

1987

Utah v. James V. Crestani : Brief of Respondent

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. STATE OF UTAH, 870525-CA:

Plaintiff-Respondent, : Case No. 870525-CA
v. :
JAMES V. CRESTANI, : Category No. 2
Defendant-Appellant. :

BRIEF OF RESPONDENT

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APPEAL FROM A CONVICTION OF FOUR COUNTS OF
THEFT, A SECOND DEGREE FELONY, IN VIOLATION
OF UTAH CODE ANN. § 76-6-404 (1978), AFTER A
TRIAL IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE JOHN A. ROKICH, JUDGE,
PRESIDING.

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v.	:	
JAMES V. CRESTANI,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of four counts of Theft, a Second Degree Felony, in violation of Utah Code Ann. 76-6-404 (1978), in the Third Judicial District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. 78-2a-3(2)(e) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether defendant was denied effective assistance of counsel.
2. Whether trial counsel's use of a civil statute was sound trial strategy and therefore not ineffectiveness.
3. Whether Jury Instruction No's. 16 and 25 were prejudicial and misleading?
4. Whether the trial court properly instructed the jury regarding the culpable mental state of the offense of theft?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV:

Section 1. [Citizenship - Due process of law - Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Utah Const. Art. I, § VII:

Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. Art. I, § XII:

Section 12. [Rights of accused person.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense to alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before

final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

STATEMENT OF THE CASE

Defendant, James V. Crestani, was charged with five counts of Theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1953, as amended). Defendant was convicted of four counts of theft in a jury trial held July 7-10, 1987, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, Judge, presiding. Defendant was sentenced by Judge Rokich on October 23, 1987, to four concurrent sentences of not less than one nor more than 15 years in the Utah State Prison.

STATEMENT OF FACTS

In 1980, Defendant became the sole stockholder of Alta Title Company (T. 503).¹ Sometime thereafter, defendant opened several bank accounts for Alta Title at the Sandy State Bank (T. 503, 505). Although the exact number of corporate accounts is unclear, there were, apparently, three corporate accounts and one personal account of defendant's at the Sandy State Bank (T. 275).

¹ The record in this case has four volumes of trial transcripts, the court record file, and four supplemental transcripts. The trial transcripts are numbered from 1 to 615, the record's file from 1 to 505, and each of the four supplemental transcripts begin on page "1". In order to avoid confusion, the State will refer to the original trial transcript as (T.), the court record file as (R.), and each supplemental transcript by the record and page number (R. , p.).

At least one of the corporate accounts was a "Money Market Demand" account which was referred to as "MMD-2" (T. 56, 70). The initial deposit into MMD-2 was on February 9, 1982 (T. 145). MMD-2 was not a personal account, but a commercial account (T. 68-69). MMD-2, however, was used by the defendant for several purposes (T. 428). It was used as an escrow account, (T. 130, 143, 510), as a deposit account for contract service fees which defendant claimed were his personal fees (T. 146-47, 267, 536), and for personal deposits of defendant (T. 410, 415).

MMD-2 was an active account which in February, 1982 had a closing balance of \$132,448.63 (T. 429). The following table lists the deposits and withdrawals for the relevant months of March through August of 1982:

<u>MONTH</u>	<u>DEPOSITS</u>	<u>WITHDRAWALS</u>
March	\$1,066,883.23	\$1,138,335.95
April	1,623,808.64	1,438,912.00
May	759,193.15	783,662.79
June	2,635,507.50	2,818,662.54
July	2,154,433.83	1,907,506.73
August	1,208,787.09	1,492,514.89

(T. 430-31). Despite these large deposits, the withdrawals eventually became greater. MMD-2 was consistently overdrawn and eventually caused American Title Insurance Company, who underwrote Alta Title, to pay between \$250,000 to \$300,000 in claims against Alta Title Company (T. 57-58, 144-242). More than half of these claims were attributed to the MMD-2 account. Id.

During the months of May, June, and August of 1982, defendant's personal bank account was also continually overdrawn (T. 79, 84, 97). Funds were occasionally transferred from MMD-2 to defendant's personal account or were simply withdrawn from

MMD-2 (T. 77-78, 81, 94). The first such instance occurred on May 7, 1982, when defendant telephoned Cleo Rasmussen, the then vice-president of Sandy State Bank, and asked her to prepare a withdrawal of \$4,000 in cash from the MMD-2 account (T. 24-25) (State's Exhibit 3; Appendix A). Defendant sent two runners to the bank who picked up the cash and delivered it to defendant (T. 14, 130-33). Defendant testified that he used some of these funds for employee bonuses, including himself (T. 530).

