

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20030614-CA
v.)	
)	
Cal Gilbert,)	F I L E D
)	(October 14, 2005)
)	
Defendant and Appellant.)	2005 UT App 432

Fourth District, Nephi Department, 011600137
The Honorable James R. Taylor

Attorneys: Randy S. Kester, Provo, for Appellant
 Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
 City, and Jennifer Gowans, Provo, for Appellee

Before Judges Billings, Bench, and Thorne.

BILLINGS, Presiding Judge:

Cal Gilbert appeals from the trial court's order denying his motion for a new trial. Gilbert argues the trial court erred because he received ineffective assistance of counsel and because he was convicted of an offense that was time barred under the statute of limitations. We affirm in part and reverse in part.

First, Gilbert argues that his trial counsel, Geoffrey Clark, was ineffective because Clark: (1) did not allow Gilbert to testify in his own defense; (2) waived Gilbert's right to a jury trial; and (3) failed to adequately investigate the facts and law. To prevail on an ineffective assistance claim, Gilbert must first "identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance[,]" and second "demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant." State v. Parker, 2000 UT 51, ¶10, 4 P.3d 778 (quotations and citation omitted). Moreover, in determining whether counsel's performance was deficient, "we presume that counsel has rendered adequate assistance. . . . Thus, if the challenged act or omission might be considered sound trial

strategy, we will not find that it demonstrates inadequacy of counsel." Id. (quotations and citation omitted).

Gilbert has not shown that his failure to testify was not sound trial strategy and that his testifying would have resulted in a different outcome. Gilbert's failure to testify could be considered sound trial strategy because by not testifying, Gilbert was shielded under Utah Rule of Evidence 609 from the possibility of prejudicial impeachment with his prior convictions for rape and sexual abuse of a child. See Utah R. Evid. 609. Evidence of these prior convictions would be harmful to Gilbert's case; thus, the decision not to testify was a sound trial strategy to protect Gilbert. Gilbert has also failed to show that "but for counsel's unprofessional errors, the result . . . would have been different." State v. Templin, 805 P.2d 182, 187 (Utah 1990) (quotations and citation omitted). Gilbert submitted an affidavit in support of his motion for a new trial stating that for the three charges at issue he "would take the stand [and] honestly and forthrightly deny the charges" and that he would "[d]eny that he had ever touched [the victim] in any inappropriate fashion." We cannot say that these general statements of denial would have affected the outcome of the case. Therefore, we determine that Clark provided effective assistance by advising Gilbert not to testify.

Gilbert next argues that Clark's waiver of a jury trial constituted ineffective assistance and that Gilbert's subsequent coerced waiver of a jury trial was unknowing and involuntary. When a defendant challenges his waiver of a jury trial, this court determines whether the defendant "knowingly, voluntarily, and intelligently exercised his right to waive a jury trial," and we look to the totality of the circumstances in making such a determination. State v. Hassan, 2004 UT 99, ¶¶13-14, 108 P.3d 695. The trial court found that Gilbert filed a written motion for a bench trial on October 25, 2002, and that at trial, Gilbert personally acknowledged that he wished to waive the jury before the court continued with the trial. In an affidavit supporting his motion, Gilbert states "[i]t never made any sense to me but under the stress of time and upon [Clark's] advice, [Clark] waived the jury." Other than this affidavit, there is no evidence in the record supporting Gilbert's contention that his waiver of a jury trial was coerced and Gilbert has not shown that a jury trial would have rendered a different result. Therefore, Gilbert fails to convince this court that he did not knowingly, voluntarily, and intelligently waive the jury trial, or that such waiver by Clark constituted ineffective assistance.

Additionally, Gilbert argues that Clark's failure to investigate the facts and law and his failure to hire an expert constituted ineffective assistance. Gilbert alleges that Clark

spent only thirty minutes with him, that he did not interview the victim, that he did not prepare Gilbert to testify, and that he should have retained an expert to interview the victim and then testify regarding the victim's credibility. However, Gilbert fails to show how this allegedly deficient performance prejudiced him. Moreover, "counsel's decision to call or not to call an expert witness is a matter of trial strategy, which will not be questioned and viewed as ineffectiveness unless there is no reasonable basis for that decision." State v. Tyler, 850 P.2d 1250, 1256 (Utah 1993). We cannot say that Clark's failure to call an expert witness had no reasonable basis, nor can we say on the record before us that Clark's preparation fell below the standard of reasonable professional assistance. Thus, we determine that Clark provided effective assistance.

Finally, Gilbert argues that the trial court committed error in finding him guilty of the 1982 incident because it was barred by the statute of limitations. The State concedes that the 1982 charge was time barred and that Gilbert's conviction on that count should be reversed. Accordingly, we reverse the conviction on the 1982 count. See State v. Irwin, 924 P.2d 5, 8 (Utah Ct. App. 1996) (stating that "the exceptional circumstances concept . . . [is] used to memorialize an appellate court's judgment . . . even though . . . the plain error doctrine does not apply").

Therefore, we affirm the trial court's denial of Gilbert's motion for new trial and reverse Gilbert's conviction on the 1982 count as barred by the statute of limitations.

Judith M. Billings,
Presiding Judge

WE CONCUR:

Russell W. Bench,
Associate Presiding Judge

William A. Thorne Jr., Judge