otherwise available limiting jury instruction can be a "sound trial strategy," see

Strickland, 466 U.S. at 689 (internal quotation marks omitted), designed to avoid emphasizing the subject of the instruction.[1] In State v. Kooyman, 2005 UT App 222, 112 P.3d 1252, this court concluded that counsel's decision not to pursue a limiting instruction was "based upon his experience and his perception of the value of such instructions," id. ¶ 45, and did not "necessarily [fall] outside the range of reasonable professional assistance," id. ¶ 44 (internal quotation marks omitted). Similarly, in State v. Harter, 2007 UT App 5, 155 P.3d 116, we held that trial counsel's decision not to request a curative jury instruction "could be construed as sound trial strategy . . . to avoid drawing the jury's attention to the [d]efendant's flight from police officers." Id. ¶ 16.

Like the attorney in Kooyman,[2] counsel in this case expressly stated that he "preferr[ed] not to have [a cautionary instruction] with respect to the [prior bad acts] witnesses simply because . . . those kind of instructions have a tendency to overemphasize the point." We cannot say that this tactical decision "fell below an objective standard of reasonableness," see Strickland, 466 U.S. at 688. Furthermore, we cannot say that trial counsel's actions prejudiced Brooks because "any advantage [he] may have gained by requesting a [limiting] instruction may have been offset by the attention drawn to Defendant's [prior bad acts]," see Harter, 2007 UT App 5, ¶ 16.

Defense counsel's decision not to pursue a jury instruction limiting the use of the prior bad acts evidence constituted a

---

[1]As Brooks points out, a panel of this court in State v. Torres-Garcia, 2006 UT App 45, 131 P.3d 292 upheld a judge's decision to give the jury a limiting instruction, even where the defendant, "in an attempt to avoid emphasizing the evidence to the jury," had requested that such an instruction not be given. See id. ¶ 23 n.4. We did so, not because the attorney erred in failing to request the instruction, but because it was within the judge's discretion to give the instruction over the attorney's objection where it was a correct statement of the law and applicable under the circumstances of that case. See id. (citing State v. Hansen, 734 P.2d 421, 428 (Utah 1986)). There is nothing in Torres-Garcia that supports Brooks's position that defense counsel's decision not to request such an instruction was constitutionally deficient.

[2]Trial counsel for Kooyman explained that it was his "practice" not to request limiting instructions because "they work against you." State v. Kooyman, 2005 UT App 222, ¶ 44, 112 P.3d 1252.

reasonable tactical decision within the "range of professionally competent assistance," see Strickland, 466 U.S. at 690.

Affirmed.[3]

_____
Carolyn B. McHugh,
Associate Presiding Judge

WE CONCUR:

_____
Gregory K. Orme, Judge

_____
William A. Thorne Jr., Judge

[3]We do not address the right to self-representation claim. Brooks concedes that there is nothing in the record before us indicating that he made any attempt to discharge his counsel and represent himself. We therefore "presume the regularity of the proceedings below." State v. Pritchett, 2003 UT 24, ¶ 13, 69 P.3d 1278.