Again, on May 19, 1982, defendant telephoned Ms. Rasmussen and requested that \$20,000 be transferred from MMD-2 to his personal account (T. 76-77). Ms. Rasmussen perceived the transfer as "highly irregular" and documented the transfer "as per Mr. Crestani 5/19/82 2:30 p" (T. 76) (State's Exhibit 4; Appendix A).

A third transfer occurred on June 11, 1982, when defendant personally appeared at the bank, made out a counter check from MMD-2 to himself in the amount of \$16,800, and then deposited \$16,000 into his personal account, keeping \$800 in cash (T. 80-82, 106) (State's Exhibit 5; Appendix A).

The last transfer occurred on August 13, 1983, when defendant authorized \$16,500 to be transferred from MMD-2 to his personal account (T. 94) (State's Exhibit 6; Appendix A).

Sometime in June, 1982, defendant hired an accountant, Roger Piburn, who later became the controller of Alta Title (T. 138-40). In November, 1982, Piburn made an accounting of the MMD-2 account because it was consistently being overdrawn (T. 144). Piburn understood that MMD-2 was an escrow account (T.

143). Piburn was curious why MMD-2 was consistently being overdrawn, because, as Piburn testified, "an escrow account is simply funds that we take in from a buyer and distribute exactly the same amount that we take in, and there should be no fluctuation in how much we take in from what we distribute." (T. 144, 242.)

Piburn went back to February 9, 1982, when the account was opened, and matched the disbursements with the deposits through November, 1982 (T. 144, 153). By using the bank statements and check vouchers, Piburn found there were disbursements without corresponding deposits (T. 148, 162). Each escrow deposit and disbursement had a reference number so Piburn was able to match them up (T. 149).

According to Piburn, there were three² withdrawals that had no corresponding deposits (T. 149). The three withdrawals were on May 19, 1982, for \$20,000; June 11, 1982, for \$16,800; and August 13, 1982, for \$16,500 (T. 76-78, 80-81, 94-95, 149).

In December of 1982, Piburn spoke with defendant about the three withdrawals (T. 150). Defendant told Piburn that there was enough money in the account to cover the withdrawals (T. 150). Piburn went back and attempted to identify sufficient monies in MMD-2 to cover the withdrawals, but could find none (T. 150, 151). Piburn then re-examined the auditing records, the

² On re-direct, Piburn stated there were four disbursements that did not have corresponding deposits (T. 243). Later, he noted that there were actually six to eight items, totalling over \$90,000, which were brought to his attention (T. 243-45).

individual transactions, and the bank statements to see if he had made a mistake (T. 151). In Piburn's accounting of MMD-2, he found only escrow funds or Badgen Contracting Servicing fees to be contained in MMD-2 (T. 152-53). Although Piburn testified that he knew defendant had personal money in the account, he also testified that he took that money into consideration when he performed the accounting of MMD-2 (T. 242).³

Piburn also found that MMD-2 was an interest bearing account with interest deposited directly into MMD-2 by the bank (T. 157). Piburn was able to account for all of the interest in MMD-2 (T. 158). To the best of his recollection "that interest was put into the general fund as income" (T. 157). The general fund account and MMD-2 were separate accounts (T. 251).

Lastly, Piburn found that defendant made weekly withdrawals from \$500 to \$1,000 in cash and placed it "in his pocket" (T. 251-52).

At trial, defendant attempted to show that he had deposited personal money in MMD-2 sufficient to cover the withdrawals in question. Defendant called James McIntyre, the attorney for Alta Title (T. 340). McIntyre testified that defendant had personal money in MMD-2 (T. 348-49). McIntyre recalled one specific occurrence where defendant's personal funds were deposited in MMD-2 (T. 342). However, on cross-examination, McIntyre admitted that he really did not know if they were personal funds, he merely assumed that they were (T. 352).

³ Piburn's original testimony was that there was no personal money in MMD-2, but on cross-examination, Piburn stated that it seemed like there were some personal transactions placed in the

Vicki Crestani, defendant's wife, also testified that defendant had deposited personal money in MMD-2. She claimed that there were two deposits of \$100,000 each in which defendant's personal money was placed in MMD-2 (T. 419). Also, there was a personal loan for \$17,082 to purchase a boat that was deposited in MMD-2 (R. 414-15). Additionally, she stated that two deposits, one for \$15,000 and another for \$19,896.53, were placed into MMD-2 and were defendant's personal funds (T. 410). Furthermore, she said there were a number of \$50 deposits (as many as 1800) into MMD-2 which were agency fees due defendant (T. 411). Lastly, she alluded to a deposit of personal funds into MMD-2 for about \$8,000 (T. 412).

