2006

State of Utah v. Jimmie and Anita Mae Butler : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20060509-CA
JIMMIE & ANITA MAE BUTLER,	:	
Defendants/Appellants.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION ON ONE COUNT EACH OF THEFT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (WEST 2004), AND FORGERY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (WEST 2004), IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY, THE HONORABLE J. PHILIP EVES, PRESIDING

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction on one count each of theft, a second degree felony, and forgery, a third degree felony (R. 388-91). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e)(West 2004).

STATEMENT OF THE ISSUES ON APPEAL AND

STANDARDS OF APPELLATE REVIEW

1. Have defendants carried their substantial burden of showing their counsel was ineffective where their claims of prejudice are speculative, their briefing is inadequate, and they have not shown that counsel's trial strategies were anything but legitimate?

2. Did the trial court abuse its discretion in denying defendants' motion to arrest judgment where the evidence and its

fair inferences sufficed to prove that defendants committed forgery and theft?

Before a trial court may substitute its judgment for that of the jury by arresting judgment, the court must determine that the "the evidence, viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element." State v. Workman, 852 P.2d 981, 984 (Utah 1993)(citations omitted).

"The decision to grant or deny a new trial is a matter of discretion with the trial court and will not be reversed absent a clear abuse of that discretion." State v. Williams, 712 P.2d 220, 222 (Utah 1985); accord State v. Martin, 1999 UT 72, ¶ 5, 984 P.2d 975 (citing Crookston v. Fire Ins. Exch., 860 P.2d 937, 940 (Utah 1993)). In general, an appellate court "will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." Goddard v. Hickman, 685 P.2d 530, 534-35 (Utah 1984)(citation omitted). To constitute an abuse of discretion, the trial court's determination must be "beyond the limits of reasonability." State v. Hamilton, 827 P.2d 232, 239-40 (Utah 1992).

In reviewing claims of ineffective assistance of counsel, this Court must determine whether trial counsel's performance was deficient and, if so, whether the deficient performance prejudiced defendant. Strickland v. Washington, 466 U.S. 668,

687 (1984); State v. Oliver, 820 P.2d 474, 478 (Utah App. 1991). This claim presents a question of law, reviewed on the record of the underlying trial. See State v. Litherland, 2000 UT 76, ¶¶ 16-17, 12 P.3d 92.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No constitutional provisions, statutes, or rules are dispositive in this case.

STATEMENT OF THE CASE

Defendants were charged with one count each of theft, a second degree felony, and forgery, a third degree felony (R. 1-3). A jury convicted them as charged (R. 203-04, 211-12). Prior to sentencing, new defense counsel filed a motion to arrest judgment (R. 214-15, 270-72, 286-317). After a hearing, the trial court denied the motion (R. 465; R. 347-54 at addendum A). Based on the same grounds, defendants then filed a motion for new trial (R. 362-64, 365-84). The trial court entered judgement, imposed and stayed the sentence, and issued a commitment order (R. 388-91). After another hearing, the trial court denied the motion for new trial (R. 443-47 at addendum B). Defendants timely filed a notice of appeal from the denial of the new trial motion (R. 456-57).

STATEMENT OF THE FACTS

Elmer Butler, the 83-year-old victim, spent his working life as a real estate developer, subdividing large parcels of land into hundreds of house lots and then selling them (R. 463: 46,

60-61). He understood well the process of conveyancing (Id. at 61). In 1999, after losing his wealth in a lawsuit arising from a fatal pedestrian-truck collision for which he was uninsured, he purchased a home in Cedar City with his remaining funds. He intended to live there with his wife until they both died (Id. at 61, 74-75). The warranty deed listed Elmer and his wife of more than fifty years, Edna Mae, as joint tenants of the property (Id. at 48-49, 53, 96).

In March, 2001, Edna Mae died (Id. at 50, 67). About a month later, Elmer asked his daughter, Marilyn, to accompany him to the title company office to remove his deceased wife's name from the title and add Marilyn's name, thus avoiding probate in the future (Id. at 67; R. 464: 199). An escrow officer for the title company, who had previously worked with Elmer on other deeds, testified that she executed both an affidavit severing the joint tenancy between Elmer and Edna Mae and a warranty deed conveying the property from Elmer to Elmer and Marilyn (R. 463 at 96-97). She stated at trial, "I think he's the only person in 20 years that's ever walked through the door with a death certificate. Most people come in and ask me what they need to do. He actually came in and was specific about the documents that he wanted" (Id. at 95).

That fall, Marilyn was helping her father with his bills. Elmer showed Marilyn a tax notice for the property, with the name and address whited out, and Elmer's name handwritten in next to

it (Id. at 68). Marilyn testified: "We held it up to the light and it said Anita Butler and Anita's address" (Id.). Anita, Elmer's daughter-in-law, was married to Elmer's son, Jimmie. Elmer immediately summoned Jimmie to the house (Id.).

When confronted with the tax notice, Jimmie told his father that the house belonged to Anita, that Edna Mae had given it to her, and that Elmer had signed the warranty deed while intoxicated (Id. at 69). At trial, Elmer vehemently denied ever signing the deed or intending to transfer ownership of his home (Id. at 47, 48, 61, 63, 69; R. 464: 195). He and Marilyn both maintained that Edna Mae would never have given the home away (R. 463: 53, 69, 72, 74). The warranty deed conveying the property from Elmer and Edna to Anita was notarized on April 23, 1999, shortly after Elmer and Edna Mae moved into the home. It was recorded on April 3, 2001, two weeks after Edna Mae died (R. 325).

