

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20051160-CA
v.)	
)	F I L E D
Robert William Millar,)	(November 30, 2006)
)	
Defendant and Appellant.)	2006 UT App 480

Third District, Tooele Department, 041300456
The Honorable Randall N. Skanchy

Attorneys: David J. Angerhofer, Sandy, for Appellant
Mark L. Shurtleff and Erin Riley, Salt Lake City, for
Appellee

Before Judges Greenwood, Davis, and Orme.

PER CURIAM:

Robert William Millar appeals from his convictions on two counts of aggravated sex abuse of a child. Millar asserts that he received ineffective assistance of counsel at trial. He has not provided an adequate record for review of his claim and counsel's conduct appears to be reasonable trial strategy, thereby precluding a finding of ineffective assistance.

Because a defendant alleging an ineffectiveness claim is responsible for presenting a full and adequate record on appeal, "an appellate court will presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which defendant is aware." State v. Litherland, 2000 UT 76, ¶17, 12 P.3d 92. "Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." Id.

The record here is inadequate to determine Millar's ineffectiveness claim.¹ Although it is clear from the record

1. Millar did not file a motion for temporary remand to develop specific facts supporting his ineffective assistance claim. See Utah R. App. P. 23B. Where trial counsel's alleged

(continued...)

that trial counsel did not call the interviewer or an expert witness to testify, there is no factual support indicating what those additional witnesses would testify regarding the interviewing techniques. Millar assumes that the testimony would indicate improper techniques which would support his position that the victim was manipulated into reporting abuse. However, absent any record support, this is mere speculation insufficient to support a claim of ineffective assistance of counsel. See State v. Person, 2006 UT App 288, ¶14, 140 P.3d 584. Therefore, we assume that trial counsel performed effectively. See Litherland, 2000 UT 76 at ¶17.

Furthermore, a strategic choice, even if ultimately unsuccessful, does not constitute ineffective assistance. See State v. Tyler, 850 P.2d 1250, 1258-59 (Utah 1993). If a rational basis for trial counsel's choice can be articulated, this court will assume counsel acted competently. See State v. Tennyson, 850 P.2d 461, 468 (Utah Ct. App. 1993). Here, trial counsel was aware of an expert performing a review of the victim's interviews, and, in fact, requested a continuance of trial to allow the report to be completed. Still, trial counsel did not call the expert at trial. A plain strategic explanation of such a choice is that trial counsel thought that calling the expert would not benefit, or perhaps would harm, Millar's case at trial. Given a rational strategic basis for counsel's conduct, this court must assume that trial counsel acted competently. See id.

Accordingly, Millar's convictions are affirmed.

Pamela T. Greenwood,
Associate Presiding Judge

James Z. Davis, Judge

Gregory K. Orme, Judge

1. (...continued)
ineffectiveness caused or exacerbated the record deficiencies, rule 23B provides a procedure to remedy the record gaps. See State v. Litherland, 2000 UT 76, ¶16, 12 P.3d 92. Here, however, based on the lack of specific facts, such as what the proposed witnesses would testify if called, it appears that a rule 23B remand would not have been available. See State v. Vessey, 967 P.2d 960, 965 n.5 (Utah Ct. App. 1998).