IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Robert Carl Terry, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040326-CA F I L E D (May 25, 2006) 2006 UT App 217

Second District, Farmington Department, 011700517
The Honorable Michael G. Allphin

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

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Before Judges Greenwood, Davis, and McHugh.

GREENWOOD, Associate Presiding Judge:

Defendant Robert Carl Terry appeals his conviction for two counts of possession of clandestine laboratory precursors while in possession of a firearm, a first degree felony. See Utah Code Ann. §§ 58-37d-4(1)(a), -5(1)(a) (2004). On appeal, Defendant argues that his trial counsel rendered ineffective assistance. Defendant also argues that the trial court's failure to adequately instruct the jury concerning a lesser-included offense was plain error. We affirm.

Defendant first asserts that he was denied effective assistance of counsel because trial counsel failed to request jury instructions on a lesser-included offense. Specifically, Defendant contends that there was a rational basis for the jury to acquit him of the enhanced charge of clandestine laboratory precursors and instead convict him of the lesser-included offense of possession of a controlled substance precursor. See id. §§ 58-37c-3(12)(k), -19(2), -20(1) (2002). An ineffective assistance of counsel claim raised for the first time on appeal is reviewed as a question of law. See State v. Clark, 2004 UT 25,¶6, 89 P.3d 162.

To show ineffective assistance of counsel, a defendant must satisfy both prongs of a test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984). To meet the first prong, a defendant must show that counsel's performance was deficient and that specific acts or omissions fell below an objective standard of reasonable performance. See State v. Litherland, 2000 UT 76,¶19, 12 P.3d 92; Moench v. State, 2004 UT App 57,¶21, 88 P.3d 353. To satisfy the second prong, a defendant must show that he was prejudiced by counsel's deficient performance. See id.

To bolster his argument that his counsel's performance was deficient, Defendant cites State v. Baker, 671 P.2d 152 (Utah 1983), for the proposition that a defendant's request for lesser-included offense instructions must be granted if (1) the offenses are related because the statutory elements overlap and the evidence at trial involves proof of some or all of those overlapping elements; and (2) the evidence provides a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Id. at 159 (quoting Utah Code Ann. § 76-1-402(4) (2003)).

The propriety of a lesser-included offense instruction is determined by the evidence presented at trial. See State v. Kruger, 2000 UT 60,¶14, 6 P.3d 1116 (stating that the trial court must decide whether there is a "sufficient quantum of evidence" to ascertain whether a rational basis exists to "support both acquittal of the greater and conviction of the lesser offense"). In the instant case, Defendant provides only cursory references to the record and fails to cite relevant authority or caselaw to support his claim that, if requested, a lesser-included offense instruction would have been appropriate in this case. Consequently, Defendant fails to show how the jury would have had a "rational basis," Baker, 671 P.2d at 159, to acquit Defendant of clandestine laboratory precursors and instead convict him of the lesser-included charge of possession of a controlled substance precursor. Therefore, Defendant's reliance on Baker is unavailing.

Moreover, Defendant's failure to demonstrate that this case was appropriate for a lesser-included offense instruction defeats his argument that trial counsel's performance did not meet an objective standard of reasonable performance. See Litherland, 2000 UT 76 at ¶19. At trial, defense counsel's strategy was to demonstrate that the State had failed to prove that Defendant was involved in any crime, not that Defendant was guilty of the lesser-included charge of a controlled substance precursor. Such a strategy does not constitute ineffective assistance. See State v. Perry, 899 P.2d 1232, 1241 (Utah Ct. App. 1995) (rejecting ineffective assistance of counsel claim where trial counsel could

reasonably have chosen not to request lesser-included aggravated assault instruction to avoid weakening kidnaping defense). We necessarily apply a highly deferential standard of review to trial counsel's performance. See State v. Tennyson, 850 P.2d 461, 466 (Utah Ct. App. 1993). Failure to do so "would produce too great a temptation to second-guess trial counsel's performance on the basis of an inanimate record." Id. Applying a deferential standard to the facts at hand, we note that trial counsel's strategy not to seek lesser-included instructions could have been "sound trial strategy." Litherland, 2000 UT 76 at ¶19 (quotations and citation omitted). Therefore, we conclude that trial counsel did not fall below an objective standard of reasonable performance.[1]

Defendant additionally argues that the trial court's failure to sua sponte instruct the jury about the lesser-included offense of possession of a clandestine laboratory precursor was plain error. To establish plain error, an appellant must show (1) the existence of an error; (2) that the error should have been obvious to the trial court; and (3) that the error harmed the appellant and absent such error a more favorable outcome was reasonably likely. See State v. Nelson-Waggoner, 2004 UT 29,¶16, 94 P.3d 186 (Utah 2004). A plain error claim is a question of law, which we review for correctness. See Kruger, 2000 UT 60 at ¶11.

It is well settled that a court has no independent duty to give a lesser-included instruction unless a defendant so requests. See State v. Howell, 649 P.2d 91, 94 (Utah 1982); State v. Mitchell, 3 Utah 2d 70, 278 P.2d 618, 621 (1955). Hence, to the extent Defendant argues that the trial court's failure to independently give such an instruction was error, his argument fails.

Moreover, because Defendant cannot show that counsel's failure to request lesser-included instructions was not the result of a strategic decision to seek acquittal on all charges, we need not further consider his plain-error argument. See State

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[1]Because Defendant cannot meet the first prong of the test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), we need not consider the second prong. See State v. Diaz, 2002 UT App 288,¶38, 55 P.3d 1131. However, even if we were to consider the second prong, Defendant would be unable to demonstrate that counsel's alleged deficient performance prejudiced the outcome of his case. Defendant fails to cite to the record or proffer evidence to show he was prejudiced by trial counsel's performance. As a result, Defendant does not meet the second prong of the Strickland test.

v. Winfield, 2006 UT 4,¶14, 128 P.3d 1171 (explaining that "we have declined to engage in even plain error review when counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].") (alterations in original) (quotations and citation omitted); State v. Anderson, 929 P.2d 1107, 1109 (Utah 1996) ("We have held repeatedly that on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." (quotations and citation omitted)). In this instance, we reiterate that counsel's failure to object to the jury instructions could have been the product of a "conscious decision to refrain from [seeking an instruction]." State v. Hall, 946 P.2d 712, 716 (Utah Ct. App. 1997) (quotations and citation omitted). Hence, Defendant's plain error argument also fails.

We affirm.

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Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge