

NOT FOR PUBLICATION



NO. 25450

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

KHAMAKAHO
CLEM. APPEL. LATE COURTS
STATE OF HAWAII

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STATE OF HAWAI'I, Plaintiff-Appellee, v.
DINO KALEOLANI KAUAI, also known as KALEO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-2179)

MEMORANDUM OPINION

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

Defendant-Appellant Dino Kaleolani Kauai (Kauai) appeals from the Judgment entered on October 7, 2002, by the Circuit Court of the First Circuit (circuit court).^{1/} The State of Hawai'i (the State) charged Kauai with Attempted Murder in the Second Degree. After a jury trial, Kauai was found guilty of the included offense of Attempted Assault in the Second Degree, a violation of Hawaii Revised Statutes (HRS) §§ 705-500 and 707-711 (1993).^{2/} The circuit court sentenced Kauai as a repeat offender

^{1/} The Honorable Karen S.S. Ahn presided.

^{2/} Hawaii Revised Statutes (HRS) §§ 705-500 and 707-711 (1993) provide in relevant part as follows:

§ 705-500 Criminal attempt. (1) A person is guilty of an attempt to commit a crime if the person:

(b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person

to imprisonment of five years with a mandatory minimum imprisonment term of three years and four months. The court ordered that this sentence be served consecutive to terms of imprisonment Kauai was serving on two other convictions.

On appeal, Kauai claims that 1) a detective's stopping of a tape recorder on two occasions while interviewing the complaining witness (CW) violated Kauai's right to due process; 2) the trial court erred in allowing the CW to testify that he carried a knife because of "rumors" and to relate a "dying declaration;" 3) the trial court erred in refusing to instruct the jury on Assault in the Third Degree as an included offense; and 4) the suspension of jury deliberations for seven weeks to permit a juror to go on a previously scheduled trip violated Kauai's right to due process. After a careful review of the record and the briefs submitted by the parties, we conclude that Kauai's claims are without merit and affirm the circuit court's Judgment.^{3/}

intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

§ 707-711 Assault in the second degree. (1) A person commits the offense of assault in the second degree if:

- (a) The person intentionally or knowingly causes substantial bodily injury to another;
- (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument[.]

^{3/} The appeal was assigned to this court on October 28, 2004. The briefing was completed on November 19, 2004.

BACKGROUND

Kauai and his half-brother, William Kalani (Kalani), lived with Wandall Homalon (Homalon) at a place in Haleiwa known as Long Bridge. There were several houses, a junk yard, and cockfighting facilities at Long Bridge. Homalon had hired the CW to care for and train fighting cocks, but the CW had stopped working for Homalon after they had a falling out in early September, 2001. The CW knew Kalani because they had worked together at Long Bridge for Homalon, but the CW had little prior contact with Kauai.

On September 20, 2001, at about 10:00 p.m., the CW went to Long Bridge to "party" with Kauai and Kalani. The CW carried a survival knife he had borrowed from Kalani earlier that day. The CW testified that he usually did not go to Long Bridge without a knife "[b]ecause of previous rumors that was going around." The CW smoked crystal methamphetamine in a van with Kauai, Kauai's girlfriend, and Kalani. The CW, Kauai, and Kalani then moved to a small shed used to house the cocks before they fought, which was referred to as the "cock house." In the cock house, the CW returned the knife to Kalani, who placed it on a table.

According to the CW, sometime after he returned the knife, the lights in the cock house were turned off. When the lights came back on, Kalani started punching the CW in the head,

and Kauai came at the CW with the knife and tried to stab the CW in the chest and eye. The CW sustained an injury near his left eye as a result of Kauai poking him with the knife. The CW grabbed Kalani and pushed him out the cock house door. The CW then ran toward a gate, which was tied shut with a rope, in an attempt to flee. As the CW was trying to open the gate, Kauai stabbed the CW in the ribs.^{4/}

The CW opened the gate and ran to a pay phone. Instead of using the phone, he decided to run home because he thought he was dying and wanted to see his children. After taking a few steps, however, the CW realized that he could not make it home and returned to the phone. The CW called 911 and reported the stabbing. The CW told Honolulu Police Department (HPD) Officer William Gasper, who responded to the 911 call, that Kauai had stabbed him.

The CW was transported by helicopter to Queen's Hospital where he was taken into surgery. The CW had a stab wound to the right lower chest, a collapsed right lung, and a lacerated liver. The surgeon who operated on the CW testified that the CW's injuries created a substantial risk of death. The surgeon, however, could not definitely say that the CW would have died without treatment. After the CW's surgery, he was

^{4/} Defendant-Appellant Dino Kaleolani Kauai (Kauai) testified that he punched the complaining witness (CW) in self-defense while in the cock house, but denied ever stabbing the CW.

interviewed at about 2:00 a.m. on September 21, 2001, by HPD Detective Robert Kupukaa. Detective Kupukaa tape recorded the interview but stopped the recorder on two occasions at the CW's request.

DISCUSSION

I.

Kauai moved in limine to prohibit the CW from testifying at trial and Detective Kupukaa from testifying about any oral or written statements made by the CW. The motion was based on Kauai's claim that Detective Kupukaa, by stopping the recorder during the CW's interview, had deliberately and with malice destroyed evidence that would have assisted the defense. At a hearing on the motion, Detective Kupukaa testified that the CW had indicated through gestures that the CW wanted the recorder stopped on two occasions. Detective Kupukaa complied with the CW's requests. While the recorder was stopped, Detective Kupukaa recalled that the CW expressed concern about getting a friend in trouble, the CW said something about the friend selling drugs for Homalon, and the CW said he was afraid and would be moving from the North Shore.

Detective Kupukaa testified that he did not feel that anything the CW said while the recorder was stopped was pertinent to the investigation. If the CW had provided pertinent information while the recorder was off, Detective Kupukaa would

have included it in his police report. Detective Kupukaa testified that he always turns off a tape recorder if requested by a witness. He complied with the CW's requests to stop the recorder in order to make the CW comfortable and to ensure that the CW would continue with the interview. Detective Kupukaa stated that he did not "deliberately, intentionally, or with malice" destroy evidence or do anything to alter or affect the evidence in the case.

The circuit court noted that in cases involving the destruction of evidence that is only potentially exculpatory, the defendant, to prevail, must show that the State acted in bad faith. The court found that Kauai failed to show that Detective Kupukaa acted in bad faith in stopping the recorder. It therefore denied Kauai's motion in limine.

On appeal, Kauai argues that Detective Kupukaa's stopping of the recorder during the CW's interview was an intentional destruction of exculpatory evidence that violated his due process right to a fundamentally fair trial. We disagree. Detective Kupukaa did not destroy evidence by stopping the recorder; he simply failed to memorialize certain statements the CW made during the interview. Kauai cites no authority for the proposition that a police officer is required to record all witness interviews or is precluded from agreeing to a witness's request that portions of an interview not be recorded.

But even assuming arguendo that we view Detective Kupukaa's stopping of the recorder as the destruction of evidence, Kauai is not entitled to relief. The CW's unrecorded statements were at most only potentially exculpatory. "[U]nder the United States Constitution, where the state destroys evidence that has only a potential exculpatory value, due process is not offended unless the defendant can demonstrate that the state acted in bad faith." State v. Okumura, 78 Hawai'i 383, 402, 894 P.2d 80, 99 (1995) (internal quotations and brackets omitted) (quoting State v. Matafeo, 71 Haw. 183, 187, 787 P.2d 671, 673 (1990)). We have no basis for overturning the circuit court's determination that Kauai failed to show that Detective Kupukaa acted in bad faith.

Nor does the record support Kauai's claim that the statements made by the CW while the recorder was stopped were so critical to the defense that the failure to record them rendered the trial fundamentally unfair under the Hawaii Constitution. See Okumura, 78 Hawai'i at 402, 894 P.2d at 99. Detective Kupukaa testified that the unrecorded statements of the CW did not relate to the identity of the person who had stabbed the CW and were not pertinent to the investigation. The circuit court permitted Kauai to use Detective Kupukaa's failure to record the entire interview of the CW to attack the integrity of the police investigation and impeach the CW's credibility. Detective

Kupukaa's stopping of the recorder did not deprive Kauai of his right to a fair trial.

II.

The CW testified that he borrowed a knife from Kalani because he usually did not go to Long Bridge without one and "[b]ecause of previous rumors that was going around." We reject Kauai's claim that the circuit court erred in overruling his hearsay objection to this testimony. The CW's testimony that he borrowed the knife because of "rumors . . . going around" was not hearsay. The CW did not relate the substance of the rumors or what third-parties had told him. The CW's testimony, therefore, did not fall within the definition of hearsay. Hawaii Rules of Evidence (HRE) Rule 801(3).^{5/} The CW's testimony was admissible to explain why he was carrying a knife when he went to Long Bridge and was particularly relevant given Kauai's asserted defense of self-defense.

Kauai also claims that the circuit court erred in admitting the CW's "dying declaration." It is not clear whether Kauai is referring to the CW's testimony that 1) he thought he was dying and wanted to see his children or 2) he told Officer Gasper, the officer responding to the CW's 911 call, that Kauai had stabbed him. In either case, we find no basis to vacate

^{5/} Hawaii Rules of Evidence (HRE) Rule 801(3) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Kauai's conviction. The CW's testimony that he thought he was dying was relevant to explaining why he delayed calling 911. The CW testified that instead of calling 911, he initially decided to run home because he thought he was dying and wanted to see his children. The CW returned to the pay phone and called 911 when he realized he could not make it home. The circuit court did not abuse its discretion in admitting this testimony. Moreover, the CW's fear that he was dying could easily be inferred from the undisputed evidence regarding the seriousness of his injuries.

The CW's testimony that he told Officer Gasper that Kauai had stabbed the CW was admissible as a prior identification under HRE Rule 802.1(3). State v. Tafokitau, 104 Hawai'i 285, 290-92, 88 P.3d 657, 662-64 (App. 2004). In addition, once Kauai attacked the CW's credibility on cross-examination, evidence that the CW told Officer Gasper that Kauai was the stabber was admissible as a prior consistent statement under HRE Rule 802.1(2). The CW properly testified on redirect examination that he had identified Kauai as the stabber to the 911 dispatcher, to Officer Gasper, and to Detective Kupukaa. Moreover, Kauai introduced the recording of Detective Kupukaa's hospital interview with the CW during which the CW identified Kauai as the person who stabbed the CW. Thus, Kauai has no basis to complain about the admission of the CW's prior statement to Officer Gasper identifying Kauai as the stabber.

III.

The circuit court instructed the jury on the charged offense of Attempted Murder in the Second Degree and the included offenses of Attempted Assault in the First and Second Degrees. During her closing argument, the Deputy Prosecuting Attorney (DPA) made clear that the attempted murder charge and the included offenses were based only on the stabbing and injury that occurred at the gate, and not on what happened in the cock house.^{6/} During its deliberations, the jury asked if it could consider "assault third degree as a charge[.]" The circuit court responded that "[t]he prosecution has charged Defendant only for alleged events which are alleged to have occurred outside of what was claimed to be a cockhouse . . ." The court refused to instruct the jury on Assault in the Third Degree.

On appeal, Kauai argues that the circuit court erred in failing to instruct on Assault in the Third Degree as an included offense. The jury, however, returned a verdict of guilty on Attempted Assault in the Second Degree, an offense greater than Assault in the Third Degree. Given this circumstance, we need not decide whether the circuit court erred in failing to instruct

^{6/} Prior to closing argument, the trial court indicated that it did not believe the State of Hawai'i (the State) should argue that the included offense of Attempted Assault in the Second Degree could be based on the scratch near the CW's eye, which the CW testified was caused by Kauai poking him with the knife during the struggle in the cock house. Both parties agreed that the Deputy Prosecuting Attorney (DPA) would make "extremely clear" in her closing argument that the jury could only find Kauai guilty of Attempted Assault in the Second Degree "based on activity at the gate and nothing more."

on Assault in the Third Degree because any such error was harmless beyond a reasonable doubt. State v. Haanio, 94 Hawai'i 405, 415-16, 16 P.3d 246, 256-57 (2001); State v. Gunson, 101 Hawai'i 161, 162, 64 P.3d 290, 291 (App. 2003).

IV.

During jury selection on May 28, 2002, a juror notified the parties that she had no conflict sitting on the jury "as long as [the case] doesn't go near [June] 12th." That juror was selected to serve on the jury. In the morning on June 5, 2002, the circuit court informed counsel for both parties that the juror would be leaving on a trip on June 12th and returning on July 31st. The court asked counsel if they wanted to replace the juror and gave counsel time to think about it.

The case was submitted to the jury in the afternoon on June 6, 2002. Prior to that time, neither counsel requested that the juror be replaced. The court excused the remaining alternate juror and the jury began its deliberations. On June 10, 2002, with counsel for both parties and Kauai present, the court advised the jury that because of the juror's planned trip, the court was excusing the jury until August 1st. Kauai's counsel did not object. The jury resumed its deliberation on August 2nd and returned its verdict on August 5th.

Kauai claims that the extended suspension of jury deliberations violated his right to due process. We do not reach

the merits of Kauai's claim because we conclude that he waived his right to challenge the suspension of jury deliberations. In an analogous situation, where a defendant is aware of alleged jury misconduct before the verdict but waits until after the verdict to raise the misconduct claim, courts have held that the defendant waives the claim. United States v. Costa, 890 F.2d 480, 482 (1st Cir. 1989); State v. Durfee, 322 N.W.2d 778, 786 (Minn. 1982).

Despite being advised by the circuit court that the juror would be leaving on an extended trip, Kauai did not seek to replace the juror before the jury began its deliberations and did not object when the court suspended jury deliberations. The record is also devoid of any evidence that during the suspension of jury deliberations, Kauai sought a stipulation under Rule 23(b) of the Hawai'i Rules of Penal Procedure to remove the absent juror and permit the remaining eleven jurors to resume deliberating. Nor did Kauai move for a mistrial based on the delay resulting from the suspension of jury deliberations before the jury rendered its verdict. Kauai presumably made a tactical decision that he was better off with the juror and the delay in jury deliberations. Under these circumstances, Kauai waived any due process claim arising out of the suspension of jury deliberations.

CONCLUSION

IT IS HEREBY ORDERED that the October 7, 2002 Judgment of the Circuit Court of the First Circuit is affirmed.

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

On the briefs:

David Glenn Bettencourt, Esq.,
for defendant-appellant.



Acting Chief Judge

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.



Associate Judge



Associate Judge