NO. 24130

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
MARCO LEE, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 00-101463)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., and Lim, J.;
Foley, J., concurring separately)

Defendant-Appellant Marco C. Lee (Defendant) appeals the February 5, 2001 judgment, entered upon a jury's verdict in the circuit court of the first circuit,[1] that convicted him of robbery in the second degree, in violation of Hawaii Revised Statutes § 708-841(1)(a) (1993).

Upon an assiduous review of the record and the briefs submitted by the parties, and giving due consideration to the arguments advanced and the issues raised by the parties, we resolve Defendant's two points of error as follows:

(1) Defendant's first principal argument on appeal is that he was denied the effective assistance of counsel in seven respects:

[1] The Honorable Karl K. Sakamoto, judge presiding.

(a) First, Defendant claims that his trial counsel was ineffective in failing to request a curative instruction at the time his photograph was admitted into evidence and a prosecution witness referred to the photograph as a "mug shot[]." We disagree. By not requesting a curative instruction, trial counsel avoided emphasizing the negative implications of what trial counsel later clarified was merely the witness's personal impression of the photograph. "Specific actions or omissions alleged to be error but which had an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (citation and internal block quote format omitted; emphasis in the original). "Lawyers require and are permitted broad latitude to make on-the-spot strategic choices in the course of trying a case." State v. Silva, 75 Haw. 419, 441, 864 P.2d 583, 593 (1993) (citations omitted). "Defense counsel's tactical decision at trial will not be questioned by a reviewing court." State v. Samuel, 74 Haw. 141, 156, 838 P.2d 1374, 1382 (1992) (citation omitted). At any rate, the mention of "mug shots" did not "result[] in either the withdrawal or substantial impairment of a potentially meritorious defense[,]" State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980) (footnote and citations omitted), where the admission into evidence of Defendant's old mug shot, which was used in the photographic

lineup from which Defendant was identified as the perpetrator, was necessary before trial counsel could point out the differences between the mug shot and Defendant's appearance at the time of the offense, and was consistent with Defendant's other defense strategy, discussed next.

(b) Second, Defendant asserts that his trial counsel was ineffective in introducing evidence that Defendant had previously committed a serious crime and had been incarcerated for that crime. This point lacks merit. Introducing such evidence was an integral part of the defense strategy to convince the jury that Defendant's friend and companion on the night of the incident, who was initially identified as the robber, implicated Defendant as the robber in order to avoid incarceration, because he had first-hand information from Defendant about the hardships of prison life. The alleged error had an obvious tactical basis for benefitting Defendant's case, Dan, 76 Hawai'i at 427, 879 P.2d at 532; Silva, 75 Haw. at 441, 864 P.2d at 593, and did not withdraw or substantially impair a potentially meritorious defense. Antone, 62 Haw. at 348-49, 615 P.2d at 104. Hence, we will not question trial counsel in this respect. Samuel, 74 Haw. at 156, 838 P.2d at 1382.

(c) Third, Defendant maintains that his trial counsel was ineffective in introducing evidence that Defendant had been incarcerated pending trial. We disagree. Here, trial counsel's defense tactic was to show that, because Defendant had been

incarcerated since his arrest for the robbery, he had lost touch with the witnesses who could support his alibi defense. Dan, 76 Hawai‘i at 427, 879 P.2d at 532; Silva, 75 Haw. at 441, 864 P.2d at 593; Samuel, 74 Haw. at 156, 838 P.2d at 1382. We believe, in any event, that it is common knowledge that defendants who fail to make bail remain incarcerated pending trial, such that the revelation bore scant prejudice to Defendant. Antone, 62 Haw. at 348-49, 615 P.2d at 104.

(d) Fourth, Defendant argues that his trial counsel was ineffective in failing to interview a key prosecution witness and for not objecting to the witness's testimony. This point is without merit. First, even if the witness had agreed to talk to Defendant's trial counsel, the record shows that there was nothing new or useful trial counsel would have gained in conducting an interview, and Defendant does not argue otherwise on appeal. Trial counsel had the witness's statement to the police, and instead opted to extensively cross-examine the witness, wherein trial counsel was able to elicit admissions supportive of Defendant's case. Hence, in this respect, there was no "withdrawal or substantial impairment of a potentially meritorious defense." Antone, 62 Haw. at 348-49, 615 P.2d at 104 (footnote and citations omitted). Cf. State v. Pacheco, 96 Hawai‘i 83, 102, 26 P.3d 572, 591 (2001) ("the record does not reflect how these witnesses [(whom defense counsel failed to investigate)] would have assisted Pacheco's defense"). Second,

the record yields no basis for objection to the witness's testimony, and Defendant provides no such basis on appeal. "Trial counsel is not required to make futile objections merely to create a record impregnable to assault for claimed inadequacy of counsel." Antone, 62 Haw. at 351, 615 P.2d at 106 (ellipsis, citations and internal quotation marks omitted).

(e) Fifth, Defendant avers that his trial counsel was ineffective in introducing evidence of the complaining witness's identification of Defendant at the preliminary hearing. This point is devoid of merit. Trial counsel's clear purpose during this juncture of Defendant's testimony was to emphasize that the first time Defendant saw the complaining witness, whom Defendant was alleged to have previously robbed, was at the preliminary hearing. Here, trial counsel's actions had "an obvious tactical basis for *benefitting* [Defendant's] case [and] will not be subject to further scrutiny." Dan, 76 Hawai'i at 427, 879 P.2d at 532 (citation and internal block quote format omitted; emphasis in the original). See also Silva, 75 Haw. at 441, 864 P.2d at 593; Samuel, 74 Haw. at 156, 838 P.2d at 1382. In this regard, Defendant's testimony that the complaining witness identified him at the preliminary hearing, after having identified him previously, did little to bolster the reliability of any of the other identifications that were made of Defendant. Antone, 62 Haw. at 348-49, 615 P.2d at 104.

(f) Sixth, Defendant contends his trial counsel was ineffective in failing to cross-examine the complaining witness about his use of marijuana. We disagree. The record is devoid of any foundation regarding the complaining witness's use of marijuana at or around the time of the incident. Cf. Silva, 75 Haw. at 441, 864 P.2d at 593 (the mere failure to elicit available evidence that the victim drank and used marijuana on the day of the incident did not rise to the level of ineffective assistance of counsel). Even assuming, *arguendo*, that evidence could have been adduced at trial that the complaining witness was under the influence of marijuana on the night of the incident, this would only serve to undermine the complaining witness's initial identification of Defendant's friend and companion on the night of the incident as the assailant, an identification the defense strategy aimed to bolster, and would by contrast bolster the complaining witness's later identification of Defendant as his attacker, an identification the defense strategy aimed to undermine. If trial counsel did as Defendant urges in this point on appeal, she would have substantially impaired a potentially meritorious defense. Antone, 62 Haw. at 348-49, 615 P.2d at 104.

(g) Seventh, Defendant claims that his trial counsel was ineffective in suggesting in closing argument that Defendant's previous crime was a robbery, a theft and/or a rape. On the contrary. The transcript reveals quite clearly that trial

counsel was not suggesting this in any way. Nor could her remarks be reasonably understood as such. Antone, 62 Haw. at 348-49, 615 P.2d at 104.

(h) Finally, Defendant "contends that the cumulative effect of the alleged errors discussed *supra* deprived [him] of a fair trial. After carefully reviewing the record, we conclude that the individual errors raised by [Defendant] are by themselves insubstantial. Thus it is unnecessary to address the cumulative effect of these 'alleged errors.'" Samuel, 74 Haw. at 160, 838 P.2d at 1383 (citation omitted).

(2) Defendant's second principal argument on appeal is that the court erroneously rejected his requested jury instruction on eyewitness identification. We disagree.

The Hawai'i Supreme Court has repeatedly held that a trial court does not abuse its discretion when it refuses to give the defendant's requested eyewitness identification instruction, where the opening statements, the cross-examination of the prosecution witnesses, the arguments to the jury, and the general instructions of the court adequately directed the jury's attention to the identification evidence. State v. Pahio, 58 Haw. 323, 331-32, 568 P.2d 1200, 1206 (1977); State v. Padilla, 57 Haw. 150, 162, 552 P.2d 357, 365 (1976); State v. Okumura, 78 Hawai'i 383, 404-5, 894 P.2d 80, 101-2 (1995); State v. Vinge, 81 Hawai'i 309, 316-17, 916 P.2d 1210, 1217-18 (1996). First, to be

clear, the court did give the jury the first paragraph of the eyewitness identification instruction Defendant requested, sans its first sentence. Second, trial counsel's opening statement, cross-examination of the prosecution witnesses and closing argument, and the instructions given by the trial court, both its general instructions and the redacted first paragraph of Defendant's instruction, adequately directed the jury's attention to the identification evidence. There is absolutely no question that in this case, it was made crystal clear to the jury, from opening statements through closing arguments, that identification was the one and the only issue for trial. Defendant's point is not well taken.

Therefore,

IT IS HEREBY ORDERED that the February 5, 2001 judgment is affirmed.

DATED: Honolulu, Hawai'i, September 30, 2002.

On the briefs:

Michael Tanigawa,
for defendant-appellant.

Chief Judge

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge