

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20061101-CA
v.)	
)	F I L E D
Raymond Glen Dodge,)	(January 31, 2008)
)	
Defendant and Appellant.)	2008 UT App 36

Second District, Ogden Department, 061902441
The Honorable W. Brent West

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Christine F. Soltis, Salt Lake
City, for Appellee

Before Judges Thorne, Bench, and Orme.

PER CURIAM:

Raymond Glen Dodge appeals his convictions on two charges of distributing a controlled substance and one charge of possession of a controlled substance with intent to distribute. We affirm.

Dodge asserts on appeal that he received ineffective assistance of counsel at trial because counsel presented evidence of Dodge's prior convictions and failed to object to hearsay evidence.¹ To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. See State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993). In determining whether counsel's performance was deficient, appellate courts "presume that counsel has rendered adequate performance." Id. If a challenged act or omission "might be considered sound trial strategy, we will not find that it demonstrates inadequacy of

¹Dodge also argues plain error for the admission of the prior convictions. However, because his counsel introduced the evidence, review under plain error is precluded under the invited error doctrine. See State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993).

counsel." Id. Indeed, "an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." State v. Tennyson, 850 P.2d 461, 468 (Utah Ct. App. 1993). Furthermore, counsel's failure to make objections which would have been futile does not constitute ineffective assistance. See State v. Wallace, 2002 UT App 295, ¶ 22, 55 P.3d 1147.

Dodge first argues that trial counsel was ineffective because he introduced evidence of two prior drug possession convictions. However, the prior convictions were introduced as part of a legitimate trial strategy and so cannot constitute ineffective assistance. It is clear from the record that trial counsel was attempting to support that Dodge used drugs rather than just dealing them. Indeed, trial counsel argued that the drugs found on Dodge during his arrest were for personal use and did not support an intent to distribute. Portraying Dodge as a drug user was a reasonable strategy to raise a defense against the possession with intent to distribute charge. Accordingly, the introduction of the two prior convictions does not constitute ineffective assistance.

Dodge also asserts that trial counsel was ineffective because he permitted hearsay evidence to be introduced.² Dodge does not identify any specific statements as hearsay, but asserts that any testimony regarding what a confidential informant and an unwitting buyer said during the course of the investigation should have been barred. However, the statements of the informant and buyer were not hearsay and are therefore admissible.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. See Utah R. Evid. 801. Not all out-of-court statements constitute hearsay. "When an out-of-court statement is offered only to prove that the statement was made, without regard to its truth or falsity, it is not proscribed by the hearsay rule." State v. Hutchison, 655 P.2d 635, 636 (Utah 1982). Thus, when an out-of-court statement is offered for purposes other than showing that the statement was true, the statement is not hearsay and is generally admissible.

Here, the out-of-court statements of the informant and the buyer were offered as narrative facts explaining the chronology of events and the conduct of the officers. The truth of the

²To the extent that Dodge asserts this as a confrontation clause violation, the matter is insufficiently briefed, so we do not address it further in that context. See State v. Thomas, 961 P.2d 299, 305 (Utah 1998).

statements was irrelevant. Rather, the import of the statements was that they explained the conduct of the officers in pursuing an investigation and meetings with Dodge to buy drugs. See State v. Collier, 736 P.2d 231, 234 (Utah 1987) (finding testimony regarding informant's statement of where defendant was located not hearsay because it was offered to explain police conduct in setting up surveillance of the location). Testimony that the informant said the drug buy was to be at a particular location was not offered for the truth of the statement, but to explain why officers went to the location with money for the buy and with surveillance back-up. Because the statements were not hearsay, they were admissible, and any objection on that basis would have been futile. Accordingly, trial counsel's failure to object was not ineffective assistance.

Affirmed.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge