NOT FOR PUBLICATION

NO. 23951

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
WILLIAM NAPEAHI, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-0014)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant William Napeahi (Napeahi) appeals from the December 4, 2000, Amended Judgment entered by the Circuit Court of the First Circuit (circuit court).[1] Napeahi was convicted, as charged, of the following:

> Counts I and II: Terroristic Threatening in the First Degree in violation of Hawaii Revised Statutes (HRS) § 707-716(1)(d) (1993)[2];
>
> Count III: Reckless Endangering in the First Degree in violation of HRS § 707-713 (1993)[3];

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[1]/The Honorable Marie N. Milks presided.

[2]/HRS § 707-716 (1993) provides in relevant part:

> **§707-716 Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
> . . . .
> (d) With the use of a dangerous instrument.
> (2) Terroristic threatening in the first degree is a class C felony.

[3]/HRS § 707-713 (1993) provides:

> **§707-713 Reckless endangering in the first degree.** (1) A person commits the offense of reckless endangering in the first degree if the person employs widely dangerous means in a manner

(continued...)

Count IV: Place to Keep Loaded Pistol or Revolver in violation of HRS § 134-6(c)&(e) (Supp. 2002)[4];

Count V: Felon in Possession of any Firearm in violation of HRS § 134-7(b)&(h) (Supp. 2002).[5]

[3/](...continued)
which recklessly places another person in danger of death or serious bodily injury or intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury.

(2) Reckless endangering in the first degree is a class C felony.

[4/]HRS § 134-6(c)&(e) (Supp. 2002) provides:

§134-6 Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty.

. . . .

(c) Except as provided in sections 134-5 and 134-9, all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the place of purchase to the possessor's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

. . . .

(e) Any person violating subsection (a) or (b) shall be guilty of a class A felony. Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or a revolver, shall be guilty of a class C felony.

A conviction and sentence under subsection (a) or (b) shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under subsection (a) or (b) may run concurrently or consecutively with the sentence for the separate felony.

[5/]HRS § 134-7(b)&(h) (Supp. 2002) provides:

§134-7 Ownership or possession prohibited, when; penalty.

. . . .

(b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for,

(continued...)

On appeal, Napeahi contends (1) the circuit court reversibly erred by denying his motion for continuance of the trial; erred by not clearly establishing that he knowingly, intelligently, and voluntarily waived his right to testify at the jury trial; and erred by allowing his right to compulsory process to be waived without his knowledge or consent, and (2) the verdicts were not supported by substantial evidence. We disagree with Napeahi's contentions and affirm the December 4, 2000, Amended Judgment of the Circuit Court of the First Circuit.

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 Napeahi's points of error as follows:

(1) Napeahi contends the circuit court erred in refusing to grant his request to continue the trial so that he could obtain discovery and represent himself *pro se*. Napeahi alleges that his request was reasonable because his relationship with his attorney was strained, and, therefore, the denial was an abuse of discretion.

[5/](...continued)
or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

. . . .

(h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony. Any person violating subsection (c), (d), (e), (f), or (g) shall be guilty of a misdemeanor.

The record shows that Napeahi moved for a continuance to retain private counsel on September 15, 2000, a few days prior to the onset of the trial. He did not request to proceed pro se until the close of the State's case-in-chief.

Not only is the record lacking any indication that Napeahi's request constituted anything more than a delay tactic, requests for a continuance made very shortly before trial are viewed with disfavor by the court. State v. Lee, 9 Haw. App. 600, 603, 856 P.2d 1279, 1281 (1993). "In the interest of judicial economy, a judge is not expected to wait indefinitely." Coyle v. Compton, 85 Hawai‘i 197, 209, 940 P.2d 404, 416 (1997).

It was within the sound discretion of the circuit court to deny Napeahi's request for a continuance. Lee, 9 Haw. App. at 603, 856 P.2d at 1281. Therefore, we conclude that no error occurred.

(2) Napeahi argues the circuit court erred by not clearly establishing that he knowingly, intelligently, and voluntarily waived his right to testify at his trial. It is clearly established that "trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify." State v. Tachibana, 79 Hawai‘i 226, 236, 900 P.2d 1293, 1303 (1995). The waiver must be knowingly and voluntarily made. Id. at 239, 900 P.2d at 1306.

Napeahi, on his own accord, decided mid-trial to remain in his cell block and no longer participate in his trial. The record clearly reflects that the judge, both counsel, and the court reporter then proceeded to his cell block, and the judge explained his constitutional right to testify and that his failure to return to the courtroom would be deemed a waiver of this right under Tachibana.

It appears from the record that Napeahi waived his right to testify. Napeahi does not allege, nor does the record indicate, that the recorded responses were an inaccurate reflection of what was said during the colloquy or that he did not speak the recorded responses. Nor is there any evidence on the record that Napeahi was unable to understand what the judge was saying.

We therefore conclude that the circuit court did in fact conduct the waiver colloquy and properly advised Napeahi of his right to testify, and that Napeahi waived this right.

(3) Napeahi alleges the circuit court erred by allowing his right to compulsory process to be waived without his knowledge or consent. Napeahi presents no support for his contention, but merely asserts that the public defender's decision not to call the second witness was arbitrary and unilateral because Napeahi had already objected to the public defender's continued representation of him.

We generally do not question defense counsel's tactical trial decisions. State v. Antone, 62 Haw. 346, 352, 615 P.2d 101, 106 (1980). Lawyers are permitted to make the necessary strategic decisions when trying a case. Id. In addition, unless the second witness could have produced "relevant and material testimony" that would have benefitted Napeahi, there is not a constitutional violation. State v. Mitake, 64 Haw. 217, 223, 638 P.2d 324, 329 (1981). Napeahi does not aver that there is any relevant or material evidence that the second witness would have presented, and we shall not speculate as to what that evidence could have been.

Accordingly, we conclude there was no denial of Napeahi's right to compulsory process.

(4) Napeahi contends the evidence adduced at trial did not support the verdicts. The record contains substantial credible evidence upon which the jury found Napeahi was in fact the perpetrator of the offenses, in contravention of his alibi and misidentification defense. Taking the evidence in the light most favorable to the State, and fully recognizing the province of the trier of fact, we conclude that a reasonable person might fairly conclude guilt beyond a reasonable doubt. State v. Pone, 78 Hawai‘i 262, 265, 892 P.2d 455, 458 (1995).

Accordingly, the Amended Judgment entered on December 4, 2000 by the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai‘i, September 30, 2003.

On the briefs:

Nelson Goo
for defendant-appellant.

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

Chief Judge

Associate Judge

Associate Judge