

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 24250

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

ROY ALAN COSTA, Defendant-Appellant

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APPEAL FROM THE SECOND CIRCUIT COURT  
(CR. NO. 00-1-0253)

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Roy Alan Costa appeals from the May 2, 2001 judgment of the circuit court of the second circuit, the Honorable Shackley F. Raffetto presiding, convicting Costa of and sentencing him for: (1) sexual assault in the second degree, in violation of HRS § 707-731(1)(a) and/or (b) (1993 & Supp. 1999)<sup>1</sup> (Count 1); (2) burglary in the first degree, in violation of HRS § 708-810(1)(c) (1993)<sup>2</sup> (Count 2); and (3) sexual assault

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<sup>1</sup> HRS § 707-731 provides in relevant part:

Sexual assault in the second degree. (1) A person commits the offense of sexual assault in the second degree if:

- (a) The person knowingly subjects another person to an act of sexual penetration by compulsion;
- (b) The person knowingly subjects to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless[.]

<sup>2</sup> HRS § 708-810(1)(c) provides in relevant part:

Burglary in the first degree. (1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

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- (c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

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in the third degree, in violation of HRS § 707-732(1)(e) (1993)<sup>3</sup> (Count 6). On appeal, Costa argues that: (1) the circuit court plainly erred by failing to properly instruct the jury; (2) the verdicts appear to be inconsistent; (3) the circuit court abused its discretion by denying his motion to continue; (4) repeated evidence of his prior bad acts deprived him of a fair trial; (5) prosecutorial misconduct requires reversal of his conviction; and (6) he was denied his constitutional right to effective assistance of counsel.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that: (1) the jury instructions were not erroneous, inasmuch as (a) unanimity instructions were not required and there was no reasonable possibility that the jury convicted Costa based on an unsupported theory, see State v. Jones, 96 Hawai'i 161, 181, 29 P.3d 351, 371 (2001) ("[U]nanimity is not required where alternative means of establishing an element of an offense are submitted to the jury, provided that there is no reasonable possibility that the jury's verdict was based on an alternative unsupported by sufficient evidence."), and (b) Costa clearly misinterpreted Instruction No. 36 and Instruction No. 37; (2) the jury was not required to find only absence of consent or only ineffective consent as to all counts because each count was a

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<sup>3</sup> HRS § 707-732(1)(e) provides in relevant part:

Sexual assault in the third degree. (1) A person commits the offense of sexual assault in the third degree if:

- . . . .
- (e) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor; provided that paragraphs (b), (c), and (d) shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices.

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separate offense based on separate acts; (3) the circuit court did not abuse its discretion by denying Costa's motion to continue because Costa failed to show that he exercised due diligence in obtaining Scritchfield as a witness, that Scritchfield would tender substantial favorable evidence, that Scritchfield was available and willing to testify, and that denial of the continuance would cause him material prejudice, see State v. Lee, 9 Haw. App. 600, 856 P.2d 1279 (1993); (4) the circuit court (a) properly excluded Kirsch's testimony that Costa was in jail and Detective Dadez's testimony that Diaz was in jail from evidence, and (b) did not abuse its discretion by admitting into evidence Detective Dadez's testimony that he knew Costa from the police station receiving desk because Costa "opened the door" to Detective Dadez's testimony as to how he knew Costa, see State v. Duncan, 101 Hawai'i 269, 67 P.3d 768 (2003); (5) Costa failed to show that the alleged prosecutorial errors, individually and cumulatively, constituted misconduct, see State v. St. Clair, 101 Hawai'i 280, 67 P.3d 779 (2003); and (6) Costa failed to establish the necessary facts to support his claims of ineffective assistance of counsel, see State v. Richie, 88 Hawai'i 19, 960 P.2d 1227 (1998). Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, November 26, 2003.

On the briefs:

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for the defendant-appellant  
Roy Alan Costa

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