On cross-examination, the prosecutor asked Mrs. Crestani to pinpoint where in the MMD-2 records were any deposits for exactly \$100,000 (T. 425). The witness could not find a deposit for \$100,000 (T. 425). The witness also could not explain a \$17,082 withdrawal from MMD-2 which occurred just two days after the \$17,082 was deposited, payable to Alta Title, not defendant (T. 437-38). Mrs. Crestani further admitted that the \$15,000 she claimed was defendant's personal money was withdrawn the same day it was deposited into MMD-2 (T. 471). Likewise, the prosecution established that \$19,869.73 was withdrawn from MMD-2 the same day it was deposited (T. 475-76).

Finally, the prosecution admitted two check drafts from MMD-2, made payable to Alta Title Company, not defendant, which were for "Agent Fees" and deposited into other accounts (T. 481, 483).

SUMMARY OF ARGUMENT

Defendant fails to establish, under the Strickland test, that trial counsels' preparation and representation fell below the standard of objective reasonableness guaranteed by the United States and Utah Constitutions. Defendant's claim of prejudice is purely speculative and is thus insufficient under the Strickland test. Because trial counsel's claimed ineffectiveness can be considered sound trial strategy, defendant's ineffective claim must fail.

Trial counsel's offering of a civil statute into evidence was trial strategy consistent with the defense asserted by counsel. Therefore, trial counsel's tactical decision cannot be grounds for ineffectiveness.

Considering the jury instructions as a whole, Instruction No's. 16 and 25 were not misleading or prejudicial, but rather, were helpful to the jury in determining whether defendant was authorized to withdraw escrow funds for personal use. Under the circumstances, Instruction No. 25 was not confusing or misleading to the extent that the jury disregarded their duty to find each and every element of the offense beyond a reasonable doubt.

The trial court properly instructed the jury on the required culpable mental state of the offense of theft and therefore did not err in refusing to give defendant's proffered "specific intent" instruction.

ARGUMENT

POINT I

DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE
OF COUNSEL AS GUARANTEED BY THE UTAH AND THE
UNITED STATES CONSTITUTIONS.

Defendant argues that defendant was denied effective assistance of counsel at trial because defense counsel failed to obtain and examine all available evidence critical to his defense.⁴

In order to establish ineffective assistance of counsel "it is the defendant's burden to show: (1) that this counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error." State v. Geary, 707 P.2d 645, 646 (Utah 1985); see also Strickland v. Washington, 466 U.S. 668 (1984); State v. Lairby, 699 P.2d 1187, 1203-04 (Utah 1984), overruled on other grounds, 739 P.2d 628, 631 (Utah 1987) (adopting Strickland test). Failure to show either deficient performance or resulting prejudice will defeat a claim of ineffective counsel. State v. Geary, 707 P.2d at 646.

In Strickland, the United States Supreme Court discuss the various aspects of the test in order to assist courts in

⁴ Although defendant does not cite to any constitutional provisions in the argument portion of his brief, the State assumes that defendant asserts a violation of the United States Constitution Amendments VI and XIV, and Utah Constitution Article I §§ 7 and 12, based upon defendant's "Determinative Constitutional Provisions" section of his brief (Br. of App. at 2).

applying the test to cases.

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. . . . From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. . . .

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . .

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. . . .

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

. . . .

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . .

. . . .

Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . .

. . . .

The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

. . . .

When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .

Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . .

In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

466 U.S. at 687-96 (citations omitted).

The Utah Supreme Court most recently reiterated its adoption of the Strickland test in State v. Archuleta, 747 P.2d 1019 (Utah 1987):

Before this Court will consider whether specific conduct falls below the required standard of objective reasonableness, the person arguing ineffective assistance must show that the conduct prejudiced his case. [Strickland, 466 U.S.] at 697, 104 S.Ct. at 2069; see also State v. Frame, 723 P.2d 401, 405 (Utah 1986). In order to prove prejudice to his case, "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 1028. . . .

Archuleta, 747 P.2d at 1023.

Defendant, in Point I of his brief, asserts that his trial counsel was ineffective for two reasons. First, he failed to adequately investigate Alta Title's bank records and as a result both he and his witnesses were unprepared for trial. Second, trial counsel failed to call a key witness for the defense.

