

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050790-CA
v.)	
)	F I L E D
Robin Lance Kaalooa,)	(December 14, 2006)
)	
Defendant and Appellant.)	2006 UT App 501

Third District, Salt Lake Department, 041905376
The Honorable J. Dennis Frederick

Attorneys: Lori Seppi, Salt Lake City, for Appellant
Mark L. Shurtleff and Matthew D. Bates, Salt Lake
City, for Appellee

Before Judges Billings, Orme, and Thorne.

THORNE, Judge:

Robin Lance Kaalooa appeals his convictions of murder, a first degree felony, see Utah Code Ann. § 76-5-203 (Supp. 2006), and obstruction of justice, a second degree felony, see id. § 76-8-306 (Supp. 2006).

Kaalooa makes several claims that he received ineffective assistance of counsel at trial. To prevail on a claim of ineffective assistance of counsel, Kaalooa "must meet the heavy burden of showing that (1) trial counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." State v. Chacon, 962 P.2d 48, 50 (Utah 1998).

Kaalooa first claims that trial counsel provided ineffective assistance when counsel elicited unfavorable testimony from Shelly Smith, a witness for the State. On cross-examination, counsel asked Smith in some detail about three other killings allegedly committed by Kaalooa. Under the circumstances, Kaalooa has not demonstrated that counsel's assistance "fell below an objective standard of reasonable professional judgment." Id. Although the exact reasons for counsel's actions are unknown,

they appear to have been an attempt to either discredit Smith as biased or incredible, or to preemptively acknowledge adverse facts that might come to the jury's attention at some other point in the trial. These represent legitimate trial strategies, even if the line of questioning ultimately fell flat or failed to provide the benefit that counsel was attempting to procure for his client. Therefore, Kaalooa cannot prevail under the first prong of the ineffective assistance of counsel test.

Further, even if we were to view counsel's questioning to be professionally unreasonable, Kaalooa has failed to demonstrate the prejudice necessary to establish ineffective assistance of counsel. Kaalooa's killing of Jerry Coates was not a disputed fact in this case; rather, the question was whether Kaalooa acted in self-defense. The evidence strongly suggests that Kaalooa did not act in self-defense: Kaalooa had made threats against Coates shortly prior to the killing; Kaalooa's description of Coates's attack on him with a machete was contradicted by the undamaged table that Kaalooa claimed to have used as a shield; and Kaalooa's actions after the altercation can only be described as demonstrating a complete lack of remorse for Coates's death. Perhaps most importantly, Kaalooa's own testimony was that he struck Coates several times after Coates was on the ground and not moving. Under these circumstances, we do not believe that there is a reasonable probability that the jury would have concluded that Kaalooa acted in self-defense if it had not heard Smith's testimony about the prior killings. See State v. Simmons, 2000 UT App 190, ¶4, 5 P.3d 1228 (requiring a defendant to "illustrate that, absent [counsel's] acts or omissions, there is a reasonable probability of a more favorable result" (quotations and citations omitted)).

Kaalooa's second claim arises from his counsel's stipulation to the admission of two crime scene photographs and the medical examiner's description of Coates's decomposed body. The photographs that Kaalooa challenges are not particularly gruesome, and both the photos and the testimony were relevant to the charges against Kaalooa. We see no reasonable probability that an objection to this evidence would have been successful, and counsel's decision to forego such an objection is therefore not ineffective assistance. See State v. Kelley, 2000 UT 41, ¶26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel.").

Kaalooa's third claim is that his counsel acted ineffectively by failing to move for a directed verdict based on insufficiency of the evidence. As discussed above, the evidence that Kaalooa did not act in self-defense was particularly strong in this case. Because there was more than sufficient evidence to convict Kaalooa

on both charges against him, a motion for directed verdict would properly have been denied and the failure to bring the motion cannot be deemed ineffective assistance. See id.

Kaaloa's final allegation is that trial counsel was ineffective because counsel did not request a jury instruction on manslaughter as a lesser-included offense to the charge of murder. We consider this failure to request a lesser-included offense instruction to be a classic example of an all-or-nothing approach, whereby counsel attempts to secure an acquittal by precluding the jury from reaching a compromise verdict of guilt on the lesser offense. See State v. Hall, 946 P.2d 712, 723-24 (Utah Ct. App. 1997). Such a strategy does not constitute ineffective assistance of a counsel. See id.

For the above reasons, we hold that Kaaloa has failed to meet the "heavy burden" of showing that his trial counsel rendered ineffective assistance. State v. Chacon, 962 P.2d 48, 50 (Utah 1998). Affirmed.

William A. Thorne Jr., Judge

I CONCUR:

Judith M. Billings, Judge

ORME, Judge (concurring in part and dissenting in part):

I concur in the court's decision, except for its determination that defense counsel's unfocused introduction of three other murders attributed to Kaaloa did not fall below the objective standard of reasonable professional judgment to which Kaaloa was constitutionally entitled. The tactical objectives theorized by the majority simply have no basis in the record or in logic. There is not so much as a hint that these alleged murders would otherwise have come to the attention of the jury. Nor is it possible to infer counsel intended to show the witness was incredible without at least a modicum of effort on counsel's part to show the witness's claims were false.

Because I agree that Kaaloa's claim of self-defense was completely incredible and that the jury would have reached the same verdict even without the improperly introduced testimony of prior murders, I concur in the decision to affirm Kaaloa's convictions.

Gregory K. Orme, Judge