

**NOT FOR PUBLICATION**

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NO. 25602

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
RUTA TUPUA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 02-1-0676)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Ruta Tupua (Tupua) appeals from the Judgment entered on November 27, 2002, by the Circuit Court of the First Circuit (circuit court). Tupua was charged with Attempted Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS) §§ 705-500 and 707-701.5 (1993) and HRS § 706-656 (1993 and Supp. 2004). Tupua waived her right to a jury trial in favor of a bench trial before circuit court Judge Richard K. Perkins. Judge Perkins found Tupua guilty as charged and issued written "Findings of Fact, Conclusions of Law, and Verdict" explaining his guilty verdict and his rejection of Tupua's extreme mental or emotional disturbance (EMED) defense. As mandated by HRS § 706-656(2) (Supp. 2004), Judge Perkins sentenced Tupua to life imprisonment with the possibility of parole.

On appeal, Tupua claims that her trial counsel provided ineffective assistance by failing to 1) move for a mistrial when

a witness testified that he had been threatened by Tupua's brother; 2) pursue a defense of self-defense; and 3) develop or offer evidence of a provocative triggering event that would have supported Tupua's EMED defense. After a careful review of the record and the briefs submitted by the parties, we conclude that Tupua's ineffective assistance of counsel claims are without merit and affirm the circuit court's Judgment.

I.

At trial, J.S., a person who had witnessed Tupua stab the alleged victim and had previously picked Tupua out of a police lineup, expressed uncertainty over his prior identification and testified that he did not see the perpetrator in court. The Deputy Prosecuting Attorney (DPA) notified the trial judge that J.S. had recently reported being threatened by a man identifying himself as Tupua's brother. The man had smashed J.S.'s windshield and told J.S. not to testify. The DPA made clear that there was no evidence that Tupua had instigated the threat. The trial judge permitted the DPA to question J.S. about the threat for the purpose of providing a "possible explanation for why [J.S.] may not be able to make an identification." J.S. subsequently testified that a man, referring to his "sister," had smashed J.S.'s windshield and told J.S. not to testify.

The trial court properly allowed the DPA to question J.S. about the threat because it provided a possible explanation

for J.S.'s reluctance to confirm his prior identification and for J.S.'s failure to identify Tupua in court. See State v. Clark, 83 Hawai'i 289, 302-03, 926 P.2d 194, 207-08 (1996); People v. Olguin, 37 Cal. Rptr. 2d 596, 600-01 (Cal. App. 1994). The DPA was entitled to elicit evidence regarding the threat to show that J.S. may have a bias or motive that influenced his identification testimony. Hawaii Rules of Evidence (HRE) Rule 609. Moreover, in a bench trial, it is presumed that the judge will not be influenced by incompetent evidence. State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980). We conclude that J.S.'s testimony regarding the threat did not provide a basis for a mistrial, and, accordingly, Tupua's trial counsel was not ineffective in failing to move for one.

II.

At trial, G.S., the alleged victim, and two eyewitnesses testified that Tupua, without any provocation, stabbed G.S. in the neck with a knife. The knife punctured G.S.'s carotid artery and nearly caused G.S. to bleed to death.

Tupua claims that her trial counsel was ineffective in failing to pursue a defense of self-defense and to locate witnesses who might have supported this defense. The trial evidence did not support a defense of self-defense. Tupua's trial counsel was not ineffective in failing to assert a defense for which there was no evidentiary support.

Tupua does not proffer the names of any witnesses who would have supported a defense of self-defense, much less describe what those witnesses would have said. Instead, Tupua asks this court to speculate that people who were with Tupua during the stabbing might have provided support for a self-defense claim. Tupua concedes that "Ms. Tupua may have been unable to, or even unwilling, to identify those present" to her trial counsel. Nevertheless, she claims that her trial counsel was ineffective in failing to locate witnesses to the stabbing. Ineffective assistance of counsel claims based on the failure to obtain witnesses, however, "must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998). Tupua's claim fails because she has provided no affidavit or sworn statement of what the possible witnesses whom her trial counsel allegedly failed to locate would have said.

III.

Tupua's trial counsel called Dr. Stephen Choy, Ph.D., a clinical psychologist, in support of Tupua's EMED defense. Dr. Choy testified that Tupua was suffering from depression, substance-abuse, possible attention deficit hyperactivity syndrome, and possible post-traumatic stress disorder. Dr. Choy testified that in his opinion, these conditions rose to the level of EMED for which there was a reasonable explanation. In

response to questioning by the trial court, Dr. Choy indicated that because Tupua's EMED was based on long-lasting mental conditions, Tupua would virtually always be under the influence of EMED.

In rendering its verdict, the trial court found sufficient evidence to show that Tupua had been suffering from EMED which the prosecution had failed to negate beyond a reasonable doubt. The court, however, rejected Tupua's EMED defense because the court concluded that there was no reasonable explanation for any EMED Tupua may have been experiencing at the time of the stabbing.

Tupua contends that her trial counsel provided ineffective assistance in presenting her EMED defense. In particular, Tupua claims that her counsel should have presented evidence of a recent provocative event that "triggered" her EMED because it would have strengthened her EMED defense. She faults her trial counsel for not locating witnesses who could testify that she was provoked into stabbing G.S. and for not developing other possible triggering events through her questioning of Dr. Choy.

Tupua's claim is based on a premise that is not supported by the record, namely, that there are witnesses who could testify that she was provoked into stabbing G.S. or that another triggering event exists that would have strengthened her

EMED defense. Tupua has not provided affidavits or sworn statements of witnesses who could testify that Tupua was provoked before stabbing the victim. Nor has she provided an affidavit or sworn statement from Dr. Choy or any other mental health expert supporting her contention that her counsel overlooked a triggering event that would have strengthened her EMED defense. Tupua's claim that her trial counsel was deficient in presenting her EMED defense therefore fails. Richie, 88 Hawai'i at 39, 960 P.2d at 1247 (1998).

IV.

Based on the existing record, it appears that Tupua's conviction was not attributable to any deficiency of her trial counsel, but to the overwhelming evidence of her guilt. We have rejected Tupua's ineffective assistance of counsel claims regarding self-defense and the EMED defense based on her failure to produce supporting witness affidavits or sworn statements. Tupua, however, may not have had the opportunity to obtain these affidavits or sworn statements since her trial counsel represented Tupua through the filing of her notice of appeal.

Therefore,

IT IS HEREBY ORDERED that the November 27, 2002 Judgment of the Circuit Court of the First Circuit is affirmed. With respect to Tupua's ineffective assistance of counsel claims regarding self-defense and the EMED defense, our disposition of

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this appeal is without prejudice to Tupua filing a petition under Rule 40 of the Hawai'i Rules of Penal Procedure, provided that Tupua must first obtain affidavits or sworn statements from witnesses supporting her allegations regarding these claims before filing her petition.

DATED: Honolulu, Hawai'i, January 28, 2005.

On the briefs:

DONN FUDO, Deputy Prosecuting Attorney, City and County of Honolulu, for Plaintiff-Appellee.	Chief Judge
JACOB M. MERRILL, ESQ. for Defendant-Appellant.	Associate Judge
	Associate Judge