

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20060129-CA
v.)	
)	F I L E D
Kelly Carpenter,)	(June 14, 2007)
)	
Defendant and Appellant.)	2007 UT App 205

Fourth District, Provo Department, 041400619
The Honorable Lynn W. Davis

Attorneys: Margaret P. Lindsay, Orem, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
City, for Appellee

Before Judges Bench, McHugh, and Thorne.

THORNE, Judge:

Defendant Kelly Carpenter appeals his jury trial conviction of aggravated sexual abuse of a child, a first degree felony. See Utah Code Ann. § 76-5-404.1 (2003). Defendant claims that his defense counsel rendered ineffective assistance by failing to timely object to evidence of Defendant's prior abuse of K.R., the victim in this matter.

To demonstrate ineffective assistance of counsel, Defendant must show that his counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment, and [that] . . . counsel's deficient performance prejudiced him." State v. Hernandez, 2005 UT App 546, ¶17, 128 P.3d 556 (quotations and citation omitted). To prove that counsel's representation fell below an objective standard of reasonableness, Defendant must rebut "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, [Defendant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland v.

Washington, 466 U.S. 668, 689 (1984) (quotations and citation omitted). "We give counsel wide latitude to make tactical decisions," Taylor v. Warden, 905 P.2d 277, 282 (Utah 1995), and we will reverse a conviction based on ineffective assistance of counsel only when there is a "lack of any conceivable tactical basis for counsel's actions," State v. Bryant, 965 P.2d 539, 542 (Utah Ct. App. 1998) (quotations and citation omitted).

We are not persuaded that there was a lack of any conceivable tactical basis for defense counsel's action. To the contrary, a tactical basis for defense counsel's lack of objection is apparent from the record. The record demonstrates that defense counsel was aware that testimony about a prior incident of abuse would be elicited at trial,¹ allowed such testimony without objection, and thereafter utilized the testimony in an attempt to impeach K.R.² It was only when this

¹Approximately two to three weeks before trial, K.R. told the prosecutor that she remembered one other incident of abuse. The prosecutor contacted defense counsel and informed him that she intended to question K.R. about the prior incident.

²During cross-examination, the following colloquy occurred:

Q. You spoke to a different lady do you remember, way back that you spoke to a different lady in a different house altogether about this?

A. Yes.

. . . .

Q. Do you remember in--when you spoke to her she asked you if this had ever happened before and you said you don't know?

A. Uh-huh.

Q. Did you tell her that?

A. Yes.

Q. And then today you said it a little bit differently, didn't you?

A. Yes. Because I never thought it happened until it got into my mind.

. . . .

Q. Until it got into your mind today?

A. Yeah.

Q. How did it get into your mind today?

A. Maybe of talking, it--talking about it so much.

Q. Okay. But you did tell the other lady

(continued...)

strategy failed that defense counsel objected to the evidence by making a motion for mistrial. The fact that defense counsel's strategy did not produce the expected result does not itself constitute ineffective assistance of counsel. See Parsons v. Barnes, 871 P.2d 516, 524 (Utah 1994) ("[W]henver there is a legitimate exercise of professional judgment in the choice of trial strategy, the fact that it did not produce the expected result does not constitute ineffectiveness of counsel." (quotations and citation omitted)). Because Defendant's challenged act might reasonably be considered sound trial strategy, Defendant's claim of ineffectiveness fails.

Moreover, even if Defendant could establish that his attorney performed deficiently by failing to object, Defendant has not demonstrated that he was prejudiced by the alleged deficiency because there was no error in admitting the evidence of the prior incident of abuse. The prior incident of abuse evidence bolstered the State's theory that Defendant deliberately, and not inadvertently, touched K.R.,³ and could therefore be admissible under rule 404(b) of the Utah Rules of Evidence for the purpose of demonstrating lack of mistake or accident. See Utah R. Evid. 404(b) (providing that previous wrongs are inadmissible under rule 404(b) for the purpose of showing character, but are admissible for other purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

Defendant asserts that, even if K.R.'s testimony about the prior incident is admissible under rule 404(b), it does not meet the requirements of rule 403 because the evidence is unfairly prejudicial. See Utah R. Evid. 403. Defendant does not, however, demonstrate that he was prejudiced by the admission of a prior incident that was similar to, but somewhat less offensive than, the charged offense. Accordingly, Defendant cannot

²(...continued)
that it had not happened before or you don't
remember, am I right?
A. Yes.

³At trial, Defendant's theory of the case was that, although K.R. had sat on his lap, any redness of K.R.'s vaginal area was not caused by inappropriate or deliberate action on his part.

demonstrate that he was prejudiced by defense counsel's decision not to object to the prior incident of abuse evidence.

Affirmed.

William A. Thorne Jr., Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

Carolyn B. McHugh, Judge