

NO. 24977

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee/Cross-Appellant,
v. TYRONE GALDONES, also known as Jiggy,
Defendant-Appellant/Cross-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-1690)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant/Cross-Appellee Tyrone Galdones
(Galdones) appeals from the February 12, 2002 Judgment¹ of the
Circuit Court of the First Circuit² (circuit court). Galdones
was charged with and convicted of the following:

^{1/} Galdones was charged in Count I with Hawaii Revised Statutes (HRS) §§ 707-701.5, 706-656, and 706-660.1, and the jury found Galdones guilty as charged. However, the February 12, 2002 Judgment fails to state in the boxes labeled "ORIGINAL CHARGE(S)" and "DEFENDANT IS CONVICTED AND FOUND GUILTY OF" that in Count I Galdones was charged with and convicted of HRS § 707-701.5. The circuit court is hereby ordered to file an Amended Judgment setting forth the § 707-701.5 charge.

^{2/} The Honorable Gerald H. Kibe presided.

Count I: Murder in Second Degree in violation of Hawaii Revised Statutes (HRS) §§ 707-701.5 (1993),³ 706-656 (1993 & Supp. 2003),⁴ and 706-660.1 (1993);⁵

^{3/} HRS § 707-701.5 (1993) provides as follows:

§707-701.5 Murder in the second degree. (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

^{4/} HRS § 706-656 (1993 & Supp. 2003) provides:

§706-656 Terms of imprisonment for first and second degree murder and attempted first and second degree murder. (1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole.

As part of such sentence the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

(2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

If the court imposes a sentence of life imprisonment without possibility of parole pursuant to section 706-657, as part of that sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

^{5/} HRS § 760-660.1 (1993) provides, in relevant part, as follows:

§ 706-660.1 Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony.

. . . .

(3) A person convicted of a felony, where the person had a
(continued...)

Count II: Place to Keep Pistol or Revolver in violation of HRS § 134-6(c) and (e) (Supp. 2003);⁶ and

^{5/}(...continued)

semiautomatic firearm or automatic firearm in the person's possession or used or threatened its use while engaged in the commission of the felony, whether the semiautomatic firearm or automatic firearm was loaded or not, and whether operable or not, shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(a) For murder in the second degree and attempted murder in the second degree--twenty years.

^{6/} HRS § 134-6 (Supp. 2003) provides, in relevant part, as follows:

§134-6 Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty. (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:

- (1) A felony offense otherwise defined by this chapter;
- (2) The felony offense of reckless endangering in the first degree under section 707-713;
- (3) The felony offense of terroristic threatening in the first degree under section 707-716(1)(a), 707-716(1)(b), and 707-716(1)(d); or
- (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

. . . .

(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 purchaser'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
(continued...)

Count III: Carrying, Using or Threatening to use a Firearm in the Commission of a Separate Felony in violation of HRS § 134-6(a) and (e) (Supp. 2003).⁷

On appeal, Galdones contends the trial court committed plain error (1) in giving court's special instruction number 10 regarding factors to consider in evaluating the mitigating defense of extreme mental or emotional disturbance; (2) in failing to instruct the jury on the included offense of reckless manslaughter; and (3) in failing to declare a mistrial or take other corrective action where the prosecutor argued an incorrect proposition of law.

Plaintiff-Appellee/Cross-Appellant the State of Hawaii (State) contends that in the event Galdones' conviction is vacated, the circuit court erroneously precluded the State from calling its expert witness at trial.

^{6/} (...continued)

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 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.

^{7/} Note 6 supra.

We disagree with Galdones' contentions and affirm the February 12, 2002 Judgment. As we are not vacating Galdones' conviction, we need not address the State's point of error.

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 as raised by the parties, we resolve Galdones' points of error as follows:

(1) Special instruction No. 10 regarding the factors to consider in evaluating the mitigating defense of extreme mental or emotional distress (EMED) was a correct statement of the law, and therefore, no error occurred. State v. Perez, 90 Hawai'i 65, 976 P.2d 379 (1999).

(2) The circuit court did not commit plain error in failing to instruct the jury on the included offense of reckless manslaughter because there was no rational basis in the evidence to support a reckless manslaughter instruction. State v. Haanio, 94 Hawai'i 405, 407, 16 P.3d 246, 248 (2001).

(3) The circuit court did not commit error in failing to declare a mistrial or take other corrective action because the prosecutor did not state an incorrect proposition of law, and therefore, prosecutorial misconduct did not occur. State v. Kaiama, 81 Hawai'i 15, 25-26, 911 P.2d 735, 745-46 (1996); Perez, 90 Hawai'i at 74, 976 P.2d at 388.

Accordingly, we affirm the February 12, 2002 Judgment of the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, July 9, 2004.

On the briefs:

Michael G.M. Ostendorp
for defendant-appellant/
cross-appellee.

Chief Judge

Bryan K. Sano,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee/
cross-appellant.

Associate Judge

Associate Judge