The warranty deed was the subject of much trial testimony. A school administrator testified that he had notarized around fifty documents, mostly wage garnishments, during the five years he was a notary. The remaining documents, no more than five to ten, were brought to him by school employees or by other persons he knew (R. 463: 79-80). He testified that he had no recollection of the warranty deed at issue, although it did appear to bear both his signature and notary stamp (Id. at 81, 87). Noting that the deed required the signatures of Edna,

Elmer, Anita, and a witness, and that he always did notaries in his office, he stated, "I'm basically certain I never did a notary with four people" (Id. at 83, 84, 87). He also stated that he had never seen Elmer prior to the preliminary hearing; that contrary to what appeared on the warranty deed, he did not use a typewriter to complete documents he notarized; and that his log book did not attest to this notary event (Id. at 85, 90, 91).

A questioned document examiner opined with "high probability" that the warranty deed conveying the Cedar City property from Elmer and Edna to Anita was a "simulated forgery," with Elmer's name forged by someone familiar with his handwriting (R. 463: 115, 126, 139).[1] The examiner also opined with "strong probability" that Edna Mae had signed the document (Id. at 120).

The owner of a Cedar City title company also testified, stating that he had notarized a trust deed in Anita Butler's name that secured a loan of $75,000 to her against the Cedar City property (Id. at 101-02). Further, a real estate broker testified that defendants had tried to sell the Cedar City property during the summer of 2002, but that the sale fell through because the title was not clear (R. 464: 201-02).

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[1] This witness also testified that another warranty deed, not at issue in this case, was similarly forged (R. 463: 115, 118, 120, 139). This testimony was corroborated by a notary, who testified that she had notarized only Anita Butler on the document. She was confident the document had been altered because the names of Elmer and Edna were added after she completed her notarization (Id. at 166-67).

Jimmie and Anita's daughter, Hollie, testified on her parents' behalf. Twenty years old at the time of trial, she stated that "a long time before" her grandmother became ill, both her grandparents decided to deed the house to her (R. 463: 186). She testified, "They were leaving it to me, and I was a minor at the time, so they deeded it to my mom to deed to me after they weren't there anymore" (Id. at 181). Hollie maintained that her grandparents, Elmer and Edna Mae, as well as her parents, Jimmie and Anita, all signed the deed conveying the property "right there in front of me" at the Cedar City home (Id. at 185). Hollie opined that because Elmer drank "all the time, . . . he was probably drunk" when he signed the deed (Id.).

Based on this evidence, a jury convicted defendants as charged (R. at 211-12).

SUMMARY OF ARGUMENT

Defendants contest the trial court's denial of their motions to arrest judgment and for a new trial. However, the crux of their complaint is that they received ineffective assistance of counsel. Their multiple claims of ineffectiveness all fail either because their counsel was exercising a legitimate trial strategy, because their claim of prejudice was entirely speculative, or because their briefing is inadequate.

Their remaining claim is that the motion to arrest judgment was improperly denied because the state failed to prove "a public offense" as that phrase is used in rule 23, Utah Rules of

Criminal Procedure. This argument fails because defendants have not complied with the marshaling requirement. It also fails on the merits because the evidence, when viewed in the light most favorable to the jury's verdict, sufficed to prove defendants committed forgery and theft.

ARGUMENT

POINT ONE

DEFENDANTS HAVE NOT CARRIED THEIR SUBSTANTIAL BURDEN OF SHOWING COUNSEL WAS INEFFECTIVE WHERE THEIR CLAIMS OF PREJUDICE ARE SPECULATIVE, THEIR BRIEFING IS INADEQUATE, AND THEY HAVE NOT SHOWN THAT COUNSEL'S TRIAL STRATEGIES WERE ANYTHING BUT LEGITIMATE

The crux of defendants' claim is that they received ineffective assistance of counsel at trial.[2] See Br. of Aplt. at 20-29. They urge multiple instances of ineffectiveness, all of which fail either because their counsel was exercising a legitimate trial strategy, or because their claim of prejudice was speculative, or because their briefing is inadequate. Where defendants have failed to demonstrate either deficient performance or prejudice, the trial court properly determined

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[2] The claim arose after defendants procured new counsel, following trial but before sentencing. At that juncture, counsel filed a motion to arrest judgment premised on ineffective assistance. When the trial court denied the motion, counsel filed a motion for new trial, also based on ineffective assistance. Again, the trial court denied the motion. Defendants now argue that the trial court erred in denying both motions. The dispositive issue, however, is not the propriety of the court's denial of the motions, but rather whether defense counsel performed ineffectively at trial.

their counsel was not ineffective and, accordingly, denied defendants' motions to arrest judgment and for a new trial.

To prevail on an ineffective assistance of counsel claim, defendants must demonstrate both that their counsel's performance was so deficient as to fall below an objective standard of reasonableness and that, but for the deficient performance, a reasonable probability existed that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. at 687; State v. Templin, 805 P.2d 182, 186-87 (Utah 1990).

When reviewing trial counsel's work to assess deficient performance, "a[n appellate] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Taylor, 947 P.2d 681, 685 (Utah 1997)(quoting Templin, 805 P.2d at 186 (quoting Strickland, 466 U.S. at 689)). "If a rational basis for counsel's performance can be articulated, [this Court] will assume counsel acted competently." State v. Tennyson, 850 P.2d 461, 468 (Utah App. 1993). Thus, "an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." Id.

When reviewing trial counsel's work for prejudice, defendants must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Templin, 805 P.2d at 186 (citing Strickland, 466 U.S. at 687). Defendants must affirmatively demonstrate prejudice by

showing a reasonable probability that, but for counsel's deficient performance, "the result of the proceeding would have been different." Id. at 187.

A. Failure to introduce evidence of power of attorney or investigate claims of Elmer's drinking

Defendants first argue that their counsel performed ineffectively by failing to introduce into evidence a power of attorney, pursuant to which Elmer allegedly gave Edna Mae the authority to sign documents for him. See Br. of Aplt. at 20-21. Counsel asserts that if the jury had known that Edna Mae could have signed the warranty deed for Elmer, the jury would have entertained a reasonable doubt that the document was forged. Id. at 20. This argument fails on the deficient performance prong of ineffective assistance because it directly conflicts with defendants' theory of the case, which was not that Edna Mae signed the document, but that Elmer himself signed it and later forgot that he had done so (R.464: 223-24). Indeed, the sole witness for the defense was Elmer's granddaughter, Hollie Butler, who testified unequivocally that she saw Elmer sign the warranty deed in the presence of his wife, son, and daughter-in-law (R. 463: 184-85). Plainly, then, defense counsel had a "rational basis" for choosing not to introduce the power of attorney. Tennyson, 850 P.2d at 468. Had he done so, he would have effectively undermined his own theory of defense.

Defendants next claim that their counsel performed ineffectively by not investigating whether Elmer signed the deed

while intoxicated. See Br. of Aplt. at 26-27. The defense theorized that Elmer intentionally signed the warranty deed over to Hollie's mother, Anita Butler, in order to give the house to his granddaughter when she reached her majority. For the defense to prevail, the jury had to believe Hollie's testimony that her grandfather knowingly signed the deed in the presence of his family. Had counsel pursued a line of questioning about Elmer's drinking, however, counsel would have emphasized precisely the part of Hollie's testimony that it wished to underplay. That is, while emphasizing Elmer's drinking bolstered the theory that he simply did not remember signing the document, it could also directly erode the defense theory that he knowingly signed the deed. Because counsel had reason to believe that pursuing further evidence of Elmer's drinking was a double-edged sword that could be harmful to the defense, counsel could reasonably decide not to further press the matter. See State v. Montoya, 2004 UT 5, ¶ 24, 84 P.3d 1183 (citing Strickland, 466 U.S. at 691); see also State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992)(to establish deficient performance, defendant must show counsel's actions "were not conscious trial strategy").

The crux of the matter is that defendants' deficient performance arguments are premised on a new theory of the case, developed only after the jury rendered its verdict and trial counsel had been replaced. See R. 211-12; 214-15. Defendants' new counsel, aided by hindsight, entertained an alternative

theory of the case – that Edna Mae signed the document for Elmer. However appealing such a theory may now be, it cannot serve to establish deficient performance by previous counsel, who acted on a legitimate, though different, trial strategy. See, e.g., State v. Perry, 899 P.2d 1232, 1241 (Utah App. 1995)("An ineffectiveness claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions. Moreover, this court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect" (quotations and citations omitted)). The law is well-settled that "[a] lawyer's legitimate exercise of judgment in the choice of trial strategy that does not produce the anticipated result does not constitute ineffective assistance of counsel." State v. Wynia, 754 P.2d 667, 672 (Utah App. 1988)(citing Codianna v. Morris, 660 P.2d 1101, 1109 (Utah 1983); State v. McNicol, 554 P.2d 203, 205 (Utah 1976)). For this reason, defendants' claims fail.

B. Failure to impeach Elmer

Defendants also fault their attorney for failing to impeach Elmer's testimony. See Br. of Aplt. at 21-23. Counsel contends that Elmer's failing memory should have been highlighted to the jury, and also that trial counsel should have objected to "statements that contained strong inferences of guilt . . . [and] narratives" (Br. of Aplt. at 22). These unadorned assertions fail to establish either deficient performance or prejudice.

First, on its face, Elmer's testimony made quite clear that his memory was less than perfect. He could not accurately remember his address, when he moved into his Cedar City home, or his age (R. 463: 44-46). Had trial counsel frontally attacked Elmer's memory, however, he would have run the risk of being perceived by the jury as badgering the 83-year-old victim and thus enhancing the jury's sympathy for this elderly man who claimed defendants had stolen his home. Tactically, then, where the testimony spoke for itself, counsel had good reason to refrain from aggressively attacking Elmer. Instead, defense counsel wisely let Elmer's failing memory speak for itself. As was proper, counsel let the jury assess Elmer's credibility and the extent to which his inability to remember basic personal information might also indicate faulty memory in other areas. See, e.g., Workman, 852 P.2d st 984 (holding that jury serves as exclusive judge of witness credibility).

