

NOT FOR PUBLICATION

NO. 25440

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

IN THE INTEREST OF JOHN DOE, BORN ON DECEMBER 28, 1987, MINOR

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-J NO. 0056244)

SUMMARY DISPOSITION ORDER

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

Minor appeals the June 24, 2002 order of the family court of the first circuit.¹ The family court adjudicated Minor a law violator on two charges of sexual assault in the first degree and one charge of kidnapping.

After a meticulous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Minor's points of error on appeal as follows:

1. Citing Hawaii Revised Statutes § 701-109 (1993), Minor first contends he could not be convicted of the kidnapping in addition to the sexual assaults, because the former had merged into the latter. We disagree. See State v. Horswill, 75 Haw. 152, 161-63, 857 P.2d 579, 584-85 (1993); State v. Hoopii, 68 Haw. 246,

¹ The Honorable Linda K.C. Luke presided.

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250-52, 710 P.2d 1193, 1196-97 (1985); State v. DeCenso,
5 Haw. App. 127, 133-36, 681 P.2d 573, 579-80 (1984).

2. Minor next contends the family court erred in refusing to permit the defense to question one of its witnesses about purported prior inconsistent statements the complainant made to the witness. The record reveals, however, that no prior inconsistent statements were excluded. First, the defense witness was in fact allowed to testify that the complainant had spoken to him about the incident, evidence which contradicted the complainant's testimony that she had not. Second, the implication that the complainant had at one time told the defense witness that "it" happened four times, and at another time that "it" happened only once, appears to involve prior statements inconsistent with each other, but nothing in the record reveals what "it" is, or how either statement was "inconsistent with the declarant's testimony[.]" Hawaii Rules of Evidence Rule 802.1(1) (1993). This point is devoid of merit.

3. The family court sustained the State's objections to the proffered "prior inconsistent statements" on the basis of a lack of foundation. For his final point of error on appeal, Minor contends his trial counsel was ineffective in failing to establish the proper foundation. On this point, Minor merely assumes there was evidence that would have established the required foundation, cf. State v. Fukusaku, 85 Hawai'i 462, 481, 946 P.2d 32, 51 (1997) (a defendant's speculation about the

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potential testimony of witnesses who were not called to testify at trial is insufficient to show ineffective assistance of counsel); hence, this point lacks merit. State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998) ("Ineffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses." (Citations omitted.)).

Therefore,

IT IS HEREBY ORDERED that the June 24, 2002 judgment is affirmed.

DATED: Honolulu, Hawai'i, February 25, 2005.

On the briefs:

Richard Naiwieha Wurdeman,
for minor-appellant.

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

Chief Judge

Associate Judge

Associate Judge