

NOT FOR PUBLICATION

NO. 25715

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
HENRY LAGMAY, also known as Enrique,
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-0616)

MEMORANDUM OPINION

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

Henry Ulit Lagmay, aka Enrique (Lagmay or Defendant), appeals the March 19, 2003 judgment of the circuit court of the first circuit¹ that convicted him, after a bench trial, of the charged offenses of murder in the second degree² and burglary in the first degree.³ Lagmay contends the court erred in finding him guilty of murder instead of manslaughter, because at the time of the crime he was under the influence of extreme mental or

¹ The Honorable Richard K. Perkins, judge presiding.

² Hawaii Revised Statutes (HRS) § 707-701.5 (1993) provides, in pertinent part, that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

³ HRS § 708-810(1)(c) (1993) provides that, "A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and: The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling." (Enumeration omitted; format modified.) Henry Ulit Lagmay presents no argument on appeal against his conviction of burglary in the first degree. Hence, we may affirm the March 19, 2003 judgment insofar as that conviction is concerned. Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (2003); Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002).

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emotional disturbance for which there is a reasonable explanation (the EMED mitigation).⁴ We conclude the court did not so err and so, we affirm.

Lagmay's essential, and only, argument on appeal is that his evidence on the EMED mitigation was compelling, whereas the corresponding evidence adduced by the State was not. For his part, Lagmay touts the expert witness he presented on the EMED mitigation:

In the instant case, the defense presented expert testimony from clinical psychologist Xanya Sofra-Weiss, Ph.D. regarding whether Lagmay was under the influence of extreme mental or emotional disturbance at the time of the offense. Dr. Sofra-Weiss reviewed all records, including police reports, witness statements from neighbors, family members, co-workers, as well as Kaiser medical records, mental health and substance abuse records, and reports prepared by the court-appointed three-panel of examiners: McLaughlin, Gitter and Jacobs.

Dr. Sofra-Weiss reviewed the following models: [the] EMED model by Dr. Harold Hall, the Richard Rogers Model for Clinical Assessment for Malingering and Deception, Howard Cleckley's Conception of the Antisocial Personality Disorder. Dr. Sofra-Weiss gave Lagmay a battery of tests that include the Hare Psychopathy checklist, Rorschach [sic] and the Thematic Apperception test as well as a two [sic] distinct structural clinical interviews. Dr. Sofra-Weiss' report dated October 10, 2002 contained an analysis of Hawaii law with regards to EMED. She incorporated the three-part test for EMED set forth in the Model of Extreme Mental and Emotional Distress presented by Harold Hall, Ph.D., Caroline Mee, J.D., and Peter Bresciani, J.D.

Opening Brief at 9 (citations to the record omitted). Lagmay also endorses his expert witness's reliance upon defense

⁴ HRS § 707-702(2) (1993) provided:

In a prosecution for murder in the first and second degrees it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.

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allegations of impinging environmental stressors at the time of the crime -- the decedent's physical and emotional abuse of her young son, with whom Lagmay had developed a warm and quasi-paternal relationship; her deception about working as an accountant when she was really an ecdysiast; her prostitution in the parking lot of the strip club; and her obdurate return to stripping in spite of Lagmay's reform efforts in helping her get a job as a sixth-grade French teacher.

In contrast, Lagmay is considerably downbeat about contrary evidence from the State:

The State presented little, if any, evidence to prove beyond a reasonable doubt that Lagmay was not suffering from extreme mental or emotional disturbance at the time of the incident. The only witness the State presented to rebut the EMED defense was Dr. Leonard Jacobs, one of the three-panel members previously appointed[, who was the one member] to evaluate Lagmay for extreme mental or emotional disturbance. On cross-examination, Dr. Jacobs testified that the tests he performed (Rogers criminal responsibility assessment scale, competency to stand trial assessment, and mini mental status exam) are used to test insanity, not EMED. Dr. Jacobs did not use any other tests specifically designed to evaluate EMED, or as recommended by the controlling literature in this area. Dr. Jacobs testified that in addition to the tests, he interviewed Lagmay. Despite not employing any other tests specifically addressing EMED, Dr. Jacobs was still able to evaluate Lagmay for fitness and penal responsibility, and EMED. Rather than rebut Dr. Sofra-Weiss' analysis, Dr. Jacobs never discussed the applicable case law, statutes, and models for evaluating EMED, nor did he address the specific instances of environmental stress or loss of self-control discussed by Dr. Sofra-Weiss in her report. Dr. Jacobs only testified regarding his interview with Lagmay. Most importantly, it was unclear whether Dr. Jacobs had a thorough understanding of EMED or what was necessary to evaluate EMED. According to Dr. Jacobs, this was only the second time he had ever testified regarding an EMED defense.

Opening Brief at 5 (emphasis in the original; citations to the record omitted).

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The problem with Lagmay's argument is, that the assessment of credibility and the weight of evidence was for the court as finder of fact and for the court alone, as such: "An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge." State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996) (citations omitted). This principle holds sway for expert testimony as well, including expert testimony on the EMED mitigation. State v. Matias, 74 Haw. 197, 208-09, 840 P.2d 374, 379-80 (1992).

Here, the court found: "That Defendant was not, at the time he caused the death of [the decedent], under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation has been proved beyond a reasonable doubt by the State. See [Hawaii Revised Statutes (HRS)] § 707-702(2) [(1993)]." Because Lagmay derogates this finding solely on credibility and the weight of evidence, we will not disturb it on appeal. Eastman, 81 Hawai'i at 139, 913 P.2d at 65; Matias, 74 Haw. at 208-09, 840 P.2d at 379-80.

Despite its narrow focus, we observe that Lagmay's argument on appeal may be characterized broadly as an attack on the sufficiency of the evidence. Accordingly, in our independent review of the entire record of the trial, we employed the standard of review for sufficiency of the evidence;

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namely, whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Ferrer, 95 Hawai'i 409, 422, 23 P.3d 744, 757 (App. 2001) (citation and block quote format omitted). We conclude, thereon, that the State adduced "substantial evidence as to every material element of the offense charged[,]" id. (citation and block quote format omitted), including substantial evidence refuting the EMED mitigation, see HRS § 702-205(b) (1993); HRS § 701-114 (1993); State v. Maelega, 80 Hawai'i 172, 177, 907 P.2d 758, 763 (1995), such that "a reasonable mind might fairly conclude guilt beyond a reasonable doubt[,]" Ferrer, 95 Hawai'i at 422, 23 P.3d at 757 (citation and block quote format omitted), as charged.

Affirmed.

DATED: Honolulu, Hawai'i, October 8, 2004.

On the briefs:

Myles S. Breiner,
for defendant-appellant.

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

Chief Judge

Associate Judge

Associate Judge