

NO. 27425

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
JOE A. CRAIG, Defendant-Appellant

EMERANDO
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APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 04-1-0526(1))

MEMORANDUM OPINION

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

Defendant-Appellant Joe A. Craig (Craig) appeals from the Judgment filed on July 1, 2005, in the Circuit Court of the Second Circuit (circuit court).¹ Craig was charged by indictment with first degree assault, in violation of Hawaii Revised Statutes (HRS) Section 707-710(1) (1993),² for intentionally or knowingly causing serious bodily injury to David Hembree (Hembree). After a jury trial, Craig was found guilty as charged. The circuit court sentenced Craig to a ten-year term of imprisonment.

On appeal, Craig argues that: 1) the circuit court abused its discretion by admitting evidence that Craig assaulted Hembree in a prior incident; 2) the court erred by excluding evidence that Craig contends was relevant to show Hembree's character for violence and thus to support Craig's claim of self-

¹ The Honorable Joel E. August presided.

² Hawaii Revised Statutes (HRS) Section 707-710(1) (1993) provides:

(1) A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person.

defense; and 3) Craig's trial counsel provided ineffective assistance. We affirm.

BACKGROUND

Craig and Hembree were tenants living on the Okamura farm in Makawao, Maui. The patriarch of the farm was 96-year-old Kazuma Okamura (Kazuma), who lived on the farm with his daughter, April Jones (April), his son, Michael Okamura (Michael), and Michael's wife, Ruth Okamura (Ruth). Michael and April ran the farm subject to Kazuma's approval. Craig lived in a unit on the ground floor that was below the area occupied by Michael and Ruth. Hembree lived in a school bus on the farm that was near Craig's unit. Hembree was an alcoholic and regularly smoked marijuana.

Hembree testified that he drank "six to eight" beers in the evening on September 25, 2004,³ and was pretty drunk. He also likely smoked marijuana that day. Hembree became hungry and at about 1:30 or 2:00 a.m., he knocked on Michael and Ruth's door to get a peanut butter sandwich. Hembree was "buzzed" and "probably still pretty drunk." Michael and Ruth were both awake and Michael gave Hembree a sandwich, which he ate while talking to Michael.

According to Hembree, Craig attacked him in the garage area of Michael's house as Hembree was returning to his bus. Craig hit Hembree in the back of the leg with a bamboo stick that was an inch-and-a-half to two inches in diameter, causing Hembree to fall. Craig then hit Hembree in the head with the stick seven or eight times while Hembree was on the ground. Hembree told Craig, "[Y]ou don't have to do this" and pleaded with him to "stop, stop," to no avail.

Hembree was taken to Maui Memorial Medical Center and admitted to the intensive care unit where he remained for two days. Hembree was treated by Dr. Dilworth Thomas Rogers (Dr.

³ Other evidence in the record indicates that the correct date was September 24, 2004.

Rogers), a neurosurgeon, for fractures at the base of Hembree's skull; a laceration to his forehead; and pneumocephalus, or "air up into his brain." Dr. Rogers testified that pneumocephalus could be considered a life-threatening injury because "whenever you have a connection from the outside up into the brain, the bacteria can get in and you can develop meningitis. . . ." He also testified that "[w]ith this amount of force to the head, you can develop bleeding in the brain which can also be life-threatening." In Dr. Rogers's opinion, Hembree had sustained serious bodily injury. Hembree's medical records included a paramedic report stating that "[p]atient is intoxicated" and an entry by the doctor who admitted Hembree that Hembree appeared intoxicated.

Hembree testified that the injuries he sustained as a result of Craig's assault included a scar on his forehead, fractures to his skull, and fractures under the eyes and to the nose. He claimed that he had almost completely lost his sense of smell and that his eyesight had diminished. At the time of trial, Hembree was five-feet-four-inches tall and weighed 135 pounds.⁴

Hembree was permitted to testify about a prior incident that occurred several years before the charged assault, in which he was assaulted by Craig ("the prior assault incident"). During the prior assault incident, Hembree was involved in a heated argument with Michael when Craig intervened. Craig hit Hembree over the head a couple of times with a "two-by-four" and then repeatedly bashed Hembree in the head with a cement rock while Hembree was on the ground. Hembree went to the hospital and required 19 stitches to close a big gash on his head.

⁴ Although testimony regarding the height and weight of Defendant-Appellant Joe A. Craig (Craig) were not elicited at trial, the record shows that the Deputy Prosecuting Attorney (DPA) had Craig and David Hembree (Hembree) stand next to each other so that the jury could do a visual comparison. The non-trial portion of the record includes an entry that lists Craig as five-feet ten-inches tall and weighing 170 pounds.

David Jouvenat (Jouvenat), Hembree's good friend, testified that before the charged assault, Craig had several conversations with Jouvenat about the prior assault incident. During these conversations, Craig told Jouvenat that Hembree was a "screw-up" who "deserved to have his ass kicked." Craig also told Jouvenat that Craig "almost finished [Hembree] off the first time" and, given the chance, Craig would "finish [Hembree] off." Jouvenat had not witnessed the previous assault incident.

Michael testified about the charged assault. Michael confirmed that Hembree came to his door in the early morning asking for a sandwich, which Michael gave him. Michael's door was at the top of interior stairs at the end of a hallway that passed by Craig's unit. As Hembree was leaving, Michael heard Craig tell Hembree, "[G]o back to your bus and go to sleep," and Hembree reply, "Okay." Michael was in hallway on the ground floor when he saw Hembree and Craig walk out of the house. When Michael got to the end of the hallway and looked outside, he saw Craig "pounding down" with what looked like a big bamboo stick or a baseball bat. Michael testified that he could not see what Craig was hitting but "could hear it was human flesh." Michael heard Craig hitting the flesh ten or twelve times. The blows made a "wop, wop" sound and Michael could tell that Craig was hitting a body.

Michael got scared and ran back to his residence. His wife, Ruth, told Michael that he better find out what happened. Michael went down the steps and saw Craig, who was in the process of closing a screen door to the garage. Michael asked Craig if everything was all right, and Craig responded that everything was fine. Michael returned to his residence and his wife again directed him to determine what happened. Michael went outside and saw "lots of blood on the ground." He went back to his residence and called 9-1-1. The State played a recording of the 9-1-1 call. Hembree can be heard in the background saying that he had been hit with a bamboo stick.

Michael also testified about the prior assault incident. Michael was arguing with Hembree, who was somewhat intoxicated, over Hembree's handling of produce when Craig attacked Hembree with a two-by-four from behind. Michael was surprised by Craig's attack because Michael's argument with Hembree had not involved a physical altercation. Craig "whacked" Hembree several times with the two-by-four, punched Hembree, and then pounded Hembree's head with a cement rock while Hembree was on the ground. Michael told Craig to stop because Hembree was not even fighting back. Hembree went to the hospital, where he was given "many" stitches.

Ruth's testimony corroborated Michael's testimony about the charged assault. After Hembree finished eating his sandwich and went outside, Ruth heard what appeared to be someone being attacked and a whacking sound. She then heard Hembree say, "[Craig], what are you doing[?]" and "[Craig], why are you doing this[?]" Ruth heard at least five or six whacks, maybe more. Ruth went outside and saw that Hembree had a deep wound on his head, had a lot of blood on his face, and seemed to be in pretty bad shape.

Craig testified in his own defense at trial. With regard to the charged assault, Craig testified that he woke up after hearing Hembree knock on Michael's door at 1:30 a.m. Craig opened his door and saw Hembree eating a sandwich on the interior stairs leading to Michael's door. Craig told Hembree to go back to his bus. Hembree was drunk and had to hold onto the stairs to keep himself upright.

According to Craig, as Hembree stepped out into the carport area, Hembree tripped and fell headlong into a post. Hembree dropped what was left of his sandwich. When Craig reached to pick up the sandwich, Hembree attacked Craig, striking at Craig with fists and feet. Craig acknowledged that he had "whipped Hembree before" and testified that he was able to defend himself against Hembree's blows "easily enough," blocking them with his arms. Craig stated that Hembree drove him backwards ten

or fifteen feet and then grabbed a piece of lumber that was two-by-three inches and four feet long. Hembree swung the lumber at Craig, but Craig caught the lumber before it hit him and took it away from Hembree. Craig hit Hembree once across the face with the lumber, knocking Hembree to the ground. Craig then went back into the house and closed and locked the door to the garage.

Craig testified that he hit Hembree "as hard as you would maybe drive a grounder to first base. I was not out for a homerun. I wasn't out to kill him." Craig stated that when Hembree tripped and hit the post, it was only a glancing blow. Craig admitted that the cut on Hembree's forehead was caused by Craig hitting him with the lumber. Craig stated that he received no injuries as a result of his altercation with Hembree. When asked why he did not flee behind the door to the garage after taking the stick away from Hembree, Craig testified, "Because I believe he lives to run away, lives to run another day. And I had to do what I had to do."

With respect to the prior assault incident, Craig testified that he remembered it very well. Craig stated that Hembree, who was drunk and staggering, was arguing with Michael. Craig testified that he intervened after he saw Hembree push and then kick Michael. Craig "brought [Hembree] around with a left hook and popped him . . . about nine times within about 15 seconds" in the face, which knocked Hembree to the ground. Craig then "took a rock and . . . popped [Hembree] a few times in the noggin" with it. Craig hit Hembree with the rock even though Hembree was on the ground because Hembree "wasn't stopping."

DISCUSSION

I.

Craig argues that the circuit court abused its discretion in admitting evidence of the prior assault incident because: 1) Plaintiff-Appellee State of Hawai'i (the State) had not adequately notified Craig that it was going to introduce the evidence; and 2) the probative value of the evidence was substantially outweighed by its prejudicial impact. We disagree.

Prior to trial, the State filed its "Notice of Intent to Rely on Potential [Hawaii Rules of Evidence (HRE)] Rule 404(b) Material" (Rule 404(b) Notice). In the Rule 404(b) Notice, the State advised that it sought to introduce evidence:

1) That [Craig] had previously assaulted David Hembree, bragged about doing it, and indicated to Mr. David Jouvenat his intention to assault Hembree again. "If I had the chance, I'll do it again". I got away with it once, I can get away with it again". "Dave's just a drunk nobody would care". (See attached Exhibit "A".

(Punctuation in original.) Exhibit A, which was attached to the State's Rule 404(b) Notice, was a portion of a police report containing a summary of an interview of Jouvenat on October 5, 2004. The report indicated that in his interview, Jouvenat stated that Craig had assaulted Hembree "a couple of years ago," that Craig had subsequently bragged about the assault, and that Craig told Jouvenat he had struck Hembree on the head with a two inch by four inch piece of lumber.

HRE Rule 404(b) (Supp. 2006) provides:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

(Emphasis added.)

Craig contends that the State's Rule 404(b) Notice was deficient because it only indicated that Jouvenat would testify about Craig's bragging about the prior assault and did not provide notice that the State intended to introduce evidence of the prior assault itself. Craig's bragging about the prior assault to Jouvenat, however, did constitute evidence that the prior assault had occurred. Moreover, the State's Rule 404(b) Notice explicitly advised that the State intended to introduce evidence "that [Craig] had previously assaulted David Hembree."

We conclude that the State's Rule 404(b) Notice was sufficient to advise Craig that the State intended to offer evidence of the prior assault itself.

We further conclude that Craig was not prejudiced by the State's failure to specify the precise date or location of the prior assault in its Rule 404(b) Notice. Craig testified at trial that he remembered the prior assault incident "very well" and then proceeded to describe in detail his version of what had happened. The State's HRE Rule 404(b) Notice was therefore adequate to apprise Craig of the prior assault incident and to enable him to prepare for the introduction of evidence relating to that incident.

Evidence that Craig had beaten Hembree during the prior assault incident and had bragged that if given the chance, he would do so again was relevant to showing Craig's intent and motive in engaging in the charged assault. The probative value of the prior assault incident was heightened by Craig's claim of self-defense. Evidence that Craig had previously beaten an intoxicated Hembree with relative ease served to refute Craig's claim that Craig reasonably believed his use of force against Hembree during the charged assault was immediately necessary for self-protection. In addition, the circuit court gave a limiting instruction with respect to evidence of the prior assault incident that diminished the risk of any unfair prejudice.⁵ We conclude that the probative value of the evidence of the prior assault incident was not substantially outweighed by the danger

⁵ Prior to submitting the case to the jury, the trial court gave the following instruction:

During the trial, you have heard evidence of a prior incident involving the defendant, David Hembree, and Michael Okamura. This testimony is not to be considered as evidence of the character of the defendant or to prove that he acted on September 25th, 2004 in conformity with any trait of his character. You may only consider this evidence in considering the defendant's motive, intent, or plan relative to his actions taken on September 25th, 2004.

of unfair prejudice and that the circuit court did not abuse its discretion in admitting the evidence. See HRE Rule 403 (1993).

II.

Craig contends that the circuit court erred by precluding him from introducing evidence that Hembree had been arrested for disorderly conduct shortly before trial and from questioning Hembree about whether he had been forced to leave the Okamura farm. Craig argues that such evidence was relevant to show Hembree's character for violence or aggression in light of Craig's claim that he acted in self-defense and that Hembree had been the aggressor. Craig's arguments are without merit.

An arrest for disorderly conduct does not necessarily show that the person arrested engaged in violent or aggressive conduct. Indeed, the disorderly conduct offense can be committed by someone making unreasonable noise with the intent to cause physical inconvenience. See HRS § 711-1101(b) (Supp. 2006). Craig did not proffer the circumstances underlying Hembree's disorderly conduct arrest; nor did he proffer what evidence he expected to elicit by asking Hembree if Hembree was forced to leave the farm. Absent a proffer of evidence, Craig did not preserve his claim of error for appeal, and he fails to demonstrate that the circuit court erred. See HRE Rule 103(a)(2) (1993); State v. Kelekolio, 74 Haw. 479, 523, 849 P.2d 58, 78 (1993).

III.

Craig asserts that his trial counsel provided ineffective assistance by opening the door to questions about Craig's post-arrest silence through counsel's questioning of Craig on direct examination. With respect to ineffective assistance of counsel claims, the Hawai'i Supreme Court has held:

[T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998).

A.

Although the record is not clear, it appears that Craig had two conversations with the police -- one conversation before his arrest when the police arrived at the Okamura farm in response to Michael's 9-1-1 call (the "pre-arrest statement") and the second conversation several days after he had been arrested and released from custody by the police (the "post-arrest statement"). The sequence of events appears to be as follows:

1) On September 25, 2004, Craig told the police who arrived in response to the 9-1-1 call that Hembree fell against the post. Craig did not mention anything about Hembree's attacking Craig or Craig hitting Hembree in self-defense.

2) Craig was arrested on September 29, 2004. When questioned on September 30, 2004, at the cellblock by Detective Ronald Hiyakumoto, Craig invoked his right to counsel. He was released sometime later.

3) On October 5, 2004, Detective Hiyakumoto went to the Okamura farm to take photographs as part of his investigation. Detective Hiyakumoto encountered Craig who pointed to a post in the garage and said, "[T]his is where Mr. Hembree fell and hit his head." Craig did not say anything else to Detective Hiyakumoto.

4) Craig was indicted on October 25, 2004.⁶

B.

In opening statement, Craig's counsel referred to Craig's pre-arrest statement:

[Craig] does give a statement to the police initially, when the police got called. And he said he did see David Hembree fall down and hit his head. And he didn't say anything about David Hembree then coming up and attacking him and everything else, but he didn't want to have the police involved at that point.

The State called Detective Hiyakumoto in its case in chief. Without objection from the defense, the Deputy

⁶ The full police report of Detective Ronald Hiyakumoto was not part of the record. The above sequence of events is based on statements made by counsel during trial at side bar, information in the presentence report, and other information in the record.

Prosecuting Attorney (DPA) elicited the following testimony from Detective Hiyakumoto regarding Craig's post-arrest statement:

[DPA] Q: While you were taking photographs, did Mr. Craig make any statement to you?

[DETECTIVE HIYAKUMOTO] A: Yes. He walked out in the garage area where I was standing at the time and he pointed to a pole and he said, this is where Mr. Hembree fell and hit his head.

Q: Did Mr. Craig make any statements to you regarding Mr. Hembree picking up a pole and attempting to strike Mr. Craig?

A: No.

Q: Did Mr. Craig make any indications to you that he needed to defend himself against Mr. Hembree?

A: No.

Craig testified in his own defense at trial. On direct examination, Craig's counsel questioned Craig about what he did after striking Hembree on September 25, 2004.

[Craig's counsel] Q: Then when you went into your room --

[Craig] A: Well, it's just the fact, like I said, was I heard [Michael] yell up to [Ruth] to come down here. And I says, oh, boy, you know, here we go. And about 20 minutes later, I hear the police squawker on their shoulders, you know. I knew there was police outside, and so I got up. I didn't go to sleep or anything. I knew they would probably have to talk to somebody. And two officers, a man and a woman officer, asked me what had happened. They checked me for marks. And I, basically, said that [Hembree] had just fallen against the post and just left it at that.

Q: Why didn't you tell them about the fight and everything else?

A: Well, because if I -- I knew instinctively that if I had have, that I might have been taken to jail that night, even though it was self-defense. But all my possessions probably would have - - if I had gone to jail, and I didn't know how long for, my possessions would have been looted out of my room. I would have lost everything completely.

(Emphasis added.)

On cross-examination, the DPA questioned Craig about his pre-arrest statement to the police and had Craig confirm that he did not mention being attacked by Hembree or acting in self-defense. The DPA then questioned Craig about the post-arrest statement he made to Detective Hiyakumoto, noting that Craig had "all this time" after the pre-arrest statement to think about

what to say.⁷ The DPA elicited testimony from Craig that Craig showed Detective Hiyakumoto where Hembree had fallen but did not say anything about Hembree swinging his arms at Craig.

[DPA] Q: Okay. Five or six days later, Mr. Craig, Detective Hiyakumoto comes, and what do you tell him?

[Craig] A: I knew who he was.

Q: What do you tell him, Mr. Craig?

A: I said this is where [Hembree] fell right here.

Q: Do you tell Detective Hiyakumoto anything about Mr. Hembree swinging his arm at you?

A: Not a thing, no.

Q: Did you tell Detective Hiyakumoto anything about Mr. Hembree picking up a stick?

At this point, defense counsel objected and then argued at side bar that the DPA's questioning violated Craig's right to remain silent. In particular, defense counsel noted that Craig's post-arrest statement to Detective Hiyakumoto took place several days after Craig had invoked his right to an attorney at the cellblock and thus asking Craig about what he did not tell Detective Hiyakumoto was improper. The circuit court overruled the objection, stating it thought that "the door got opened up during direct examination." The DPA then concluded his cross-examination on the post-arrest statement as follows:

[DPA] A: Mr. Craig, when Detective Hiyakumoto was at the scene taking photographs, all you told him was that Mr. Hembree fell into this post, right?

[Craig] A: No, sir. I said this is where Mr. Hembree fell and struck himself.

Q: Okay. You did not tell him about anything else did you?

A: No, sir. I remained silent.

Q: And you didn't tell him anything else because --

[Defense Counsel]; Your Honor, again, I object.

[THE COURT]: I'll sustain the objection.

⁷ The DPA referred to the interval between the two statements as being ten days, while Craig stated that the interval was five or six days.

[DPA]: Your Honor, with respect to --

[THE COURT]: Please move on.

[DPA]: I thought we agreed to this at the bench, Your Honor.

[THE COURT]: Please move on, Counsel.

C.

By his opening statement, Craig's counsel clearly opened the door to questions and comments about Craig's pre-arrest statement. Craig's counsel explained in opening statement that Craig initially told the police that Hembree fell and hit his head, but did not say anything about Hembree's attack or Craig's response because Craig did not want to have the police involved. The decision of Craig's counsel to use Craig's pre-arrest statement appears to have been a reasonable tactical choice and not ineffective assistance of counsel. The pre-arrest statement corroborated Craig's trial testimony that Hembree had tripped and fallen into the garage post, which Craig contended led to Hembree's attacking Craig. However, in referring to the pre-arrest statement, Craig's counsel opened the door to Craig being impeached by his failure to mention his self-defense claim in the pre-arrest statement.

We do not agree with Craig's claim that his counsel opened the door to questions about Craig's post-arrest silence by asking Craig on direct examination why he did not tell the police "about the fight and everything else." The question posed by Craig's counsel and Craig's answer referred to Craig's failure to raise the self-defense claim in the pre-arrest statement. The question by Craig's counsel therefore did not open the door to questions about Craig's failure to mention the self-defense claim in Craig's post-arrest statement to Detective Hiyakumoto, which apparently occurred several days after Craig had been advised of his Miranda rights and invoked his right to counsel. We therefore reject Craig's claim that his counsel was ineffective

for opening the door to questions about Craig's post-arrest silence.

But even if Craig were correct in his opening-the-door claim, he would still not be entitled to relief because the alleged error of his counsel did not result in the withdrawal or substantial impairment of a potentially meritorious defense. See Richie, 88 Hawai'i at 39, 960 P.2d at 1247. The evidence of Craig's post-arrest failure to disclose his self-defense claim to the police did not contribute to Craig's conviction given the other overwhelming evidence refuting Craig's self-defense claim.

Hembree and Michael testified that Craig struck Hembree multiple times with a stick while Hembree was on the ground. Ruth testified that she heard sounds of someone being whacked at least five or six times in combination with Hembree's asking Craig, "[W]hy are you doing this?" The evidence that Craig struck Hembree multiple times refuted Craig's claim that he only hit Hembree once in self-defense. Hembree suffered fractures to the base of his skull and a significant Y-shaped gash to his forehead, injuries that were inconsistent with Craig's account of what had happened. In addition, the State properly impeached Craig's self-defense claim with Craig's failure to mention this claim in his pre-arrest statement to the police.

