

NO. 23209

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

DENNIS HONG, Defendant-Appellant

and

ROSS NAKAMURA, Defendant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-1863)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Defendant-appellant Dennis Hong appeals from the first circuit court's conviction of and sentence for attempted murder in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-701.5 (1993), and place to keep firearm, in violation of HRS § 134-6(c) (Supp. 1999). On appeal, Hong argues that: (1) the prosecution improperly prejudiced the jury by repeatedly referring to gangs during pre-trial and trial proceedings; (2) his trial counsel was ineffective and the trial court committed plain error by failing to instruct the jury on attempted "extreme mental or emotional disturbance" (EMED) manslaughter; (3) his trial counsel was ineffective and the trial court committed plain error by failing to instruct the jury on attempted second degree murder's included offenses of first degree assault, second degree assault, attempted second degree assault, and

second degree reckless endangering; and (4) his trial counsel was ineffective and the trial court committed plain error by failing to give a specific unanimity instruction requiring agreement on the conduct supporting conviction for attempted murder or its included offenses.

Upon careful review of the record and briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that: (1) Hong did not suffer legal "prejudice" by the references to gangs because (a) such references were limited and the risk of prejudice speculative, and (b) there was overwhelming evidence, through testimony, supporting Hong's conviction; (2) the trial court did not err in not giving an EMED instruction because Hong failed to provide any evidence that he acted while under the influence of a reasonably induced loss of self control due to EMED, see State v. Sawyer, 88 Hawai'i 325, 333, 966 P.2d 637, 645 (1998); (3) the trial court did not reversibly err in not instructing the jury as to first degree assault, second degree assault, attempted second degree assault, and second degree reckless endangering because even if such offenses are included offenses of attempted second degree murder, the trial court's failure to instruct the jury as to such offenses would be harmless, see State v. Holbron, 80 Hawai'i 27, 47, 904 P.2d 912, 932 (1995), cited in State v. Haanio, No. 21720, slip op. at 26 (Haw. Ct. January 31, 2001); and (4) the trial court did not err in not giving a specific unanimity instruction because there was but one offense committed, see State v.

Valentine, 93 Hawai'i 199, 208-09, 998 P.2d 479, 488 (2000); State v. Alston, 75 Haw. 517, 531, 865 P.2d 157, 165 (1994). Accordingly, the circuit court's judgment and sentence were proper. Therefore,

IT IS HEREBY ORDERED that the judgment of conviction and sentence of the circuit court from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, March 9, 2001.

On the briefs:

Peter Van Name Esser
and Howard K. K. Luke,
for defendant-appellant

Donn Fudo, Deputy
Prosecuting Attorney,
for plaintiff-appellee