Second, defendants have not specified which statements "contained strong inferences of guilt" or what "narratives" were detrimental to the defense. They have thus failed to "identify specific acts" falling "outside the wide range of professional assistance" that constitute deficient performance. State v. Chacon, 962 P.2d 48, 50 (Utah 1998)(quotations and citations omitted). Moreover, they have not established demonstrable prejudice, asserting only that counsel's perceived deficient performance "may have prejudiced the jury" or that "the outcome

of the trial may have been different" (Br. of Aplt. at 22, 23). "On many occasions, this court has reiterated that proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." Fernandez v. Cook, 870 P.2d 870, 877 (Utah 1993)(footnote omitted). Having failed to specifically articulate deficient performance or demonstrably establish prejudice, defendants' allegation of ineffective assistance stands as an unadorned and speculative claim. State v. Arguelles, 921 P.2d 439, 441 (Utah 1996). Consequently, it fails.[3]

C. Stipulating to recording of warranty deed

Defendants argue that trial counsel performed deficiently by stipulating to the admittance of the warranty deed without first calling as a witness the recorder of the deed, whom the parties had stipulated would confirm that Anita Butler requested the recording. See Br. of Aplt. at 25; accord R. 263: 174. As a matter of course, parties often stipulate to facts that are so

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[3] Defendants' argument that trial counsel was ineffective for failing to object to Marilyn's testimony also fails for lack of demonstrable prejudice. See Parsons v. Barnes, 871 P.2d 516, 523 (Utah 1994)(quoting Strickland, 466 U.S. at 697)(approving analysis of prejudice prong only to dispose of ineffective assistance claim). Merely alleging that testimony is "highly prejudicial" does not make it so. See, e.g., Br. of Aplt. at 24 ("Because [Marilyn] Goldberg's highly prejudicial responses were heard by the jury, it severely prejudiced the case"). Moreover, lacking any record citations, the issue is inadequately briefed. See Utah R. App. P. 24(a)(9). Where an appellant fails to adequately brief an issue, a reviewing court may decline to consider the argument. See, e.g., State v. Thomas, 1999 UT 2, ¶ 11, 974 P.2d 269 (citations omitted); Mackay v. Hardy, 973 P.2d 941, 947-48 (Utah 1998).

uncontroverted, so clear on their face, that they do not warrant the expenditure of further adjudicative resources. Thus, parties will often stipulate to facts that one party would otherwise have to prove. To establish deficient performance here, defendants would have to show that there is evidence contesting the agreed-upon facts. Defendants have not done so. Absent such proof, adduced pursuant to a rule 23B remand hearing, defendants' ineffective assistance claim is purely speculative and, consequently, fails. Arguelles, 921 P.2d at 441.

D. Failure to properly analyze evidence

Finally, defendants claim that trial counsel performed ineffectively by failing "to analyze any of the documents presented at trial and . . . to undermine any inferences made by the notaries as to the alleged alterations of the documents" (Br. of Aplt. at 25-26).

This claim fails because it is inadequately briefed. Defendants do not articulate which specific documents they are referencing, how those documents should have been analyzed, what such an analysis would have produced, and how the results of the analysis would have changed the outcome of the trial.[4] They have

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[4] Defendants also claim that trial counsel was ineffective for failing to object to the use of certified copies of certain unspecified documents. See Br. of Aplt. at 28-29. This claim fails because they have not specified which documents they are referencing or what the originals would have shown that the certified copies lacked. Indeed, they virtually concede that their claim is entirely speculative when they surmise that "it is possible that documentation was used and relied upon that was incomplete" and, further, that if the documentation was

also not specified what "inferences" either of the notaries made that were suspect or what further investigation would have revealed. And they have cited no legal authority to support their unadorned allegations.

"A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." State v. Gomez, 2002 UT 120, ¶20, 63 P.3d 72 (quotations and citations omitted). "An issue is inadequately briefed 'when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" Smith v. Smith, 1999 UT App 370, ¶ 8, 995 P.2d 14 (quoting State v. Thomas, 961 P.2d 299, 305 (Utah 1998)). Where defendants have offered briefing that is wholly inadequate, neither specifying their claims nor the rationale for the results they seek, this Court should decline to consider them.

POINT TWO

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO ARREST JUDGMENT BECAUSE THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE JURY'S VERDICT, SUFFICED TO ESTABLISH THAT DEFENDANTS COMMITTED BURGLARY AND THEFT

Defendants argue that the trial court erred in denying

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incomplete, that "may have led to crucial evidence being omitted . . . ." (Id. at 28). Such bald speculation has never been sufficient to support a claim of ineffective assistance of counsel.

their motion to arrest judgment because no direct evidence proved that they forged the warranty deed. See Br. of Aplt. at 29-30. They phrase their argument in terms of rule 23, asserting that "the facts proved . . . do not constitute a public offense." Utah R. Crim. P. 23. In essence, however, they argue that the evidence was insufficient to support the jury's verdict. See Workman, 852 P.2d at 984 ("The standard for determining whether an order arresting judgment is erroneous is the same as that applied by an appellate court in determining whether a jury verdict should be set aside for insufficient evidence").

This Court should decline to address this claim because defendants have not marshaled the evidence in support of the verdict and then shown why it is "so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element." Id., (citing State v. Petree, 659 P.2d 443, 445 (Utah 1983)). Marshaling requires defendants to gather and present, in a light most favorable to the verdict, "every scrap of competent evidence . . . which supports the very findings [they] resist." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991). They must "fully embrac[e] the [State's] position" without "simply rearguing and recharacterizing" the evidence. State v. Clark, 2005 UT 75, ¶ 17, 124 P.3d 235 (citations and quotations omitted); see also Heinecke v. Dep't of Commerce, 810 P.2d 459, 464 (Utah App.

1991)(rejecting appellant's claim where he persistently argued his own position while marshaling). Failure to properly marshal the evidence suffices to reject a sufficiency claim. See, e.g., Clark, 2005 UT 75 at ¶ 17; State v. Hopkins, 1999 UT 98, ¶ 16, 989 P.2d 1065; Crookston v. Fire Ins. Exch., 817 P.2d 789, 800 (Utah 1991). Where, as here, defendants have failed to comply with the marshaling requirement, they cannot prevail on their argument that the trial court should have granted their motion to arrest judgment.

In any event, defendants' claim fails on the merits. While they assert that no evidence directly proved that either of them forged the warranty deed, they wholly ignore the circumstantial evidence and the fair inferences based on the evidence before the jury. The victim, Elmer Butler, was an experienced real estate professional, familiar with the nuances of conveying property (R. 468: 57, 60-61, 71). He testified unequivocally that he did not sign the home over to Anita and Jimmie and did not authorize anyone else to convey the property for him (Id. at 47-48, 61). A questioned document examiner testified that Elmer's signature was a forgery, written by someone familiar with Elmer's handwriting who tried to copy it (Id. at 115).

Anita Butler recorded the forged deed (Id. at 174). She later secured a loan for $75,000, using the deed as security for the loan (Id. at 101). Moreover, Anita and Jimmie together put the home on the market and tried to sell it during the summer of

2002, while the title to the house was still in dispute (R. 464: 201-02). Their actions impliedly contradicted the testimony of their daughter, Hollie, who was the only defense witness. She maintained that Elmer and his wife intended to give the house to her and that Elmer signed it over to Anita to hold for her until her grandparents died (R. 463: 181). Hollie's testimony directly conflicted with the testimony of her grandfather, who stated he never intended or discussed giving the home to her (R. 464: 195).

Evaluating this evidence and its fair inferences, the trial court opined:

> The jury had a clear choice. Did they believe that the victim signed the deed, that he had now forgotten the signing, and that the expert witness was mistaken, or did they believe that the defendants had prepared and uttered the deed for their own gain. They obviously chose to believe the latter. It is certainly reasonable for the jury to infer that the purported grantee and her husband, the ones who stood to gain from the forgery, and the ones who did gain from the forgery, and the ones who would be in a position to simulate the signature of the victim, were guilty of forging the document, or at least uttering the document that they knew to be forged.

R. 353 at addendum A. In denying defendants' motion to arrest judgment, the trial court properly deferred to the jury's role as "exclusive judge of both the credibility of witnesses and the weight to be given particular evidence." Workman, 852 P.2d at 984 (and cases cited therein). Accordingly, where the evidence sufficed to support the jury's verdict, the trial court did not

abuse its discretion in denying defendants' motion to arrest judgment.

CONCLUSION

For the reasons stated, this Court should affirm defendants' conviction on one count each of forgery, a second degree felony, and theft, a third degree felony.

RESPECTFULLY submitted this 12th day of June, 2007.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Michael W. IsBell, IsBell Law Office, 80-459 Corte Alegria, Indio, CA 92201, and William L. Bernard, Bernard Law Firm, 90 East 100 South, Suite 201, P.O. Box 659, St. George, UT 84771, this 12th day of June, 2007.

Joanne C. Slotnik

Addenda

Addendum A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, **Plaintiff,** **vs.** **JIMMIE BUTLER and** **ANITA MAE BUTLER,** **Defendants.**	**MEMORANDUM OPINION** FILED OCT - 3 2005 FIFTH DISTRICT COURT IRON COUNTY DEPUTY CLERK **CASE NOS.** **021501176 FS** **021501175 FS**

The two defendants Jimmie and Anita Mae Butler, who are husband and wife, were tried by a jury on February 17, 2005. They were represented at trial by Keith Barnes, their attorney. The State was represented by Troy Little, Chief Deputy County Attorney for Iron County. At the conclusion of the trial, the defendants were both found guilty of Theft, a 2nd Degree Felony and Forgery, a 3rd Degree Felony. A Presentence Investigation was ordered prior to sentencing.

Thereafter, the defendants retained the services of another attorney, Michael W. Isbell, who, on May 9, 2005, filed on behalf of both defendants a Motion to Arrest Judgment prior to the sentencing hearing. The State has now filed a written response to that Motion and oral argument was held on August 29, 2005. The court took the matter under submission, and having now reviewed the file, the Memoranda of the attorneys, and the record of the trial, the court enters the following ruling on the pending Motion.

FACTS

Although the complete record of the trial has not been transcribed, but is available for transcription, a brief recitation of the facts will be helpful to an understanding of the court's ruling.

The victim in this case is an elderly man, Elmer Butler. The defendants are his son and daughter in law. At trial Elmer testified that when his wife, Edna Mae, died in March 2001, he went to the County Recorder to take the necessary steps to remove Edna Mae's name from the deed to their marital home. When he tried to file the required proof of her death, he discovered that the home was no longer in his and his wife's name, but had been deeded to his daughter in law, Anita Butler, one of the defendants. The deed which made the transfer of title purported to have been signed by Elmer, his wife Edna Mae, and Anita Butler. Jimmie Butler's signature appeared on the deed as a witness.

Elmer testified that he never signed the Warranty Deed which conveyed the property to Anita Butler, nor did he authorized anyone else to do so. He claimed that the house had been taken from him without his consent.

The State next called Marilyn Goldberg, a daughter of Elmer and Edna Mae, who testified that she had accompanied her father when he went to take Edna Mae's name off the deed.

The State next called Kent Ferrill Peterson, the notary public whose signature appears on the disputed deed. Mr. Peterson testified that he did not remember notarizing that deed, which was dated April 23rd, 1999.

The State next called Jill Orton, an escrow officer with First American Title, who testified that she prepared the Affidavit necessary to take Edna's name off the deed and gave it to Elmer and Marilyn Goldberg.

The State next called Mitchell Schoppmann, owner of Cedar Land and Title, who testified that he prepared deeds on the property in question, including a trust deed to allow Anita Butler to secure a $75,000 loan on the property after the disputed deed made her the record owner of the property.

The State also called as a witness George Matthew Throckmorton, an employee of the Salt Lake City Crime Lab, a crime scene investigator, and a questioned documents examiner. Mr. Throckmorton opined that the deed in question had not been signed by Elmer, but that his apparent signature was in fact a "simulated forgery", meaning that whoever signed the deed would have been familiar with the signature of Elmer and tried to make the signature on the deed look like Elmer's writing. In making this examination, Mr. Throckmorton compared the signatures on the deed in question, and another deed purportedly signed by Elmer, to known samples of Elmer's writing. Mr. Throckmorton concluded that both of the deeds he looked at were simulated forgeries, and both were likely signed by the same person. Both deeds purported to convey property to Anita Butler from Elmer and Edna Mae Butler.

Mr. Throckmorton did opine that there was a "strong possibility" that the purported signature by Edna Mae Butler on the deed in question was in fact her signature although he could not so state conclusively.

The State's final witness was Mitzi McLeroy, a retired employee of Zion's Bank who testified that she notarized the second deed looked at by Mr. Throckmorton.

After the State rested, the defense called its principle witness, Hollie Mae Butler, who is the daughter of the defendants and the grand daughter of the victim Elmer Butler. Hollie testified that Elmer was a heavy drinker of alcohol, that Elmer wanted to deed the house to her but she was a minor, and so he deeded the house to Anita to be deeded to her went she was an adult. She testified that she was present when the deed was signed and she saw it signed by Elmer, Edna Mae, and both defendants. She testified that this signing happened before Edna Mae's final illness, although she could not give an exact date.

Neither of the defendants chose to testify.

In rebuttal, the State recalled Elmer and Marilyn Goldberg, and then called Rhett Shakespeare, a local real estate broker, who testified that in June, 2002, the Butlers, Jimmie and Anita, tried to sell the house, which was in direct contravention of the testimony of Hollie that Anita was holding the house in trust for her.

At no time during the trial did either side mention the existence of a Power of Attorney which purported to give Edna Mae Butler power to sign a deed for Elmer Butler. The court was never made aware of the existence of such a document. Certainly, the defendants, if they knew of that document, could have raised its existence during the trial. However, if they had done so, and then had claimed that the victim's signature on the deed was actually signed by his wife, Edna Mae Butler, they would have thoroughly impeached the testimony of Hollie Butler, who testified that she saw her grandfather, the victim, sign the deed himself. No one presented any evidence to indicate that it was Edna Mae Butler who signed the deed in question for Elmer. That argument was never raised until after the jury had rendered its verdict in the case. There has never been any evidence presented to indicate that Edna Mae placed her husband's signature on the questioned deed.

PERMISSIBLE SCOPE OF MOTION TO ARREST JUDGMENT

Rule 23, Utah Rules of Criminal Procedure provides:

> "At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of the defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. ..."

ARGUMENTS OF THE DEFENDANTS

In their Motion, the defendants raise the following arguments:

1. The defense presented by defendants' attorney did not rise to the level required of competent counsel and was therefore ineffective assistance of counsel.

2. The facts proved against the defendants do not constitute a public offense.

3. The jury's verdict was based upon prejudice and psychological pressures.

4. The theft conviction hinges upon a forgery conviction.

INEFFECTIVE ASSISTANCE OF COUNSEL

In its response to the Motion, the State of Utah raises first an issue as to whether a claim of ineffective assistance of counsel can properly be raised by way of a Motion To Arrest Judgment. The parties agree that the rule itself does not specifically list as one of the permissible grounds for such a Motion a claim of ineffective assistance of counsel. Therefore, if the claim is cognizable under Rule 23, it would have to be under the "other good cause" catchall phrase.

