

NO. 26848

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

STATE OF HAWAI'I, Plaintiff-Appellee,  
v.  
PETER M. ALLISON, Defendant-Appellant

K. HAMAKADO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HPD Cr. No. 02488390)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Peter M. Allison (Allison) appeals from the Judgment filed on August 26, 2004, in the District Court of the First Circuit (district court). After a retrial,<sup>1</sup> Allison was convicted of harassment, a petty misdemeanor, in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2006).<sup>2</sup> He was sentenced to pay a fine of \$225.

Allison represented himself, *pro se*, at his first trial<sup>3</sup> and was convicted of harassment. That conviction was vacated on appeal and the case remanded for a new trial because Allison had not been adequately advised with respect to his

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<sup>1</sup> The Honorable Fa'aunga To'oto'o presided.

<sup>2</sup> HRS Section 711-1106(1)(a) (Supp. 2006) provides, in relevant part:

(1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:  
(a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

<sup>3</sup> The Honorable George Y. Kimura presided.

waiver of the right to counsel. State v. Allison, No. 25685, 2003 WL 22942572 (Hawaii December 15, 2003) (unpublished summary disposition order). Prior to the retrial, the Deputy Prosecuting Attorney (DPA) provided the complaining witness (CW) with a transcript of the first trial. The CW reviewed the portion of the transcript that contained her testimony at the first trial as well as a prior statement she had made to the police before she testified at the retrial.

Allison's claims of error on appeal center around the fact that the CW reviewed a transcript of her testimony at the first trial before testifying at the retrial. Allison contends that this resulted in the CW's retrial testimony being "shaped" by her testimony at the first trial, where Allison had been deprived of the right to counsel, and that the DPA's provision of the transcript to the CW constituted "witness tampering." Allison argues that by permitting the CW to testify after reviewing the transcript of her prior testimony, the district court violated: 1) Allison's right to confrontation; 2) his right against self-incrimination; and 3) his due process right to a fair trial. He further argues that his counsel was prevented by the DPA from interviewing the CW before trial and that his retrial violated the protection against double jeopardy.

After a careful review of the record and the briefs submitted by the parties, we conclude that Allison's arguments are without merit and affirm the Judgment.

We find nothing improper in the DPA's providing the CW with her testimony from the first trial to review, or in the CW's reviewing her prior testimony, before she testified at the retrial. Allowing a witness to review his or her prior statements, including prior testimony, is an acceptable means of preparing a witness for trial. Indeed, Hawaii Rules of Evidence (HRE) Rule 612 (1993) contemplates that "writing[s]" will be used to refresh a witness's memory before the witness testifies. See United States v. Mohawk, 20 F.3d 1480, 1488 (9th Cir. 1994) (indicating a similar interpretation of Federal Rules of Evidence Rule 612). Allison's argument that the district court erred in permitting the CW to testify after she reviewed her prior testimony, if taken to its logical conclusion, would mean that a lawyer could never have witnesses review their prior statements before testifying, a proposition we reject.

The CW testified at the retrial and was subject to cross-examination by Allison. Allison had the opportunity to impeach the CW with the fact that she had reviewed her prior testimony before testifying at the retrial. Allison's right to confrontation was not violated.

Allison contends that because he was not represented by counsel at the first trial, allowing the CW to testify at the retrial after refreshing her memory with her prior testimony violated his right against self-incrimination. We disagree. We fail to see how allowing the CW to refresh her memory with her prior testimony could possibly infringe upon Allison's right

against self-incrimination. Statements are routinely obtained from witnesses in the absence of defense counsel. The fact that Allison was not represented by counsel at the first trial did not taint the testimony given by the CW at the first trial.

We reject Allison's due process claim which was based on his contention that permitting the CW to review her prior testimony before testifying at the retrial was improper. As to Allison's claim that the DPA prevented his counsel from interviewing the CW, the record contains the DPA's unrebutted representation that the DPA told the CW that it was the CW's choice regarding whether to speak to Allison's counsel and that the DPA could not advise the CW on what to do. The district court found that the DPA did not prevent Allison's counsel from speaking to the CW and that it was the CW's choice not to speak to defense counsel. In light of the record, the district court's finding is not clearly erroneous.

Finally, we reject Allison's claim that his retrial violated his constitutional protection against double jeopardy. Retrial was not barred by the protection against double jeopardy because Allison's conviction after his first trial was not overturned on the ground of insufficiency of the evidence. State v. Jones, 96 Hawai'i 161, 184 n.30, 29 P.3d 351, 374 n.30 (2001).

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

IT IS HEREBY ORDERED that the August 26, 2004, Judgment entered by the District Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, March 20, 2007.

On the briefs:

Stephen M. Shaw  
for Defendant-Appellant

Daniel H. Shimizu  
Deputy Prosecuting Attorney  
City and County of Honolulu  
for Plaintiff-Appellee

  
Presiding Judge

  
Associate Judge

  
Associate Judge