

NO. 25767

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
MICHAEL LOPEZ, Defendant-Appellant

ENRIQUANDO
CLERK APPELLATE COURTS
STATE OF HAWAI'I

2006 OCT 24 AM 8:59

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NO. 02-1-0171)

SUMMARY DISPOSITION ORDER

(By: Burns, Chief Judge, Lim, and Nakamura, JJ.)

Defendant-Appellant Michael Lopez (Lopez) appeals from the Judgment entered on March 20, 2003, in the Circuit Court of the Fifth Circuit.¹ A jury found Lopez guilty as charged of Unauthorized Entry into Motor Vehicle (UEMV), in violation of Hawaii Revised Statutes (HRS) § 708-836.5 (Supp. 2005)² (Count 1), and Theft in the Fourth Degree (Theft 4), in violation of HRS

¹ The Honorable Clifford L. Nakea presided.

² Hawaii Revised Statutes (HRS) § 708-826.5 (Supp. 2005) provides in relevant part:

(1) A person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights.

§ 708-833(1) (1993)³ (Count 2). The court sentenced Lopez to probation for five years as to Count 1 and six months as to Count 2.

On appeal, Lopez argues that the circuit court: (1) was without jurisdiction to try Lopez because no information containing the charges against Lopez was filed in the circuit court; and (2) committed "reversible, plain error" when it failed to prevent the prosecutor from (a) making an appeal to racism in closing argument; and (b) arguing at sentencing that Lopez's failure to admit guilt and his prior arrests warranted a more severe sentence.

Upon careful review of the record and the briefs submitted by the parties, we hold as follows:

1. A Complaint containing the charges against Lopez was filed in the District Court of the Fifth Circuit (district court) on May 8, 2002. After a preliminary hearing, the district court found probable cause to believe that Lopez committed the charged UEMV offense and committed Lopez to the circuit court for further proceedings. The Complaint as well as the order committing Lopez to circuit court were attached to a pleading⁴ filed in the circuit court on July 17, 2002. We conclude that

³ HRS § 708-833(1) (1993) provides in relevant part:

(1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of \$100.

⁴ The State of Hawai'i (the State) refers to this pleading as a "Notice of Docketing of Case," although this designation does not appear on the pleading itself.

the procedures followed in this case were sufficient to establish that the circuit court had jurisdiction to try Lopez. HRS §§ 801-1, 806-6, and 806-8 (1993); Hawai'i Rules of Appellate Procedure (HRAP) Rules 5(c) and 7(h) (2006).

2. During his testimony, Lopez stated that a tall girl with wavy blond or reddish hair who was "real white" had accused him of stealing her friend's car keys. Neither the complaining witness (CW) nor the CW's friend Delissa mentioned the presence of any tall, fair-skinned girl in their trial testimony. During closing argument, the prosecutor attacked Lopez's credibility by arguing that Lopez had made up the existence of the tall, fair-skinned girl because it was improbable that the CW and Delissa would be "hanging out" with such a person.

There was also some testimony about this phantom, wavy hair tall white woman. . . .

. . . [W]e still don't know who this person is. There was no evidence this person ever existed by any of the State's witnesses, and only by the defendant's only testimony did this come up as even his wife not even mentioned the fact that there was this tall phantom, wavy-haired woman.

I mean, if you look at the [prosecution's] witnesses that testified -- I mean, those were two young girls just out of high school, real plain woman -- I mean, basically she went there to cruise to look at the wave. I mean, is this the kind of person that they would be hanging out with, a wavy-haired tall, white woman? It just seems way out of whack as far as what is probable or what could have happened that day there.

Lopez did not object to the prosecutor's remarks.

We conclude the prosecutor's remarks do not warrant our vacating Lopez's convictions under the plain error standard of review. The prosecutor's reference to the race of the tall,

wavy-haired girl was made in the context of attacking the credibility of Lopez's version of events. The prosecutor's reference to race was not gratuitous but had an objectively legitimate purpose. See State v. Rogan, 91 Hawai'i 405, 415, 984 P.2d 1231, 1241 (1999).

Even assuming, *arguendo*, that the prosecutor's reference to race was improper, we conclude that such reference was harmless beyond a reasonable doubt. The prosecutor's reference to race was not inflammatory or designed to stimulate racial prejudice. It did not come close to the invidious references to race that were held to constitute harmful error in Rogan, 91 Hawai'i at 413-16, 984 P.2d at 1239-42, and State v. Shabazz, 98 Hawai'i 358, 377-82, 48 P.3d 605, 624-29 (App. 2002).

In addition, the prosecutor's argument that Lopez's testimony regarding the tall, fair-skinned girl cast doubt on his credibility was transparently weak, illogical, and unconvincing. The existence of this girl was not material to Lopez's defense or the prosecution's proof, and the prosecutor failed to articulate any motive for Lopez to have made up the girl's existence. On the other hand, there were several, more persuasive grounds for attacking Lopez's credibility. This included evidence that Lopez had told four different stories regarding whether or how he had reached into the CW's car and the glaring inconsistencies between Lopez's version of what happened and the testimony presented by the prosecution's witnesses. Under these circumstances, the prosecutor's reference to race in her closing argument did not

affect Lopez's substantial rights or deny Lopez his right to a fair trial. Hawai'i Rules of Appellate Procedure (HRAP) Rule 52(b); State v. Ganai, 81 Hawai'i 358, 376, 917 P.2d 370, 388 (1996).

3. At sentencing, the prosecutor recommended that Lopez be sentenced to 30 days of incarceration, arguing, among other things, that Lopez "still does not take responsibility" for his offenses and that Lopez "seems to . . . get arrested . . . in many places where he has lived." The circuit court did not sentence Lopez to incarceration as recommended by the prosecutor and imposed sentences of straight probation.

We reject Lopez's claim that the circuit court committed plain error in failing to prevent the prosecutor from arguing at sentencing that Lopez's failure to admit guilt and his prior arrests warranted a more severe sentence. Absent an objection, the circuit court is not obligated to "prevent" the prosecutor from making an argument. Moreover, there is no evidence that the circuit court relied on the prosecutor's arguments. Indeed, the court rejected the prosecutor's recommendation and sentenced Lopez to probation without a term of incarceration. Lopez does not contend that he was entitled to a more lenient sentence. Lopez therefore was not prejudiced by the prosecutor's arguments.

IT IS HEREBY ORDERED that Lopez's convictions and sentences, as reflected in the March 20, 2003, Judgment filed in the Circuit Court of the Fifth Circuit, are affirmed. We note,

however, that in the Judgment, both the box showing that Lopez pleaded guilty and the box showing that Lopez was found guilty pursuant to jury verdict were checked. We remand this case with instructions that the circuit court file an Amended Judgment which shows that Lopez pleaded not guilty and was found guilty pursuant to jury verdict.

DATED: Honolulu, Hawai'i, October 24, 2006.

On the briefs:

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(Earle A. Partington)
for Defendant-Appellant

Tracy Murakami
Deputy Prosecuting Attorney
for Plaintiff-Appellee


Chief Judge


Associate Judge


Associate Judge