

NO. 26751

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
DELPHINE ABBOTT, aka Delphine McCabe-Abbott,
Delphine Shorr, and Fumiko, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-1183)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Nakamura, JJ.)

Defendant-Appellant Delphine Abbott, aka Delphine McCabe-Abbott, Dephine Shorr, and Fumiko, (Abbott) appeals from the Judgment filed on July 27, 2004 in the Circuit Court of the First Circuit^{1/} (circuit court).

On May 30, 2001, the State of Hawai'i (the State) charged Abbott via an Indictment with three counts of Sexual Assault in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 707-732(1)(e) (1993) (Counts I, II, and III), and one count of Sexual Assault in the First Degree, in violation of HRS § 707-730(1)(a) (1993) (Count IV). On January 11, 2002, a jury found Abbott guilty as to all four counts. The circuit court sentenced Abbott to five years of imprisonment as to each of Counts I, II, and III and twenty years of imprisonment as to Count IV, all terms to run concurrently. The circuit court

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

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entered its Judgment on July 27, 2004.^{2/} Abbott timely filed a Notice of Appeal on August 13, 2004.

On appeal,^{3/} Abbott argues that (1) her conviction should be set aside because the circuit court did not tender proper included offense instructions to the jury and (2) she received ineffective assistance of counsel.

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) There was no rational basis in the evidence to warrant the giving of an included offense instruction to the jury. HRS § 701-109(4)(c) (1993); HRS § 707-700 (1993) ("compulsion" and "strong compulsion"); State v. Buch, 83 Hawai'i 308, 312, 926 P.2d 599, 603 (1996); State v. Haanio, 94 Hawai'i 405, 413, 16 P.2d 246, 254 (2001).

^{2/} Defendant-Appellant Delphine Abbott (Abbott) failed to appear before the circuit court for her original sentencing date of April 8, 2002. The circuit court issued a bench warrant on November 6, 2002, and Abbott was served with the warrant and arrested on July 16, 2004.

^{3/} Abbott's opening brief fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) in that each point of error does not state "(ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency." Abbott's counsel is warned that future non-compliance with HRAP 28 may result in sanctions against him.

(2) Assuming arguendo that the circuit court did err in failing to give included offense instructions, such failure was harmless beyond a reasonable doubt because Abbott was convicted of the charged offenses. Haanio, 94 Hawai'i at 415-16, 16 P.3d at 256-57.

(3) Abbott failed to meet her burden of demonstrating that her 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 Rule 28(b)(4); Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993).

Therefore,

IT IS HEREBY ORDERED that the Judgment entered on July 27, 2004 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 19, 2007.

On the briefs:

Tae Won Kim
for Defendant-Appellant.

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

Corinne K. A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Craig W. Nakamura
Associate Judge