Craig's self-defense claim was further undermined by his own description of the incident. Craig described Hembree as being intoxicated to the point of having to hold onto stairs to keep himself upright. Craig acknowledged that he was able to defend against Hembree's attempts to strike him "easily enough" and that Craig suffered no injuries. Craig also noted that he had "whipped Hembree before."

Moreover, by convicting Craig of first degree assault, the jury necessarily found that he had used "deadly force"

against Hembree.⁸ A defendant is only justified in using deadly force in self-defense if he reasonably believes it is necessary to protect himself against "death, serious bodily injury, kidnapping, rape, or forcible sodomy." HRS § 703-304 (1993 & Supp. 2006). Here, there was overwhelming evidence that Craig was not justified in using deadly force against the much smaller Hembree, who was significantly impaired by his intoxicated state.⁹

IV.

Craig further argues that his trial counsel provided ineffective assistance based on Craig's contention that his counsel: 1) asked a question that undermined Craig's self-defense theory; 2) failed to object to the DPA's "numerous inflammatory comments and insinuations about Craig;" and 3) failed to call a police officer to show that Hembree's trial testimony was inconsistent with a statement Hembree had made to the officer. We conclude that Craig was not denied his right to the effective assistance of counsel with respect to these matters.

On direct examination, Craig's counsel asked Craig, "Then you picked up that stick?" In response, Craig explained

⁸ In order to find Craig guilty of first degree assault, the jury had to find that he "intentionally or knowingly cause[d] serious bodily injury" to Hembree. See HRS § 707-710(1). For purposes of the self-defense justification, HRS § 703-304 (1993 & Supp. 2006), "deadly force" is defined to mean "force which the actor uses with the intent of causing or which the actor knows to create a substantial risk of causing death or serious bodily harm." HRS § 703-300 (1993).

⁹ Craig did not claim on appeal that the trial court erred in permitting the DPA to elicit evidence concerning Craig's post-arrest silence, but only that his counsel was ineffective in opening the door to this evidence. Thus, Craig has waived any claim that the trial court erred in permitting the DPA to elicit evidence that Craig did not disclose his self-defense claim when speaking to Detective Hiyakumoto at the Okamura farm several days after Craig's arrest. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (2007) ("Points not argued may be deemed waived."). Moreover, even if Craig had raised this claim on appeal and assuming, *arguendo*, that such evidence was improperly permitted, see *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976); but see *Anderson v. Charles*, 447 U.S. 404, 408-09 (1980), we would conclude, for the reasons stated above, that any error in permitting the evidence was harmless beyond a reasonable doubt.

that he had picked up the stick because it was "the only stick there that was really leaning out." Craig argues that his counsel's question undermined his self-defense theory, which was that he grabbed the stick away from Hembree. Although counsel perhaps could have phrased the question better, counsel's action did not "f[a]ll below the range of competence demanded of attorneys in criminal cases[.]" Dan v. State, 76 Hawai'i 423, 429, 879 P.2d 528, 534 (1994). In response to counsel's question, Craig could have explained that he obtained the stick by grabbing it out of Hembree's hands. Therefore, it was Craig's response, and not counsel's question, that undermined Craig's self-defense claim.

The DPA's "inflammatory comments and insinuations" that Craig complains about were questions the DPA asked that were based directly upon the testimony of witnesses at trial. Craig has not shown that his counsel acted unreasonably in failing to object to the DPA's questions as inflammatory or argumentative.

Craig contends his counsel was ineffective by failing to call police officer Martell Irish (Officer Irish) to show that portions of Hembree's trial testimony were inconsistent with a prior statement Hembree had made to Officer Irish. The decision on whether to call a witness is normally a matter within the judgment of counsel and will rarely be second-guessed on appeal. Richie, 88 Hawai'i at 40, 960 P.2d at 1248. In cross-examining Hembree, Craig's counsel pointed to several instances in which Hembree's trial testimony differed from the statement Hembree had given to Officer Irish. Craig's counsel may reasonably have concluded that he had impeached Hembree sufficiently and thus that calling Officer Irish to prove the prior statement was unnecessary. We cannot say that Craig's counsel acted incompetently in declining to call Officer Irish.

In any event, in light of the overwhelming evidence against Craig, we conclude that none of the alleged errors of Craig's trial counsel resulted in either the withdrawal or

substantial impairment of a potentially meritorious defense.
Richie, 88 Hawai'i at 39, 960 P.2d at 1247.

CONCLUSION

The July 1, 2005, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, August 16, 2007.

On the briefs:

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