Regarding the first claim, defendant asserts that because trial counsel failed to obtain and examine all of Alta Title's bank records, he was unaware of facts that may have provided a complete defense to Count IV of the Information. Defendant cites to an examination report of Alta Title's bank records performed after trial by Leland Martineau, C.P.A.

At the hearing on defendant's Motion for New Trial, Martineau testified that personal money of defendant was available in MMD-2 that would have covered the last withdrawal of \$16,500 (Count IV) (T. 510, p. 28-30). The basis of the "newly discovered" funds was an alleged repayment of a personal loan (R. 510, p. 29-30). Apparently, defendant loaned \$24,000 to a Mr.

Ray Fry. Id. The repayment of the loan, plus interest, totalled \$24,622.50 which was deposited in MMD-2. Id. On cross-examination, however, Martineau admitted that he did not know whether the source of the loan was from defendant's personal money or not (R. 510, p. 32). Hence, the loan repayment deposit may or may not have been personal funds.

It is well-established that proof of inadequate representation "' . . . must be a demonstrable reality and not a speculative matter.'" Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983) (quoting State v. McNicol, 554 P.2d 203, 204 (Utah 1976)). Because defendant's claim is based upon speculation, defendant has failed to meet his burden of proof, which is, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Archuleta, 747 P.2d at 1023. Simply, there is no evidence that due to trial counsel's alleged failure to review all of the bank records, defendant's cause was prejudiced.

In an effort to show that he lacked the requisite intent, defendant argues that he made some deposits into MMD-2 which were withdrawn prior to the withdrawals charged in the Information and that "the CPA found evidence that [defendant] may not have known of all of [the] withdrawals." (Br. of App. at 27) (emphasis added). Additionally, defendant claims that other money was deposited in MMD-2 which may or may not have been withdrawn and he asserts that he "may have reasonably believed that that money was available to cover [the] withdrawals" (Br. of App. at 27) (emphasis added).

Again, defendant offers nothing but mere speculation that he may have believed money was available to cover the personal withdrawals from MMD-2. This speculation is the basis of defendant's claim that his trial counsel was ineffective. Defendant's mere speculation is a far cry from "affirmatively show[ing] that a 'reasonable probability' exists that, but for counsel's error, the result would have been different." State v. Frame, 723 P.2d 401, 405 (Utah 1986).

Defendant also asserts that if trial counsel had reviewed Alta Title's bank records, trial counsel could have used the records to refresh the memory of the defendant and his wife. Defendant then speculates that if that had been done, "they would likely not have been made out to look like liars in front of the jury" (Br. of App. at 32) (emphasis added).

In his attempt to establish prejudice, defendant merely asserts that, maybe, the jury would have viewed his and his wife's testimony more favorably had their memory been more completely refreshed. Again, defendant fails to establish a "demonstrable reality" rather than a "speculative matter" as required in Codianna v. Morris, 660 P.2d at 1109.

In Commonwealth v. Sellon, 402 N.E.2d 1329 (Mass. 1980), the Massachusetts Supreme Court stated:

Moreover, even if trial counsel wholly failed to prepare his witnesses, Sellon has failed to demonstrate any "issue of fact or law that [as a result] could have been but was not exploited by counsel for the defendant's benefit in the original proceedings." . . . Even if a defendant demonstrates a deficiency in pretrial preparation, "the defendant [can] make no headway in the absence of a showing that the

fault probably resulted in forfeiture of a substantial defense."

Sellon, 402 N.E.2d at 1335-36 (citations omitted). In the present case, defendant does not assert he lost a substantial defense nor that "any issue of law or fact could have but was not exploited by counsel for the defendant's benefit." Id. (See also, State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978); Commonwealth v. Jones, 15 Mass. App. 692, 448 N.E.2d 400 (1983); State v. Long, 726 P.2d 1364 (Mont. 1986). Clearly, trial counsel's defense strategy was that defendant's personal money was available in the MMD-2 account and that defendant therefore, did not intend to deprive others of their money. Therefore, defendant's present claim of ineffectiveness can be disposed of as sound trial strategy which cannot be grounds for reversal. Strickland, 466 U.S. at 694-95.

