
NO. 23465

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

ALBERT IAN SCHWEITZER, Defendant-Appellant,

and

SHAWN SCHWEITZER, Defendant.

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 99-147)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Albert Ian Schweitzer appeals from the April 24, 2000 judgment of conviction and sentence of the Circuit Court of the Third Circuit, the Honorable Riki May Amano presiding, adjudging him guilty of and sentencing him for: murder in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-701.5 (1993); kidnapping, in violation of HRS § 707-720 (1993); and sexual assault in the first degree, in violation of HRS § 707-730 (1993). On appeal, Schweitzer alleges various errors by the trial court.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the issues raised and the arguments presented, we resolve each of Schweitzer's contentions on appeal as follows.

First, based on: (1) State v. Pauline, 100 Hawai'i 356, 367-68, 60 P.3d 306, 317-18 (2002) and State v. Pokini, 55 Haw. 640, 526 P.2d 94 (1974); (2) the fact that jury selection had not yet begun when the trial court ruled on the defense's motion for a change of venue; and (3) the trial court's statement that it would entertain a renewed motion for a change of venue after jury selection, we hold that the trial court did not err in denying Schweitzer's motion for a change of venue.

Second, based on this court's approval in Pauline of the jury selection process used in the instant case and our review of the trial court's examination of the potential jurors, we hold that the trial court did not commit plain error in denying Schweitzer's motion for a new trial.

Third, based on the trial judge's statement that "I am required to give the [EMED manslaughter] instruction if there's any fact that would support the -- the manslaughter," and our review of the evidence presented, we hold that the trial court did not err in refusing to give an EMED instruction. See State v. Sawyer, 88 Hawai'i 325, 333, 966 P.2d 637, 645 (1998).

Fourth, with respect to Schweitzer's contentions regarding the alleged included offenses, we hold that, based on the applicable statute of limitations and the offenses Schweitzer was ultimately convicted of, the trial court: (1) did not fail to bring the applicable included offenses to the attention of the parties, see State v. Timoteo, 87 Hawai'i 108, 117, 952 P.2d 865,

874 (1997); and (2) did not commit reversible error by allowing the defense to withdraw the instruction for negligent homicide in the second degree or by instructing the jury on unlawful imprisonment in the first degree. See State v. Kupau, 76 Hawai'i 387, 395-96, 879 P.2d 492, 400-01 (1994), overruled in part by State v. Haanio, 94 Hawai'i 405, 16 P.3d 246 (2001); Haanio, 94 Hawai'i at 405, 16 P.3d at 256.

Fifth, based on this court's holding in Pauline regarding the admissibility of a viewing of evidence by the jury, 100 Hawai'i at 375-77, 60 P.3d at 325-27, and the fact that the viewing in the instant case was performed by agreement of both the prosecution and the defense, we hold that the trial court did not err in allowing the jury to view the Volkswagen. See Territory v. Warner, 39 Haw. 386, 391 (1952); see also Barcai v. Betwee, 98 Hawai'i 470, 477, 50 P.3d 946, 953 (2002).

Sixth, with respect to Schweitzer's claims regarding the cumulative effect of error from the use of leading questions, introduction of hearsay, and allusions to Pauline's excluded confession, we hold that Schweitzer has failed to demonstrate reversible error. See State v. Diaz, 100 Hawai'i 210, 224-27, 58 P.3d 1257, 1271-74 (2002) (examining the individual errors specified on appeal to determine their cumulative effect).

Seventh, because evidentiary objections may be waived, see State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976); see also Hawai'i Rules of Penal Procedure Rule Rule 12(f) (2000),

we hold that offering into evidence the photographs Schweitzer complains of on appeal¹ did not constitute prosecutorial misconduct.

Eighth, given the agreement between the parties to admit various items and testimony into evidence and the presumption that the jury followed the court's instructions to consider only the evidence presented to it, see State v. Holbron, 80 Hawai'i 27, 46, 904 P.2d 912-931 (1995), we hold that the lack of objection to the various photographs did not constitute ineffective assistance of counsel. See Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976-77 (1993).

Ninth, we disregard Schweitzer's arguments regarding the testimony of nurse Antoinette Ganir because they were not properly raised pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b) (2000).

Tenth, because Schweitzer fails to cite any testimony by the witnesses from the Kapoho Kai Drive scene in the statement of points of error or the argument of his opening brief, we hold that he has failed to demonstrate error. See HRAP Rule 28(b); State v. Lagat, 97 Hawai'i 492, 497, 40 P.3d 894, 899 (2002).

¹ Appellant misrepresents that "Judge Amano -- not defense counsel -- questioned the use of two photographs of [Ireland's] brain offered here but excluded during the Pauline trial." The trial court indicated that the photos of Ireland's external genitalia were excluded during the Pauline trial. Moreover, the prosecution's witness who authenticated the photographs clearly stated that the photographs depicted the top of Ireland's skull. No photographs of Ireland's brain were submitted into evidence.

Finally, we hold that Schweitzer fails to sustain his burden of proving ineffective assistance of counsel based on trial counsel's examination of defense expert James Campbell because he fails to explain why trial counsel's examination reflects a lack of skill, judgment, or diligence, and fails to explain what defense was withdrawn or substantially impaired. See State v. Uyesugi, 100 Hawai'i 442, 449, 60 P.3d 843, 850 (2002).

Accordingly,

IT IS HEREBY ORDERED that the April 24, 2000 judgment of conviction and sentence from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, January 29, 2004.

On the briefs:

Peter Van Name Esser,
for defendant-appellant

Charlene Y. Iboshi,
for plaintiff-appellee