

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20060509-CA
v.)	
)	F I L E D
Jimmie Butler and Anita Mae)	(December 20, 2007)
Butler,)	
)	2007 UT App 396
Defendants and Appellants.)	

Fifth District, Cedar City Department, 021501175
The Honorable John J. Walton

Attorneys: Michael W. Isbell, Ogden, for Appellants
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake
City, for Appellee

Before Judges Greenwood, Billings, and Thorne.

BILLINGS, Judge:

Defendants Jimmie and Anita Butler challenge the trial court's denial of their motions to arrest judgment and for a new trial following their convictions for theft and forgery of the deed to Jimmie's parents'--Elmer and Edna Mae Butler (Mr. and Mrs. Butler)--house. We affirm.

Defendants' primary argument is that counsel rendered ineffective assistance. To prevail on an ineffective assistance of counsel claim, a party must demonstrate "(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for [the] deficient performance there is a reasonable probability that the outcome of the trial would have been different." State v. Cruz, 2005 UT 45, ¶ 38, 122 P.3d 543 (internal quotation marks omitted); see also Strickland v. Washington, 466 U.S. 668, 687 (1984). When reviewing trial counsel's work to assess deficient performance, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Taylor, 947 P.2d 681, 685 (Utah 1997)

(internal quotation marks omitted). "If a rational basis for counsel's performance can be articulated, we will assume counsel acted competently." State v. Tennyson, 850 P.2d 461, 468 (Utah Ct. App. 1993). Thus, "an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." Id.

Defendants first contend their trial counsel performed deficiently by failing to introduce into evidence a power of attorney, by which Mr. Butler allegedly gave Mrs. Butler the authority to sign documents for him. However, counsel had a rational basis for not introducing the power of attorney, as it would have conflicted with Defendants' theory of the case, which was that Mr. Butler forgot that he had signed the document. On appeal, Defendants argue that counsel should have argued alternative theories of the case--that is, counsel should have argued both that Mr. Butler forgot he had signed the document and also that Mrs. Butler had the power of attorney to sign it for him. However, "[a]s a strategic matter, defense counsel may elect not to put on any evidence or not to offer an alternate theory of the case." State v. Powell, 2007 UT 9, ¶ 30, 154 P.3d 788. In this case, defense counsel may have thought the wide variety of possible theories and their accompanying versions of the facts would undermine whatever credibility Defendants may have had and thus chose to pursue only the primary theory.

Second, Defendants claim counsel performed deficiently by not investigating whether Mr. Butler was intoxicated when he signed the document. This, too, was sound trial strategy, because concluding that Mr. Butler was too drunk to remember signing the document might easily suggest that he was too drunk to "knowingly" sign the document, which again may have served to undermine, not help, Defendants' case.

Third, Defendants fault counsel for failing to impeach Mr. Butler's testimony based on his failing memory. Mr. Butler made mistakes in his testimony concerning his address, when he purchased the home, and his age. Continuing to badger the elderly Mr. Butler could easily have backfired and served only to arouse sympathy for him. Choosing to let the inconsistencies stand for themselves and allowing the jury to draw its own conclusions from them was a reasonable trial strategy.

Fourth, Defendants argue counsel performed deficiently by stipulating to the admission of the warranty deed. However, because there is no evidence that the warranty deed was in any way controversial, Defendants' claim is speculative and consequently fails.

Fifth, Defendants argue counsel performed deficiently by failing to analyze the documents presented at trial and to undermine inferences the notaries made as to the alleged alterations of the documents. Defendants do not indicate what they think the outcome might have been if counsel had more thoroughly inspected the documents. They simply say "had the presented evidence been different it is possible that the Butlers may have been acquitted by the jury." This speculative assertion does not rise to the level of "reasonable probability" required by the test in Strickland v. Washington, 466 U.S. 668 (1984). See id. at 694.

Sixth, Defendants claim that trial counsel was ineffective by failing to object to the use of copies, not originals, at trial. Defendants say that "it is possible that documentation was used and relied upon that was incomplete." This assertion is also too speculative to meet the level of "reasonable probability" required by the Strickland test. Id.

Defendants also argue that because they were provided with ineffective assistance, the trial court ought to have granted their motions to arrest judgment and for a new trial under rule 24 of the Utah Rules of Criminal Procedure. See Utah R. Crim. P. 24. Because we conclude that Defendants' counsel was not ineffective, we do not reverse the trial court's rulings on these matters.

Finally, Defendants argue that the trial court erred in denying their motion to arrest judgment because "the facts proved . . . d[id] not constitute a public offense." Id. R. 23. Defendants argue that evidence was put forth only to show that a forgery was committed, not that they were the people who committed it. Although Defendants describe this as failing to constitute a public offense, their argument may be better characterized as a suggestion that the evidence does not support the jury's verdict. Nonetheless, Defendants' claim fails because it ignores the jury's responsibility to assess the credibility of witnesses and make inferences from the evidence presented. Here, the Butlers stood to gain from the forgery, did in fact gain from the forgery, and were in a position to forge the signature. The jury concluded, having heard all the evidence, that the Defendants forged the documents. Because the evidence supports the jury's conclusion, and the Defendants have not marshaled evidence to the contrary, we conclude that the trial court did

not abuse its discretion in denying Defendants' motion to arrest judgment.

Judith M. Billings, Judge

WE CONCUR:

Pamela T. Greenwood,
Associate Presiding Judge

William A. Thorne Jr., Judge