Finally, defendant asserts that trial counsel failed to call a key witness who would have possibly discredited the prosecutions accountant witness. In Commonwealth v. Rondeau, 392 N.E.2d 1001 (Mass. 1979), the Massachusetts Supreme Court said, "[i]neffectiveness is not established simply by showing that [counsel] failed to call an additional witness . . . to bolster the defense case." Rondeau, 392 N.E.2d at 1004. The Utah Supreme Court said, "[t]he calling of witnesses is a matter of judgment on the part of a lawyer." Batchelor v. Smith, 555 P.2d 871, 872 (Utah 1976). Defendant fails to assert in his brief how the testimony of Blake Hammond would discredit the State's witness or how he was prejudiced by the absence of the testimony. Therefore, defendant has failed to establish prejudice resulting

from any alleged ineffectiveness in trial counsel's decision to not call Hammond as a witness.

As noted earlier, the United States Supreme Court in Strickland said that the proper standard for attorney performance is that of reasonably effective assistance, considering all the circumstances. Strickland, 466 U.S. at 687. The Utah Supreme Court has further stated that a defendant:

is entitled to the assistance of a competent member of the bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession.

State v. McNicol, 554 P.2d 203, 204 (1976) (footnote omitted).

In People v. McGautha, 452 P.2d 650, 76 Cal.Rptr. 434 (1969), aff'd, 402 U.S. 183 (1971), the court stated, "in inquiry whether defendant received his constitutional right to 'effective aid in the preparation and trial of the case' . . . we do not attempt to measure such elusive qualities as the vigor of a defense counsel's efforts." McGautha, 452 P.2d at 659 (citation omitted). "The purpose of the inquiry is simply to insure that defendant receives a fair trial." Frame, 723 P.2d at 405. Defendant must show that the "adversarial process of the trial was so undermined that the jury could not have produced a just result." Id.

In the present case, there is no question that trial counsel is "a competent member of the bar." Id. He has been a member of the bar since 1950, a former Utah Attorney General, a seasoned criminal defense attorney, and a former municipal judge in the Murray City court (R. 327). There is also no question

that trial counsel showed a willingness to identify himself with the interests of defendant and presented such defenses as were available.

In State v. Neal, the Arizona Supreme Court stated:

[Defendant's] attorney made pretrial motions, called witnesses in the defendant's behalf, and adequately cross-examined the State's witnesses. [Defendant's] representation did not reach the level where he was denied effective assistance of counsel.

State v. Neal, 143 Ariz. 93, 692 P.2d 272, 280 (1984). Here, trial counsel gave vigorous cross-examination to the state's witnesses (T. 58, 99, 123, 133, 163, 252, 271, 277, 297, 306, 308, 396), made numerous objections throughout the trial (T. 46, 71, 97, 141-42, 276, 295, 336, 403, 480, 485),⁵ and made strong arguments concerning the admissibility of evidence outside the presence of the jury (T. 47, 86, 204, 380, 440, 452, 455, 543). In evaluating trial counsel's effectiveness, the trial court observed as follows:

As I sat through the case, I'm not so sure that had they put on all the documentary evidence it would have altered the outcome of the case. I think there was some very damaging evidence that gave rise to the credibility of the defendant when he got on the stand and testified.

(R. 512, p. 23). The Court further observed:

The one thing that keeps going through my mind during all these hearings is the fact that no one has ever taken into account the testimony of the defendant and his wife. I

⁵ The cited objections by no means contain all of the objections made by trial counsel during trial. They do, however, illustrate the amount of zealotness that trial counsel exhibited during the four day trial.

mean, as I sat through this trial, that might have been the most damaging issue in this whole case, was the testimony of those two. . . .

You stated before that they weren't coherent. Well, they were so glib in their answers, and that, I think, was a major factor of this case. It was not a lack of preparation as I reviewed all of this. It was not the lack of preparation.

(R. 510, p. 38-39). The Court's comments initiated the following dialogue:

MR. CLARK: Of course, Judge, I wasn't there, but it seems to me that when Mrs. Crestani was confronted on the stand by Mr. Bown with checks that directly contradicted her previous testimony that she deposited monies to cover those charged events, I'm sure she wasn't glib then. She must have sat back in her chair and swallowed her tongue.

THE COURT: That wasn't the case. That was the problem.

As I say, that element during this whole proceeding has been eliminated. So, I don't know how you can go about correcting your testimony.

Id.

Applying the facts of this case to the test set forth in Strickland and followed in Frame, trial counsel's representation did not fall below the objective standard of reasonableness guaranteed by the Utah and United States Constitutions. As noted above, trial counsel vigorously pursued the defense now espoused on appeal. Defendant has failed to meet his burden of showing ineffectiveness of counsel and prejudice

caused thereby. Therefore, this Court should find that defendant was afforded a fair trial with constitutionally sufficient representation of counsel.

POINT II

TRIAL COUNSEL'S ACTIONS DID NOT CONSTITUTE
INEFFECTIVE ASSISTANCE, BUT RATHER, WERE
TRIAL STRATEGY.

Defendant further asserts that trial counsel was ineffective because he offered into evidence a civil statute which explains the duty of a title insurance agent regarding escrow accounts (Utah Code Ann. § 31-25-26 (1981) (Repealed By 1985 Utah Laws, Ch. 242, § 58)) (T. 413).

As stated in Point I supra, the defendant must show (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error. Lairby, 699 P.2d at 1204. Furthermore, the Court in Strickland said, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, that defendant must overcome the presumption that, under the circumstances, the challenged action, 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689

The Utah Supreme Court has stated that "[d]ecisions as to . . . what objections to make . . . are generally left to the professional judgment of counsel." State v. Medina, 738 P.2d 1021, 1023 (Utah 1987). In State v. Malmrose, 649 P.2d 56 (Utah 1982) the Court said, "[t]his Court will not second guess the strategy of counsel at trial." Malmrose, 649 P.2d at 59.

Similarly, other jurisdictions have also concluded that trial tactics or strategy should be given wide latitude. The Colorado Supreme Court stated that the "public defender's decision not to object to what the defendant characterizes as prejudicial and irrelevant evidence falls within the reach of trial strategy." People v. Bossert, 722 P.2d 998, 1010 (Colo. 1986).

In another case, the defendant argued that he was "denied effective assistance of counsel because his trial attorney emphasized defendant's past history of violence." State v. Vickers, 129 Ariz. 506, 633 P.2d 315, 322 (1981). Because the defendant's emotional state was one of the few arguments that defendant's attorney could logically present with any hope of success trial counsel chose to admit that evidence in an attempt to support the insanity defense presented at trial. Id. at 322-23. The Court concluded that his decision was a legitimate trial tactic, and "'[m]atters of trial strategy and tactics are committed to defense counsel's judgment, and claims of ineffective assistance cannot be predicated thereon.'" Id. at 323.

In the present case, trial counsel, while cross-examining five of the state's witnesses, asked if they had any evidence that defendant exercised any unauthorized control over the property of another (T. 58, 99, 133, 199). During defendant's case in chief, trial counsel called James McIntyre, the attorney for Alta Title (T. 340). Trial counsel attempted to show that it was proper, or at least not illegal, for the

defendant to withdraw money from one account and deposit it into another (T. 341-43).

In response to this line of questioning, the state showed the witness the statute now in question (T. 355). Trial counsel objected to the admittance of the statute (T. 366). The court took it under advisement (T. 366). As stated above, the statute explains that duty of a title insurance agent regarding escrow accounts (T. 493).

Later in the case, Mrs. Crestani testified that the defendant was a title insurance agent (T. 462). Trial counsel asserted that defendant was not a title insurance agent, but a partnership agent (T. 458). In an effort to establish that defendant was a partnership agent and not a title insurance agent, trial counsel re-called Gary Carlson (T. 491). Mr. Carlson then explained that the defendant was an agent for out-of-state partnerships (T. 491). Trial counsel then admitted the civil statute (T. 493). The following dialogue between trial counsel and Mr. Carlson occurred:

Q: (By Mr. Hansen) All right. Now, again that statute applies to the agent that issues the title insurance policy saying that the title of the property is okay?

A: Yes.

Q: Now, I think you said there was another type of a dealing with partnerships?

A: Right.

Q: Does that have anything at all to do with this [statute]?

A: No.

Q: Now, relative to the act that pertains to out-of-state partnerships and other designations, will you explain that act as opposed to the act or the statute that you have before you?

A: Well, an out-of-state partnership has to have some individual in the state that's able to service the partnership itself.

Q: Is that your understanding of the capacity in which Mr. Crestani acts?

A: Yes.

Q: As in the partnership?

A: Yes.

(T. 493-95).

Clearly, trial counsel's strategy was to show that defendant did not exercise unauthorized control over another's property. When the testimony came forth that defendant may be an agent, the State presented a civil statute to a defense witness to show that the statute restricted what a title insurance agent could do with escrow money. The State attempted to have the statute admitted, trial counsel objected, and the court took it under advisement. Trial counsel then made a tactical decision to offer the statute to show that defendant was not a title insurance agent, but a partnership agent. As such, the fiduciary responsibility set out in the civil statute did not apply to the defendant.

