

NOT FOR PUBLICATION

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NO. 24277

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
LESLIE K. MALANI, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT  
(FC-CR NO. 01-1-004)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Defendant-Appellant Leslie K. Malani (Malani) appeals the Judgment filed on April 20, 2001 in the Family Court of the Third Circuit (family court).<sup>1</sup>

Malani was charged with and convicted of Abuse of Family and [sic] Household Member, in violation of Hawaii Revised Statutes § 709-906(1) (Supp. 2001).<sup>2</sup>

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<sup>1</sup> The Honorable Terence T. Yoshioka presided.

<sup>2</sup> Hawaii Revised Statutes § 709-906 (Supp. 2001) states in relevant part:

**§709-906 Abuse of family or household members; penalty.**

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

On appeal, Malani contends that he was provided with ineffective assistance of counsel at trial.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Malani's points of error as follows:

(1) Malani contends his trial counsel was ineffective because counsel failed to make a motion for summary judgment at the close of the State's presentation of evidence.<sup>3</sup> Specifically, Malani contends the State did not prove Malani's reason to physically abuse the complainant. The State need not prove the reason why Malani struck the complainant, only that he intended to maltreat her in such a manner as to cause injury, hurt, or damage to her body. HRS § 709-906; State v. Tanielu, 82 Hawai'i 373, 377, 922 P.2d 986, 990 (App. 1996). The failure of Malani's trial counsel to move for a judgment of acquittal, assuming arguendo it was error, did not result "in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001).

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<sup>3</sup> We construe Malani's argument to be that his trial counsel failed to make a motion for judgment of acquittal because a motion for summary judgment is inapplicable to a criminal proceeding.

(2) Malani contends his trial counsel was ineffective because counsel did not object to the hearsay testimony of Officer Castro. Malani fails to meet his burden that his counsel's failure to object to the alleged hearsay testimony of Officer Castro "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id.

(3) Malani contends his trial counsel was ineffective because counsel did not present any evidence at trial. Specifically, Malani contends his trial counsel should have presented a picture of the alleged mark left on the neck of the complainant and that an expert witness should have been called to confirm that the mark was consistent with the complainant's statement that she was struck on the neck. Malani makes no offer of proof that any pictures of the mark on the complainant's neck exist. Malani also does not cite any authority that requires the State to submit a picture of an alleged injury into evidence. In addition, if there was no picture of the mark on complainant's neck, there was no need to call an expert witness to verify that the mark was consistent with having been struck on the neck. The family court also found that Malani intelligently, knowingly, and voluntarily waived his right to testify. "Defense counsel's tactical decisions at trial generally will not be questioned by a reviewing court." State v. Silva, 75 Haw. 419, 441, 864 P.2d 583, 593 (1993) (internal quotation marks and citation omitted).

(4) Malani contends his trial counsel was ineffective because counsel did not make a motion for a mental evaluation of Malani prior to trial. There is no evidence in the record that Malani's trial counsel had any inkling Malani was mentally incompetent, and, therefore, there was no reason to request a mental evaluation of Malani.

(5) Malani contends his trial counsel was ineffective because counsel did not object to the State's version of the Agreed Statement as the Record on Appeal. A record of Malani's trial was not available because the courtroom recording device was not working properly on the day of his trial. Malani's trial counsel had a duty to reconstruct the missing portions of the record in accordance with Hawai'i Rules of Appellate Procedure Rule 10, and thus it was not error for his counsel to agree to the Agreed Statement as the Record on Appeal for purposes of this appeal. State v. Bates, 84 Hawai'i 211, 217-18, 933 P.2d 48, 54-55 (1997). Malani demonstrates no prejudice from the omission of portions of the transcript. When viewed as a whole, the assistance provided by Malani's trial counsel was "within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

Therefore,

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IT IS HEREBY ORDERED that the Judgment filed on April 20, 2001 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 7, 2004.

On the briefs:

Stephanie St. John  
for defendant-appellant.

Acting Chief Judge

Sandra L.S. Freitas,  
Deputy Prosecuting Attorney,  
County of Hawai'i,  
for plaintiff-appellee.

Associate Judge

Associate Judge