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**NOT FOR PUBLICATION**

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NO. 25676, 25677, and 25678

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

PAULINO EVANGELISTA, JR., Defendant-Appellant, V.  
STATE OF HAWAI'I, Plaintiff-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(CR. NOS. 02-1-0357, 02-1-0124, AND 02-1-0187)

SUMMARY DISPOSITION ORDER

(By Burns, C.J., Foley and Fujise, JJ.)

Defendant-Appellant Paulino Evangelista, Jr. brings this appeal from the sentence and judgment entered on February 19, 2003, in each of three criminal cases consolidated herein.

After diligently reviewing the record and the briefs submitted and carefully considering the arguments advanced and the issues raised, we resolve Defendant's points of error as follows:

1. The sentencing court<sup>1</sup> did not abuse its discretion when it ordered that Defendant's sentence, consisting of ten years' incarceration for each of ten counts of Burglary in the First Degree and five years' incarceration for each of four counts of Burglary in the Second Degree and one count of Theft in the Second Degree, be served consecutively. Where the issue has not been raised below, it is reviewed for plain error. State v.

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<sup>1</sup>The Honorable Riki May Amano presided.

Jenkins, 93 Hawai'i 87, 114, 997 P.2d 13, 40 (2000). As required by Hawai'i Revised Statutes (HRS) § 706-668.5 (1993), the sentencing court explicitly based its decision on the nature of Defendant's crimes and lack of remorse, factors contained in HRS § 706-606 (1993). It is presumed that the sentencing court properly considered and applied these factors in imposing the consecutive sentence. State v. Sinagoga, 81 Hawai'i 421, 428, 918 P.2d 228, 235 (App. 1996) *overruled on other grounds by* State v. Veikoso, 102 Hawai'i 219, 227, 74 P.3d 575, 583 (2003).

2. This sentence did not "constitute[] cruel and unusual punishment." Again, as unpreserved below, this claim is now reviewed for plain error. Jenkins, supra. The sentencing court based the sentences on the nature of the offenses and the lack of remorse by Defendant for his crimes, satisfying the first prong of the "Freitas/Lynch" test adopted in this jurisdiction to evaluate claims<sup>2</sup> that a sentence violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution and Article I, Section 12 of the Hawaii Constitution. State v. Davia, 87 Hawai'i 249, 258, 953 P.2d 1347, 1356 (1998). There is no evidence in the record nor

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<sup>2</sup>Defendant does not specify the legal basis for his claims.

argument presented showing that more serious offenses received lesser sentences than that imposed upon Defendant or that other jurisdictions impose lesser penalties for the same offense. Thus, Defendant has failed to show his punishment is so disproportionate to the seriousness of his crimes that it shocks the conscience or is an outrage to the community. State v. Kumukau, 71 Haw. 218, 226-27, 787 P.2d 682, 687 (1990).

3. Finally, there was no misconduct coloring the sentencing court's view against him. Once again, this issue is reviewed for plain error. Jenkins, supra. Defendant claims that the deputy prosecutor committed misconduct by making arguments at sentencing "calculated to inflame the passions of the trial court judge." On the record before us, it is far from clear that the deputy intended the implications Defendant ascribes. Moreover, the sentencing court was well aware of the factual basis for the matters argued and had indicated an inclination to sentence Defendant as it did even before the deputy presented his argument. In any event, a judge is presumed not to be influenced by incompetent evidence, State v. Vliet, 91 Hawai'i 288, 983 P.2d 189 (1999), let alone argument.

Therefore,

IT IS HEREBY ORDERED that the February 19, 2003  
Judgments filed in Cr. Nos. 02-1-0357, 02-1-0124, and 02-1-0187  
from the Circuit Court of the Third Circuit are affirmed.

DATED: Honolulu, Hawai'i, July 21, 2004

On the briefs:

Harry Eliason  
for defendant-appellant.

Chief Judge

Mitchell D. Roth,  
Deputy Prosecuting Attorney,  
County of Hawai'i  
for plaintiff-appellee.

Associate Judge

Associate Judge