Trial counsel's actions were clearly strategic. By claiming that the defendant was not a title insurance agent, he furthered his defense that he did not exercise unauthorized control over another's money which "was one of the few arguments that defendant's attorney could logically present with any hope

of success." Vickers, 633 P.2d at 323. Because trial counsel's actions were trial strategy, they cannot be considered ineffective assistance. Strickland, 466 U.S. at 694-95.

POINT III

JURY INSTRUCTION NO'S. 16 AND 25 WERE NOT MISLEADING OR PREJUDICIAL WHEN CONSIDERING THE JURY INSTRUCTIONS AS A WHOLE.

Defendant argues that the trial court erred in giving Jury Instruction No's. 16 and 25 because they were misleading and unfairly prejudicial. The challenged jury instructions read as follows:

INSTRUCTION NO. 16

You are instructed that the laws of the State of Utah applicable at the pertinent times in this case provide that a title insurance agent may engage in the escrow, settlement or closing business, or any combination of such business, and operate as escrow, settlement or closing agent provided that all funds deposited with the agent in connection with any escrow, settlement or closing shall be deposited in a bank in a separate trust account, or accounts and such funds shall be the property of the person or persons entitled thereto under provisions of the escrow, settlement or closing and segregate escrow by escrow, settlement by settlement, or closing by closing in the records of the agent. These funds shall not be subject to any debt of the agent and shall be used only to fulfill the terms of the individual escrow, settlement or closing under which the funds were accepted, and none of the funds shall be used until all conditions of the escrow, settlement or closing have been met.

Any interest received or funds deposited with the agent in connection with any escrow, settlement or closing which are deposited in a bank shall be paid over to the depositing party to the escrow, settlement or closing and shall not be transferred to the account of the agent.

INSTRUCTION NO. 25

You are instructed that if you find that the MMD-2 account was used as an escrow account then the defendant had no authority to use the funds of another for his own use.

(R. 149.)

In considering whether a jury instruction was proper, the Utah Supreme Court has stated:

As we have reiterated innumerable times one instruction should not be considered in isolation in order to predicate a claim of error upon it, but the instructions must be read and understood as a connected whole.

Taylor v. Johnson, 18 Utah 2d 16, 20, 414 P.2d 575, 577 (1966)

(footnote omitted). The Court has further added:

the law in Utah is that jury instructions are to be considered as a whole. . . . When taken as a whole, if they fairly tender the case to the jury, the fact that one or more of the instructions, standing alone, are not as full or accurate as they might have been is not reversible error.

State v. Brooks, 638 P.2d 537, 542 (Utah 1981) (citations omitted).

Defendant, in the instant case, claims that the challenged instructions, standing alone, led the jury to look for civil misconduct, which eventually led them to believe that defendant was guilty of the criminal charges. Defendant ignores that the challenged instructions were relevant to prove the element of unauthorized control over another's property.⁶ In

⁶ Theft is defined as follows:

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

fact, as mentioned in Point II, the defense offered the civil statute (Utah Code Ann. § 31-25-26 (1981)) in an attempt to show that defendant was not a title insurance agent, and therefore, was not statutorily restricted in exercising control over the account. Therefore, Instruction No. 16 was not misleading, but rather, helpful to the jury in determining whether defendant exercised unauthorized control over the MMD-2 escrowed funds.

Further, there was testimony at trial that MMD-2 was not solely an escrow account (T. 111, 239, 292, 353, 426, 511). Therefore, a critical question of fact existed whether the MMD-2 monies used by defendant were his own or were escrowed funds of others. Thus, Instruction No. 25 was given to clarify to the jury that they must determine whether defendant used escrow monies of other persons without proper authorization.

Defendant further claims that Instruction No. 25 was flawed in that it may create a rebuttable presumption that if the jury finds MMD-2 to be an escrow account, then they must find that defendant exercised unauthorized control over property of another. Defendant's claim strains common-sense and ignores the fundamental principle that jury instructions must be reviewed as a whole.

The jury heard extensive testimony from both the state and defense on the issue of whether the monies used by defendant were his personal funds or those of another. The jury was further instructed that in order to convict defendant, they must find beyond a reasonable doubt that defendant (1) obtained or

⁶ Cont. Utah Code Ann. § 76-6-404 (1978) (emphasis added).

exercised unauthorized control over the property of another, (2) that he did so with the purpose to deprive the owner thereof, and (3) that such property exceeded \$1,000 in value (R. 141; Jury Instruction No. 17). Clearly, taking the instructions as a whole in the context of the present case, the jury could not have been sufficiently confused or misled by Instruction No. 25 to the extent that they disregarded their duty to find each and every element beyond a reasonable doubt.

