

NO. 23382

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
BENJAMIN WILLIAMS, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 98-0768)

SUMMARY DISPOSITION ORDER

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

On August 18, 1999, Defendant-Appellant Benjamin Williams (Williams) was convicted,¹ pursuant to a jury trial,² of Count I: Robbery in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-841(1)(a) (1993);³ Count III: Sexual Assault in the First Degree, in violation of HRS § 707-730(1)(a) (1993);⁴ Count IV: Sexual Assault in the Third

¹Williams was acquitted of Count II: Kidnapping.

²The Honorable Marie N. Milks presided.

³HRS § 708-841(1)(a) provides:

§708-841 Robbery in the second degree. (1) A person commits the offense of robbery in the second degree if, in the course of committing theft:

- (a) The person uses force against the person of anyone present with the intent to overcome that person's physical resistance or physical power of resistance[.]

⁴HRS § 707-730(1)(a) provides:

§707-730 Sexual assault in the first degree. (1) A person commits the offense of sexual assault in the first degree if:

- (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion[.]

Degree, in violation of HRS § 707-732(1)(e) (1993);⁵ and Count V: Indecent Exposure, in violation of HRS § 707-734(1) (1993).⁶ Williams appeals the Judgment⁷ filed in the Circuit Court of the First Circuit (circuit court) on March 22, 2000.

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 Williams' points of error as follows:

(1) Williams contends the circuit court erred in denying his Motion to Sever Indecent Exposure Charge.⁸ Joinder of the offenses was proper under Hawai'i Rules of Penal Procedure

⁵HRS § 707-732(1)(e) provides:

§707-732 Sexual assault in the third degree. (1) A person commits the offense of sexual assault in the third degree if:

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(e) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor[.]

⁶HRS § 707-734(1) provides:

§707-734 Indecent exposure. (1) A person commits the offense of indecent exposure if, the person intentionally exposes the person's genitals to a person to whom the person is not married under circumstances in which the actor's conduct is likely to cause affront.

⁷The Judgment states that Williams both pled guilty to Counts I, III, IV, and V and was convicted of these counts after a jury trial. The record clearly states that Williams entered a not guilty plea at arraignment and plea and did not enter a plea subsequent to arraignment and plea to any of the charges. The circuit court is hereby ordered to file an Amended Judgment changing the wording under "DEFENDANT'S PLEA:" to "Not guilty" and deleting the language under the section "CHARGE(S) TO WHICH DEFENDANT PLED."

⁸The Honorable John S.W. Lim presided at the hearing on the motion.

(HRPP) Rule 8(a).⁹ Williams did not show prejudice required for relief under HRPP Rule 14;¹⁰ therefore, the circuit court did not abuse its discretion. Furthermore, Williams' failure to renew the motion for severance at trial amounted to a waiver of the motion. State v. Matias, 57 Haw. 96, 98-99, 550 P.2d 900, 902 (1976); State v. Hilongo, 64 Haw. 577, 579, 645 P.2d 314, 316 (1982).

(2) Williams contends the circuit court erred in denying his Motion in Limine to Inform Jury of the Truth and Length of Defendant and Complainant's History of Co-habitation. Williams was allowed to produce testimony as to his business and personal relationship with the complainant; therefore, the circuit court did not abuse its discretion in denying as cumulative letters and documents offered to prove the same.

⁹/HRPP Rule 8(a) provides in pertinent part:

Rule 8. JOINDER OF OFFENSES AND DEFENDANTS.

(a) **Joinder of Offenses.** Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses:

. . . .

(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

¹⁰/HRPP Rule 14 provides:

Rule 14. RELIEF FROM PREJUDICIAL JOINDER.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in a charge or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Hawai'i Rules of Evidence (HRE) Rule 403.¹¹ Furthermore, the circuit court was correct as a matter of law in denying as irrelevant the admission of photographs offered to prove the depth of the personal relationship between Williams and the complainant where consent was not used as a defense to the charge of sexual assault. HRE Rule 402;¹² HRE Rule 412 (1993).¹³

¹¹/HRE Rule 403 provides:

Rule 403 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

¹²/HRE Rule 402 provides:

Rule 402 Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

¹³/HRE Rule 412 provides, in relevant part:

Rule 412 Sexual assault cases; relevance of victim's past behavior. (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual assault is not admissible to prove the character of the victim in order to show action in conformity therewith.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual assault, evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence is not admissible to prove the character of the victim in order to show action in conformity therewith, unless such evidence is:

-
- (2) Admitted in accordance with subsection (c) and is evidence of:
 -
 - (B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual

(continued...)

(3) Williams argues that the circuit court's refusal to allow defense counsel the requested forty-five minutes of closing argument was prejudicial to Williams. We find no abuse of the court's discretion in limiting the duration of closing arguments to thirty-three minutes. State v. Adams, 61 Haw. 233, 234-35, 602 P.2d 520, 521 (1979); Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555, 45 L. Ed. 2d 593 (1975) ("The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be negative or redundant.") Furthermore, Williams has shown no prejudice and has failed to discuss this point of error in the argument section of his Opening Brief. "Points not argued may be deemed waived." Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7).

(4) Williams contends the circuit court erred in refusing to give his requested jury instructions numbers 1, 7 and 10. In considering the jury instructions as a whole, we conclude the instructions are not prejudicially insufficient, erroneous, inconsistent or misleading. State v. Knight, 80 Hawai'i 318, 324, 909 P.2d 1133, 1139 (1996). We also note that Williams'

¹³/ (...continued)

behavior with respect to which sexual assault is alleged.

Opening Brief fails to comply with HRAP Rule 28(b)(4)(B)¹⁴ with regard to the format of this point of error.

(5) Williams contends the circuit court erred in denying his Motion for Judgment of Acquittal. Williams presented no argument and has, therefore, waived this point of error. HRAP Rule 28(b)(7).

(6) Williams also argues that he "was denied a fair trial due to exclusion of black peers from gross jury panel." This argument is not listed as a point of error as required by HRAP Rule 28(b)(4) and, because we do not find plain error, will be disregarded.

¹⁴/HRAP Rule 28 provides in pertinent part:

Rule 28. BRIEFS.

. . . .
(b) Opening Brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

. . . .
(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

. . . .
(B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;

. . . .
Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

Therefore,

IT IS HEREBY ORDERED that the March 22, 2000 Judgment entered in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 12, 2002.

On the briefs:

Andre' S. Wooten
for defendant-appellant.

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge