

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27354

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CHRISTOPHER K. ESPIRITU, Defendant-Appellant

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

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NOS. 02-1-0666(1) & 03-1-0635(1))

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Christopher K. Espiritu (Espiritu) appeals from the Amended Judgment filed on May 18, 2005 in the Circuit Court of the Second Circuit (circuit court).^{1/}

On December 13, 2002, in Cr. No. 02-1-0666(1), the State of Hawai'i (the State) charged Espiritu via an Indictment with Attempted Murder in the Second Degree, in violation of Hawaii Revised Statutes (HRS) §§ 705-500 (1993) and 707-701.5 (1993) (Count One); Carrying or Use of Firearm in the Commission of a Separate Felony, in violation of HRS § 134-6(a) (Supp. 2005) (Count Two); Place to Keep Pistol or Revolver, in violation of HRS § 134-6(c) (Supp. 2005) (Count Three); and Unlawful Possession of Firearm, in violation of HRS § 134-4(b) (1993) (Count Four).

^{1/} The Honorable Joel E. August presided.

On December 15, 2003, in Cr. No. 03-1-0635(1), the circuit court re-indicted Espiritu for the offenses of Attempted Murder in the Second Degree (Count One) and Carrying or Use of Firearm in the Commission of a Separate Felony (Count Two). On January 13, 2004, the circuit court consolidated Cr. Nos. 02-1-0666(1) and 03-1-0635(1).

On March 22, 2005, the State dismissed Count Four and on April 1, 2004, the circuit court dismissed Count Two of Cr. No. 02-1-0666(1).

A jury found Espiritu guilty of Count Three under Cr. No. 02-1-0666(1) and Counts One and Two under Cr. No. 03-1-0635(1). The circuit court entered its Amended Judgment on May 18, 2005.

Espiritu filed a Notice of Appeal on June 14, 2005. On appeal, he argues:

(1) the circuit court erred by (a) admitting the testimony of Christine E. Dietz (Dietz) concerning text messages she had received on her cellular phone because her testimony contained multiple hearsay statements and was in violation of the best evidence rule, (b) allowing Anthony Manoukian, M.D. (Dr. Manoukian) to perform a live demonstration of the position of the gun because the demonstration was irrelevant and constituted unreliable scientific evidence, and (c) denying Espiritu's oral motions for judgment of acquittal on Count One (Attempted Murder

in the Second Degree) where the State failed to disprove Espiritu's defense of extreme mental or emotional disturbance (EMED) beyond a reasonable doubt; and

(2) the case should have been remanded for a new trial due to prosecutorial misconduct.

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) It was proper under Hawai'i Rules of Evidence (HRE) Rule 612 for the circuit court to allow Dietz to review the police report of the four text messages and refresh her recollection of each text message. The writing (police report) used to refresh Dietz's memory was not evidence and therefore did not present hearsay issues. HRE Rule 612; Commentary to HRE Rule 612; State v. Ferrer, 95 Hawai'i 409, 432, 23 P.3d 744, 767 (App. 2001); State v. Dibenedetto, 80 Hawai'i 138, 144, 906 P.2d 624, 630 (App. 1995).

(2) The circuit court did not abuse its discretion in admitting the demonstrative evidence. Dr. Manoukian's demonstration of the position of the gun was relevant and reliable; to the extent it differed from the actual circumstances of the shooting, these differences go to the weight of the evidence, not its admissibility. HRE Rule 401; HRE Rule 402; Yap

v. Controlled Parasailing of Honolulu, Inc., 76 Hawai'i 248, 256, 873 P.2d 1321, 1329 (1994); Lau v. Allied Wholesale, Inc., 82 Hawai'i 428, 434, 922 P.2d 1041, 1047 (App. 1996).

(3) It was proper for the circuit court to deny Espiritu's oral motions for judgment of acquittal. Espiritu presented no evidence regarding his emotional state at the time he shot Dietz. Assuming arguendo there was evidence supporting a defense of EMED, the State proved beyond a reasonable doubt that Espiritu was not acting under EMED or there was no reasonable explanation for the EMED. State v. Davalos, 113 Hawai'i 385, 389, 153 P.3d 456, 460 (2007); State v. Aplaca, 96 Hawai'i 17, 21, 25 P.3d 792, 796 (2001); State v. Locquiao, 100 Hawai'i 195, 205, 58 P.3d 1242, 1252 (2002); State v. Maelega, 80 Hawai'i 172, 179 n.10, 907 P.2d 758, 765 n.10 (1995); State v. Perez, 90 Hawai'i 65, 74, 976 P.2d 379, 388 (1999).

(4) The State's closing and rebuttal statements legitimately commented on the evidence and on reasonable inferences therefrom and therefore did not constitute prosecutorial misconduct. Hawai'i Rules of Penal Procedure (HRPP) Rule 52(a); State v. Carvalho, 106 Hawai'i 13, 16 n.7, 100 P.3d 607, 610 n.7 (App. 2004); State v. Sanchez, 82 Hawai'i 517, 528, 923 P.2d 934, 945 (App. 1996); State v. Pacheco, 96 Hawai'i 83, 95, 26 P.3d 572, 584 (2001); State v. Rogan, 91 Hawai'i 405,

412-13, 984 P.2d 1231, 1238-39 (1999); State v. Valdivia, 95
Hawai'i 465, 482-83, 24 P.3d 661, 678-79 (2001).

Therefore,

IT IS HEREBY ORDERED that the Amended Judgment entered
on May 18, 2005 in the Circuit Court of the Second Circuit is
affirmed.

DATED: Honolulu, Hawai'i, May 31, 2007.

On the briefs:

Cynthia A. Kagiwada
for Defendant-Appellant.

Peter A. Hanano,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge