

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION	
	)	(Not For Official Publication)	
Plaintiff and Appellee,	)		
	)	Case No. 20051136-CA	
v.	)		
	)	F I L E D	
Justin Blaine Davila,	)	(January 25, 2007)	
	)		
Defendant and Appellant.	)	<table border="1"><tr><td>2007 UT App 21</td></tr></table>	2007 UT App 21
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Third District, Salt Lake Department, 031902950  
The Honorable Paul G. Maughan

Attorneys: Stephen R. McCaughey, Salt Lake City, for Appellant  
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake  
City, for Appellee

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Before Judges Bench, Orme, and Thorne.

THORNE, Judge:

Defendant Justin Blaine Davila appeals his various convictions for sexual exploitation of a minor, all second degree felonies. See Utah Code Ann. § 76-5a-3 (2003). We affirm.

Defendant first asserts that the trial court erred in denying his motion for a directed verdict. In reviewing the trial court's denial of a motion for a directed verdict, "we will uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." State v. Montoya, 2004 UT 5, ¶29, 84 P.3d 1183 (alteration, quotations, and citation omitted). A person is guilty of sexual exploitation of a minor "when the person knowingly produces, distributes, possesses, or possesses with intent to distribute, child pornography." Utah Code Ann. § 76-5a-3(1)(a). Defendant asserts only that the evidence was insufficient to support a claim that he knowingly possessed child pornography. Defendant does not argue that the State failed to establish evidence of any other element of sexual exploitation of a minor.

In its case in chief, the State introduced evidence addressing Defendant's knowing possession of child pornography that included the following: (1) all the hard drives containing child pornography were taken from Defendant's residences; (2) pornographic images were downloaded by using Defendant's login and password; (3) access to the pictures required knowledge of the location of several obscure and misleading file names; (4) Defendant had the requisite technical understanding of computers; and (5) the manner of storing the pornographic images was inconsistent with simply backing up another person's computer's files. Given the evidence summarized above, we conclude that a reasonable jury could have found that Defendant knowingly possessed child pornography. See Montoya, 2004 UT 5 at ¶29. Thus, the trial court did not err in denying Defendant's motion for a directed verdict.

Defendant next contends that his trial counsel rendered ineffective assistance by failing to properly cross-examine two witnesses as well as by preventing Defendant from testifying in his own behalf. To demonstrate ineffective assistance of counsel, Defendant must show that his trial counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment, and . . . counsel's deficient performance prejudiced him."<sup>1</sup> State v. Hernandez, 2005 UT App 546, ¶17, 128 P.3d 556 (quotations and citation omitted). However, "ineffective assistance of counsel claims may be defeated upon a finding by the court that either prong was not satisfied." State v. Rojas-Martinez, 2005 UT 86, ¶9, 125 P.3d 930. Moreover, this court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland v. Washington, 466 U.S. 668, 697 (1984). Consequently, we consider whether Defendant was prejudiced by counsel's actions and subsequently dispose of Defendant's ineffectiveness claims based on lack of demonstrated prejudice.

To prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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1. We recognize that "'in certain Sixth Amendment contexts, prejudice is presumed.'" Parsons v. Barnes, 871 P.2d 516, 523 (Utah 1994) (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)). Prejudice is presumed when there has been "[a]ctual or constructive denial" of counsel, when the prosecution has interfered with counsel's assistance, and when counsel is burdened by a conflict of interest. Strickland, 466 U.S. at 692. Contrary to Defendant's assertions, the instant case does not present a circumstance where prejudice can be presumed. Therefore, Defendant must show actual prejudice to prevail on his ineffective assistance of counsel claims.

Id. at 694. "A reasonable probability is that which is sufficient to undermine the confidence in the reliability of the outcome." State v. Tyler, 850 P.2d 1250, 1258 (Utah 1993).

Defendant argues that his trial counsel failed, in the cross-examination of two witnesses, to ascertain specific dates and expose the bias of the two witnesses. Although Defendant identifies certain lines of questioning not pursued by trial counsel, he does not demonstrate what evidence would have been uncovered by a more extensive cross-examination of the witnesses. Defendant cannot establish prejudice simply by identifying unexplored avenues of cross-examination. Rather, he must demonstrate that the evidence to be obtained by trial counsel's pursuit of additional lines of questioning would have changed the result of the proceeding. Because Defendant provides no evidence to demonstrate that a "more effective" cross-examination would have rendered a more favorable result for Defendant, we conclude that Defendant has not met the requisite showing of prejudice.

Lastly, Defendant argues that his trial counsel deprived him of his right to testify, and that this failure was prejudicial because Defendant could have explained "things." Defendant raised this issue in his motion for new trial.<sup>2</sup> An evidentiary hearing was held and the trial court found that Defendant understood that he had a right to testify, agreed with his attorney's advice, and voluntarily waived his right to testify. The trial court also found that Defendant's testimony would merely corroborate already established evidence, and therefore Defendant did not suffer actual prejudice by not testifying. Defendant does not challenge the trial court's factual findings.

Affirmed.

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William A. Thorne Jr., Judge

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WE CONCUR:

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Russell W. Bench,

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2. When a trial court has previously heard a motion for new trial based on ineffective assistance of counsel, "reviewing courts are free to make an independent determination of a trial court's conclusions. The factual findings of the trial court, however, shall not be set aside on appeal unless clearly erroneous." State v. Templin, 805 P.2d 182, 186 (Utah 1990).

Presiding Judge

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Gregory K. Orme, Judge