Neither party was able to find any conclusive law on this question, nor has the court located any applicable law which addresses the question directly. The State points out that in State v. Humphries, 818 P.2d 1027 (Utah 1991), the Utah Supreme Court has said that "...ineffective assistance of trial counsel [claims] should be raised on appeal if the trial record is adequate to permit decision of the issue and defendant is represented by counsel other than trial counsel" citing State v. Templin, 805 P.2d 182 (Utah 1990) and Jensen v. Deland, 795 P.2d 619 (Utah 1989). However, the defendants argue that because of the procedural posture of that case, the decision in Humphries does not resolve the question presented in this case.

The State also points out that the Rules of Appellate Procedure now provide a way for an appellant to supplement the trial record, if necessary, so that a complete record can be provided to the appellate court. [See Rule 23B(a) UR.App.P.]

In this case, the principle argument regarding ineffective assistance of counsel which defendants now advance is that their trial attorney did not present evidence to the jury of a Power

of Attorney which the victim had given to his now deceased wife prior to the signing of the deed in question in this case. Although it is true that the existence of that document was not presented to the jury, the reasons therefore are not now part of the trial record. Those reasons could be explored and developed as part of an appeal, pursuant to the above cited Rule of Procedure. If the defendants and their trial attorney knew of the existence of the Power of Attorney and chose not to use it during the trial because it would weaken the testimony of the principle defense witness who testified that she saw the victim sign the deed in question himself, there could be no ineffective assistance claim. Rather it would appear that the failure to alert the jury to the existence of that document would have been a reasonable and deliberate trial tactic.

Therefore, under the pronouncement of the Utah Supreme Court, the Rules of Appellate Procedure, and in view of the particular facts of this case, the court now finds that the defendants' claim of ineffective assistance of counsel should be raised by them on direct appeal rather than by way of the Motion To Arrest Judgment. The Motion To Arrest Judgment is hereby denied as it relies on the ineffective assistance of counsel claim raised by the defendants.

DID STATE PROVE A PUBLIC OFFENSE AGAINST DEFENDANTS?

Clearly the State presented evidence sufficient that, if it was believed by the jury, it would proved that the defendants committed the crimes of which they were convicted. The purported grantee of the deed transferring property to Anita Mae Butler testified that he did not sign the deed, nor did he authorized anyone to sign for him. Anita Mae Butler apparently signed the deed. The defendant Jimmie Butler, husband of Anita and son of the victim, signed the deed as a witness to the signatures affixed thereto, including the forged signature of the victim. The expert witness presented by the State testified that the signature of the victim on the deed was indeed a forgery, perpetrated by one who knew of the victim's signature and one who tried to make the

deed signature look like a genuine signature. The forged deed was published (uttered) by the defendant Anita Mae Butler and recorded. The defendants' jointly borrowed money on the home based on the forged deed, in the amount of $75,000, and later put the home up for sale. These acts occurred while the victim continued to occupy the home but without notice to him.

The defense claimed that the victim did indeed sign the Warranty Deed, probably while intoxicated, and that the signing was witnessed by the daughter of the defendants who was also the grand daughter of the victim. The jury had a clear choice. Did they believe that the victim signed the deed, that he had now forgotten the signing, and that the expert witness was mistaken, or did they believe that the defendants had prepared and uttered the deed for their own gain. They obviously chose to believe the latter. It is certainly reasonable for the jury to infer that the purported grantee and her husband, the ones who stood to gain from the forgery, and the ones who did gain from the forgery, and the ones who would be in a position to simulate the signature of the victim, were guilty of forging the document, or at least uttering a document that they knew to be forged.

The Motion To Arrest Judgment is denied as it relates to the defendants' assertion that the State failed to prove a public offense against the defendants.

JURY VERDICT THE PRODUCT OF PREJUDICE AND PSYCHOLOGICAL PRESSURE

The evidence presented to the jury was sufficient to convict the defendants of the charges against them. There is no evidence in the record that the jury verdict was based on some other motive than to do justice in the case. Defendants' assumptions and arguments do not prove that the jury was in any way improperly influenced, nor does the court so find.

The Motion To Arrest Judgment is denied as it relates to that claim.

THEFT CONVICTION HINGES UPON FORGERY

Clearly, the conviction of theft is inseparably tied to the conviction for forgery. The State claims no independent basis for the theft charge. However, that statement of fact does not, in and of itself, require that the judgment in this case be arrested, since the court has ruled that the judgment on the forgery charge should not be arrested.

THEREFORE, the defendants' Motion To Arrest Judgment is denied. The case should be set for sentencing as soon as practicable.

DATED this 3rd day of October 2005.

J. Philip Eves

J. Philip Eves, District Court Judge

Certificate of Mailing

I hereby certify that on this 3rd day of October 2005, I mailed true and correct copies of the above and foregoing document, first-class postage prepaid, to the following:

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Maxine Munson, Deputy Clerk

Addendum B

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH

...N COUNTY

BY

STATE OF UTAH, **Plaintiff,** **vs.** **ANITA BUTLER ,** **Defendant.**	**MEMORANDUM DECISION AND ORDER DENYING MOTION FOR NEW TRIAL** **Case No. 0215001175** **Judge John J. Walton**

The above entitled matter came before the court for hearing on January 18, 2006, for purposes of oral argument on Defendant's Motion for New Trial. Defendant Anita Butler waived her appearance and appeared by and through her attorney Michael IsBell, and the State of Utah appeared by and through Chief Deputy Iron County, Troy A. Little. The court heard arguments and reviewed memorandum from both parties. The court enters the following ruling on Defendant's Motion.

