

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26118

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,
v.JASON K. PERRY, Defendant-Appellant,
andRYAN H. ONUMA, DELANEO K. PUHA, JAMISON MITCHELL,
MARVIN T. CADIZ, VAUGHN N. KAUMOANA, and
DAVID V.C. MAGALEI, DefendantsNORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2007 APR 26 AM 9:51

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-0796)SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Jason K. Perry (Perry) appeals from the Judgment filed on July 28, 2003 in the Circuit Court of the First Circuit^{1/} (circuit court).

On April 23, 2002, the State of Hawai'i (the State) charged Perry via an Indictment^{2/} with two counts of Murder in the Second Degree, in violation of Hawaii Revised Statutes (HRS) §§ 707-701.5 (1993) and 706-656 (1993 & Supp. 2006) (Counts 1 & 2), and one count of Criminal Conspiracy, in violation of HRS § 705-520 (1993) (Count 3). Count 1 alleged that on or about

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

^{2/} The Indictment charged a total of fifteen (15) counts and named seven (7) co-defendants: Ryan H. Onuma, Delaneo K. Puha, Andrey E. Lake, Jamison Mitchell, Marvin T. Cadiz, Vaughn N. Kaaumoana, and David V.C. Magalei. Their prosecutions and subsequent outcomes are irrelevant to this particular appeal.

January 21, 2002, Perry intentionally or knowingly caused the death of Tracey Tominaga (Tominaga). Count 2 alleged that on or about January 26, 2002, Perry intentionally or knowingly caused the death of Edward Fuller (Fuller). Count 3 alleged that on or about January 21, 2002, Perry and some of the other named defendants did agree with each other to kidnap Tominaga with the intent of inflicting bodily injury upon her.

Although Perry was indicted along with seven co-defendants, he received a separate trial that began on April 23, 2003. On May 22, 2003, the jury returned guilty verdicts on all three counts (the jury convicted Perry as a principal and accomplice on Count 1 and as an accomplice on Count 2). On July 28, 2003, the circuit court sentenced Perry to consecutive sentences of life imprisonment without parole for each of Counts 1 and 2 and to a ten-year term of imprisonment for Count 3, to be served concurrently with the sentences for Counts 1 and 2.

Perry filed a Notice of Appeal on September 26, 2003. On appeal, Perry argues that (1) HRS § 706-657 (Supp. 2006) is unconstitutional and the circuit court abused its discretion by sentencing him to consecutive life sentences without parole; (2) the circuit court erred by denying his motion for mistrial due to repeated prejudicial testimony by the State's witnesses, and he was unduly prejudiced by the court's substantial delay in striking the inadmissible testimony; (3) the circuit court did

not properly instruct the jury; (4) there was insufficient evidence to support Count 1 of the Indictment; and (5) he received ineffective assistance of counsel because his counsel (a) did not challenge or object to the constitutionality of HRS § 706-657, or the unduly prejudicial effect of its "Prior Means Simultaneous" language; (b) did not argue either to the jury or to the circuit court, based on clear evidence of a logistical impossibility, that Perry could not be convicted as a principal under Count 1; and (c) made a manifestly prejudicial statement to the jury in counsel's closing argument.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues as raised by the parties, we conclude:

(1) The language of HRS § 706-657 is plain, unambiguous, and not unconstitutional. 1996 Haw. Sess. L. Act 15, § 2 at 23; Hse. Stand. Comm. Rep. 221-96, in 1996 House Journal, at 1122-23, accord, Sen. Stand. Comm. Rep. 2592, in 1996 Senate Journal, at 1210; Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999); State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995). The Hawai'i Supreme Court long ago opined that "the enactment of laws is the prerogative of the legislature and it is not for the judiciary to secondguess the legislature or substitute its judgment for that of the legislature." State v.

Cotton, 55 Haw. 148, 151, 516 P.2d 715, 718 (1973). The circuit court did not abuse its discretion in sentencing Perry to consecutive life sentences without parole. State v. Tauiiili, 96 Hawai'i 195, 199, 29 P.3d 914, 918 (2001).

(2) The circuit court did not abuse its discretion in denying Perry's motion for a mistrial. State v. Lagat, 97 Hawai'i 492, 495, 40 P.3d 894, 897 (2002); State v. Loa, 83 Hawai'i 335, 349, 926 P.2d 1258, 1272 (1996); State v. Crisostomo, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000); State v. Webster, 94 Hawai'i 241, 248, 11 P.3d 466, 473 (2000).

(3) The circuit court's jury instructions were not "prejudicially insufficient, erroneous, inconsistent or misleading." State v. Gonsalves, 108 Hawai'i 289, 292, 119 P.3d 597, 601 (2005)

(4) There was sufficient evidence adduced at trial to support Perry's conviction on Count 1. State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998).

(5) Perry failed to meet his burden of demonstrating that his counsel provided ineffective assistance. State v. Samuel, 74 Haw. 141, 158, 838 P.2d 1374, 1382 (1992); State v. Pacheco, 96 Hawai'i 83, 94, 26 P.3d 572, 583 (2001); Hawai'i Rules of Appellate Procedure (HRPP) Rule 28(b)(4); Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993); State v. Wakisaka,

102 Hawai'i 504, 513-14, 78 P.3d 317, 326-27 (2003); State v. Knight, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996).

Based on the foregoing, the Judgment filed on July 28, 2003 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 26, 2007.

On the briefs:

Joseph A. Gomes
for Defendant-Appellant.

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Acting Chief Judge



Associate Judge



Associate Judge