***** NOT FOR PUBLICATION *****

NO. 25237

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,

vs.

MARK DUERING, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 96-0220)

AMENDED SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.,
and Circuit Judge Nakamura, in place of Acoba, J., recused)

Defendant-appellant Mark Duering (Duering) appeals from the June 17, 2002 final judgment of the Circuit Court of the First Circuit, convicting him of tampering with witness Wassa Coulibaly in violation of Hawaiʻi Revised Statutes (HRS) § 710-1072 (1993).[1] Duering argues that the circuit court erred by: (1) denying Duering's motion to dismiss; (2) incorrectly instructing the jury; and (3) committing other errors during trial including: (a) denying Duering's request to admit evidence of his acquittal in an underlying spousal abuse case; and (b) not penalizing the prosecutor for prosecutorial misconduct.

Upon carefully reviewing the record and briefs submitted, we hold as follows:

[1] The Honorable Derrick Chan presided over these proceedings.

(1) the circuit court did not err in denying Duering's motion to dismiss because:

(a) Duering has failed to show that HRS § 710-1071 is unconstitutionally overbroad. See Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 584 (2002) ("the overbreadth of a statute must not only be real, but substantial as well."); and

(b) the complaint filed against Duering was sufficient because it was drawn in the language of the statute which set forth all of the essential elements of the offense. See State v. Balanza, 93 Hawai‘i 279, 286, 1 P.3d 281, 288 (2000) ("Where the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms readily comprehensible to persons of common understanding, a charge drawn in the language of the statute is sufficient.");

(2) the circuit court's:

(a) omission of instructions for a justification defense was correct because affirmative defenses were not necessary to exclude situations where HRS § 710-1071 (1993) infringed on constitutionally protected speech because as stated supra, HRS § 710-1071 is not

unconstitutionally overbroad. Therefore, an affirmative defense instruction is unnecessary;

(b) inclusion of tampering with a witness pursuant to HRS § 710-1072 as a lesser included offense of intimidating a witness pursuant to HRS § 710-1071 was erroneous. HRS § 701-109(4)(a) and (c) (1993). Pursuant to HRS § 701-109(4)(a), "an offense is included if it is impossible to commit the greater without also committing the lesser." State v. Friedman, 93 Hawai'i 63, 72, 996 P.2d 268, 277 (2000)(quoting State v. Burdett, 70 Haw. 85, 87-88, 762 P.2d 164, 166 (1988). It is possible to commit the greater offense of intimidating a witness without committing the lesser offense of tampering with a witness. For example, a person commits the offense of intimidating a witness when a person uses a threat or force to influence a witness to testify truthfully, but such conduct does not constitute the offense of tampering with a witness. Pursuant to HRS § 701-109(4)(c), tampering with a witness is not a lesser included offense of intimidating a witness because it requires the same state of mind and has a greater risk of injury. See State v. Kinnane, 79 Hawai'i 46, 55, 897 P.2d 973, 983 (1995). The error of including tampering with a witness as a lesser included offense was not

harmless beyond a reasonable doubt because there is a reasonable possibility that the error contributed to Duering's conviction; therefore Duering's conviction must be set aside. See State v. Arceo, 84 Hawai'i 1, 11-12, 928 P.2d 843, 853-54 (1996);

(c) omission of the definition of "testimony" was not erroneous because the word has a commonplace meaning. See State v. Faria, 100 Hawai'i 383, 389, 60 P.3d 333, 339 (2002); and

(d) substitution of the word "evidence" for the word "testimony" on the verdict form was error but was harmless because there was no evidence (other than Coulibaly's testimony) which could have been withheld; therefore, there was no reasonable possibility that the error might have contributed to Duering's conviction. See Arceo, 84 Hawai'i at 11-12, 928 P.2d at 853-54; and

(3) the circuit court did not abuse its discretion when it granted the State of Hawaii's [hereinafter, prosecution's] motion in limine to exclude evidence that Duering was acquitted in the underlying abuse case. The circuit court concluded that, pursuant to Hawai'i Rules of Evidence (HRE) Rule 403, this evidence was more prejudicial than probative. There is no indication that Duering's acquittal on an abuse charge had any bearing on the charges at issue in the

instant case, and as a matter of fact, at trial Duering repeatedly informed the jury that he had been acquitted in the underlying abuse case, in violation of the court's in limine order; and

(4) the prosecution did not commit prosecutorial misconduct when it referred to the underlying abuse case because Duering earlier "opened the door" to testimony about the underlying abuse case during jury voir dire, his opening statement, and in his cross-examination of Coulibaly by referring to the underlying abuse case and his acquittal therein, in violation of the circuit court's order in limine. Moreover, Duering did not object to the prosecution's references to the underlying abuse case after he "opened the door" to such testimony, thus waiving his right to appeal this issue. See Tabieros v. Clark Equipment Co., 85 Hawai'i 336, 379 n.29, 944 P.2d 1279, 1322 n.29 (1997). Assuming arguendo that the prosecution did commit prosecutorial misconduct in referring to the underlying abuse case, on this record there is no reasonable possibility that the prosecution's misconduct may have contributed to Duering's conviction. See State v. McElroy, 105 Hawai'i 352, 356, 97 P.3d 1004, 1008 (2004). Therefore,

IT IS HEREBY ORDERED that the circuit court's final judgment filed June 17, 2002 is reversed.

DATED: Honolulu, Hawai'i, February 3, 2005.

On the briefs:

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