NO. 26270

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALLAN PEREZ, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-0618(1))

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

Defendant-Appellant Allan Perez (Perez) appeals from the Judgment filed on November 5, 2003, in the Circuit Court of the Second Circuit (circuit court).[1] A jury found Perez guilty of Burglary in the First Degree (Burglary I), in violation of Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993).[2] The circuit court sentenced Perez to ten years' imprisonment and imposed a mandatory minimum term of 40 months based on his status as a repeat offender.

On appeal, Perez argues that: 1) the circuit court erred in instructing the jury that "there can be no eye-witness

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[1] The Honorable Joel E. August presided.

[2] Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993) provides:

> (1) 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:
>
> . . . .
>
> (c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

account of thoughts comprising the state of mind with which [a person's] acts are done or omitted;" 2) the circuit court erred in denying Perez's motion for judgment of acquittal at the close of the prosecution's case in chief; 3) there was insufficient evidence for the jury to find Perez guilty of Burglary I; 4) the prosecutor improperly appealed to the "passion and prejudice" of the jury in his closing argument; and 5) the circuit court abused its discretion in failing to find that strong mitigating circumstances warranted a lesser mandatory minimum than the 40-month term that the court imposed.

After careful review and consideration of the record and the briefs submitted by the parties,[3] we resolve Perez's points of error as follows:

1. The circuit court's jury instruction which Perez attacks on appeal correctly stated the law. Therefore, the instruction was not prejudicially insufficient, erroneous, inconsistent, or misleading. State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997).

2. Perez presented evidence after the circuit court denied his motion for judgment of acquittal made at the close of the prosecution's case in chief. By doing so, Perez waived his right to challenge the circuit court's denial of that motion. State v. Pudiquet, 82 Hawai'i 419, 423, 922 P.2d 1032, 1036 (App. 1996).

[3] The briefing on appeal was completed on November 3, 2005. The case was assigned to this court on January 3, 2006.

3. There was sufficient evidence to support the jury's guilty verdict. In particular, there was substantial circumstantial evidence that Perez had the intent to commit a crime against a person or property rights when he entered his neighbor's apartment. The jury was entitled to reject Perez's testimony that he lacked the requisite criminal intent. State v. Aki, 102 Hawai'i 457, 460, 464, 77 P.3d 948, 951, 955 (App. 2003) (concluding that the determination of the credibility of witnesses and the weight of evidence is for the trier of fact, not the appellate courts).

4. We reject Perez's claim that the prosecutor's closing argument was improper. The prosecutor's remarks fell within the bounds of legitimate argument and were permissible given the wide latitude prosecutors are allowed in discussing the evidence. State v. Clark, 83 Hawai'i 289, 304, 926 P.2d 194, 209 (1996).

5. The circuit court did not abuse its discretion in finding that there were no strong mitigating circumstances justifying a lesser mandatory minimum than the 40-month term it imposed. See State v. Mara, 102 Hawai'i 346, 368, 76 P.3d 589, 611 (App. 2003). In denying Perez's motion for a lesser mandatory minimum, the circuit court noted that Perez had a long criminal record, that Perez had a prior Burglary I conviction, that Perez had been placed on probation before, and that Perez had engaged in criminal conduct after completing drug treatment subsequent to his arrest in this case.

IT IS HEREBY ORDERED that the Judgment filed on November 5, 2003, in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 23, 2006.

On the briefs:

Steven Booth Songstad,
for Defendant-Appellant.

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

James A. Burns
Chief Judge

Associate Judge

Craig H. Nakamura
Associate Judge