Finally, defendant claims that a "perverse synergistic effect" occurred by the combination of Instruction No's. 16 and 25. Because, as argued above, the jury instructions, when taken as a whole, were not confusing or misleading, the combination of any individual instructions cannot be said to be misleading.

POINT IV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE CULPABLE MENTAL STATE OF THEFT

Finally, defendant contends that the trial court erred by refusing to give a "specific intent" instruction. Defendant's claim is clearly without merit.

The Utah Supreme Court in State v. Calamity,⁷ 735 P.2d 39, 43 (Utah 1987) explained that:

The terms "general intent" and "specific intent" are no longer used in our present criminal code which refers to "culpable mental states." U.C.A., 1953, § 76-2-102 provides as follows:

⁷ Apparently, West Publishing Co. inadvertently mistitled the case of State v. Whitehair, 54 Utah Adv. Rep. 11 (Ut. Sup. Ct. filed 3/23/87) as State v. Calimity, 735 P.2d 39 (Utah 1987). Mr. Calimity was a co-defendant of Mr. Whitehair, was acquitted, and did not appeal. Id. at 40.

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility.

As noted earlier, the offense of theft is defined as follows:

Theft--Elements.--A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Ann. § 76-6-404 (1978). The statute further defines a "purpose to deprive" as follows:

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

Utah Code Ann. § 76-6-401(3) (1978) (emphasis added). Thus, the culpable mental state of theft is a "purpose to deprive" as further defined in the statute.

In the present case, the jury was instructed regarding the meaning of the term "purpose to deprive."

"Purpose to deprive" means to have the conscious object to withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or to dispose of property under circumstances that make it unlikely that the owner will recover it.


(R. 38; Jury Instruction No. 14). The culpable mental state of theft being set forth in the elements of the offense, and clearly defined for the jury, the trial court properly refused to give the improper and antiquated "specific intent" instruction offered by defendant.⁸

CONCLUSION

Based upon the foregoing, respondent respectfully requests that defendant's convictions be affirmed.

RESPECTFULLY submitted this 21st day of July, 1988.

DAVID L. WILKINSON
Attorney General



DAN R. LARSEN
Assistant Attorney General

⁸ Notably, defense counsel in the present case was also counsel in State v. Calamity, 735 P.2d 39 (Utah 1987).

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to John F. Clark, and John West, attorneys for defendant, 505 East 200 South, Suite 400, Salt Lake City, Utah 84102, this 21st day of July, 1988.

A handwritten signature in cursive script, appearing to read "Dan R. Larson", written over a horizontal line.

APPENDICES

APPENDIX A

Sandy State Bank
 140 West 9000 South • Sandy, Utah 84070

WE HAVE CHARGED YOUR ACCOUNT 400.00 Cash on

per Jim Chestnut

DATE 5/7/82 BY Chas 400.00

MMD #2 Alta Tille

61243024776 91010728 60 700004000000

Sandy State Bank
 140 West 9000 South • Sandy, Utah 84070

DATE 5/19/82

TRANSFER OF FUNDS — ☒ TELEPHONE ☐ OTHER

FROM	TO	AMOUNT
ACCOUNT	ACCT. NO.	ACCOUNT
Checking	91-010728	Checking
		11-031135
		20,000.00

DEBIT Chas

MMD #2 to Jim Chestnut
As per Mr. Chestnut 5/19/82
2:30 P

61243024776 91010728 60 700020000000

Sandy State Bank
 140 West 9000 South • Sandy, Utah 84070

8/22/83 @ 15/5 from
 From Carnegie

June 11 1982 No. 87-1130

16,800.00

JAMES CHESTNUT
SIXTEEN THOUSAND EIGHT HUNDRED & 00/100

Sandy State Bank
 140 West 9000 South • Sandy, Utah 84070

91010728
ACCOUNT NUMBER

Chas
 APPROVED BY

61243024776 700016800000

Sandy State Bank
 140 West 9000 South • Sandy, Utah 84070

DATE 8/13/82

TRANSFER OF FUNDS — ☒ TELEPHONE ☐ OTHER

FROM	TO	AMOUNT
ACCOUNT	ACCT. NO.	ACCOUNT
Checking	91-010728	Checking
		11-031135
		16,500.00

DEBIT Chas

Alta Tille Co. MMD #2
to Jim Chestnut