BACKGROUND

Defendants Jimmie Butler and Anita Butler were found guilty of forgery and theft by Jury Verdict on February 18, 2005. Defendant now seeks a new trial pursuant to Rule 24, Utah Rules of Civil Procedure.

Reference is made to the Memorandum Decision of Judge Eves dated October 3, 2005. That Memorandum Decision contains a description of the facts and procedural history of the case.

MOTION UNDER RULE 24

The court is not persuaded that a Motion for New Trial is the appropriate procedure to pursue a claim for ineffective assistance of counsel. The court can find no precedent for such a Motion. Defendant's Motion is not based on newly discovered evidence. The parties stipulated that the evidence Defendant claims should have been presented to the jury was known to her and to her counsel at the time of trial. Nor are the grounds traditionally made the basis of a Motion for a New Trial alleged in this case. Defendant may pursue her claim for ineffective assistance of counsel on appeal.

COURT'S PRIOR DECISION

The court finds that Defendant's Motion (or a near duplicate of the current motion) was previously filed by the Defendant pursuant to Rule 23, Utah Rules of Civil Procedure (as a Motion to Arrest Judgment) and was denied by Judge Eves. The court finds the reasoning in Judge Eves' decision persuasive in denying Defendant's Motion for New Trial. The Memorandum Opinion dated October 3, 2005, is, therefore, incorporated herein.

DEFENDANT'S SUBSTANTIVE ARGUMENT

Defendant's claim is that her trial attorney should have presented evidence to the jury of a Power of Attorney allegedly granted by the victim to his now deceased wife. The Power of Attorney was allegedly given to the victim prior to the execution of the deed the Defendant's were found to have forged or uttered. The Defendant argues that since the victim's wife apparently signed the deed that there would be no reason for Defendants to forge the victim's signature. In short, the victim's wife could have transferred the property to the Defendants on

her husband's behalf pursuant to the Power of Attorney.

As Judge Eves previously ruled, Defendant's attorney's trial strategy was likely tactical. Evidence of the Power of Attorney would have been at odds with the Defendant's key witness who testified that she saw the victim sign the deed. Therefore, evidence of the Power of Attorney may have been deemed contrary to the Defendant's most exculpatory evidence.

Defendant's other arguments claiming ineffective assistance of counsel were not emphasized by Defendant at oral argument and the court finds that each constitutes second guessing and conclusory allegations of ineffective assistance of counsel. Defendant's current counsel may have tried the case differently, but the decisions of trial counsel cannot be successfully challenged by simply claiming that a different procedural or substantive strategy should have been followed.

The court finds that there is not sufficient evidence of ineffective assistance of counsel as required by Strickland vs. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There has been no showing that counsel errors were so serious that Defendant's attorney was not functioning as counsel as guaranteed the Defendant by the Sixth Amendment. There has been no showing that a deficient performance prejudiced the defense or that counsel's conduct or his trial strategy so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.

By granting the Defendant's Motion the court would be doing what Strickland prevents, i.e... second-guessing trial counsel's strategic choices, however flawed those choices might appear in retrospect. Nor has there has been a showing that but for defense counsel's

unprofessional errors the result of the proceedings would have been different. Strickland, 466 694.

SUFFICIENCY OF EVIDENCE

The basis of Defendant's remaining arguments are not entirely clear but appear to be that no public offense was committed, or that the Jury's Verdict was not supported by the facts of the case.

The court finds that there is sufficient evidence in the record on which the Jury could have reached its Verdict. First, the court notes that Defendant should have marshaled the evidence in support of the Jury's Verdict in attempt to demonstrate that the Verdict is not supported by the record. The Defendant has not done so. In fact, Defendant has simply argued the evidence in a manner most favorable to her position.

The court finds that the Jury had a choice: did they believe the victim signed the deed, forgot the signing and that the expert witness was mistaken, or did they believe that the Defendants prepared and/or uttered the deed for their own gain? The Jury's conclusion as to the latter is supported by facts in the record.

The court finds that this Motion was denied by Judge Eves when previously captioned as a Motion to Arrest Judgment. Notwithstanding the different standard that may be appropriate for ruling on a Motion for New Trial, the same reasoning that Judge Eves applied in denying the Motion to Arrest Judgment is applicable to Defendant's Rule 24 Motion for New Trial, and the court incorporates Judge Eves' Memorandum Decision herein. The verdict is supported by the evidence and there is adequate evidence that a public offense was committed. See Memorandum Opinion of October 3, 2005.

The Defendant's final claim is that the Defendant's theft conviction hinges on an improper forgery conviction and should be set aside. However, the Court finds that the Jury's forgery verdict is supported by the evidence.

CONCLUSION

Based on the foregoing, Defendant's Motion for New Trial is denied.

Dated this 4 day of May, 2006.

JOHN J. WALTON
District Court Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true, and correct copy of the within and foregoing Memorandum Decision and Order Denying Motion for New Trial by first-class mail, postage fully prepaid, on this 9th day of May, 2006, to the following, to wit:

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Deputy Court Clerk