

NO. 27596

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALFRED FERNANDEZ, III, Defendant-Appellant

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 05-1-0076)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Alfred Fernandez III (Fernandez) appeals from the Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit on October 25, 2005.^{1/} A jury found Fernandez guilty of Robbery in the First Degree, pursuant to Hawaii Revised Statutes (HRS) § 708-840(1)(b)(i) and/or § 708-840(1)(b)(ii) (1993 & 2005 Supp.).

On appeal, Fernandez advances four points of error:

(1) The circuit court erred by denying his Motion to Dismiss. Fernandez argues that he was prevented from presenting a complete defense because Honolulu Police Detective Johnson used Fernandez's photograph when interviewing the State's witnesses, but did not utilize the photograph when investigating Fernandez's alibi at the Ala Moana Hotel. Fernandez also claims Detective

^{1/} The Honorable Karl K. Sakamoto presided.

Johnson failed to request that the Ala Moana Hotel preserve certain digital camera data so Fernandez could examine the data.

(2) The circuit court erred when giving the court's "special" Robbery in the First Degree charge to the jury because the "three elements given to the jury . . . did not define the requisite state of mind" and the court's instruction "failed to identify the applicable state of mind and that it applied to each and every element of the charged offense." Fernandez also argues that the "instruction did not identify the owner of the property of another or person deprived of the property, which would allow the jury to determine the element of consent vs. non-consent of the theft."

(3) Fernandez "was denied a fair trial by the prosecutor's repeatedly shifting the burden of proof during his rebuttal argument." Fernandez argues that in three instances the Deputy Prosecuting Attorney (Prosecutor) improperly engaged in burden-shifting.^{2/} Fernandez asserts that the Prosecutor

^{2/} Defendant-Appellant Alfred Fernandez argues that the following three excerpts amounted to prosecutorial misconduct:

(1) In reference to the presence of various witnesses at the alleged party at the Ala Moana Hotel: "[H]e knows people who are at the party -- you heard him identify people. Where are they?" and "They could have called Mike and asked about Cherise."

(2) In questioning the circumstances of the complainant's cell phone: "Even to this point Alfred does not explain how the cell phone that Ms. Pelayo had ends up calling Chanelle."

(continued...)

improperly commented "upon defense counsel's not asking or producing particular evidence" regarding the presence of certain individuals at the Ala Moana Hotel. Fernandez also contends the State improperly argued that he failed to produce evidence explaining his apparent use of a cell phone stolen from the complaining witness and that the cell phone had nothing to do with his alibi defense.

(4) The circuit court committed judicial misconduct by delegating its authority as judge of the law to the Prosecutor. Fernandez argues the circuit court should not have commented that the Prosecutor "has clarified that you [Fernandez] have no burden of proof in this case" because that comment, when viewed cumulatively with the Prosecutor's improper burden-shifting and other factors, created an "atmosphere not conducive to due process."

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 hold:

(...continued)

(3) In further attacking the questioning of witnesses by defense counsel:

These are other people that were at the party -- Marlon Flores, Benjie Dimapilis, Ruben Ganibe. And remember the cross of Mr. Ganibe by [Defense Counsel]? You know, there were a lot of questions about the car, a lot of questions about the jewelry. There were no questions about whether he was at a hotel party on August 16, 2004.

(1) The circuit court correctly denied Fernandez's Motion to Dismiss and did not abuse its discretion in doing so. State v. Mendonca, 68 Haw. 280, 283, 711 P.2d 731, 734 (1985). Detective Johnson did not act in bad faith by failing to ask the security director of the Ala Moana Hotel to preserve certain digital surveillance data after the security director informed him that no one matching Fernandez's description had appeared on the tapes. State v. Okumura, 78 Hawai'i 383, 402, 894 P.2d 80, 99 (1995); State v. Matafeo, 71 Haw. 183, 187, 787 P.2d 671, 673 (1990). Fernandez fails to show that the suppressed evidence was potentially exculpatory or would otherwise create an otherwise nonexistent reasonable doubt as to his guilt. Okumura, 78 Hawai'i at 402, 894 P.2d at 99. Fernandez's assertion that the surveillance data might have shown him at the hotel and supported his alibi, despite the security director's sworn testimony to the contrary, amounts to mere speculation and would not support a finding that the evidence was exculpatory. State v. Jenkins, 93 Hawai'i 87, 104, 997 P.2d 13, 30 (2000) (mere speculation insufficient to show that suppressed evidence would be exculpatory).

(2) Viewed as a whole, the circuit court's instructions were not inconsistent, erroneous, or misleading. State v. Valentine, 93 Hawai'i 199, 204, 998 P.2d 479, 484 (2000). The circuit court's instructions sufficiently directed

the jury that the State must prove that Fernandez acted "intentionally, knowingly, recklessly, or negligently" with respect to every element of the offense charged. State v. Cabrera, 90 Hawai'i 359, 368, 978 P.2d 797, 806 (1999). The circuit court instructed the jury that it must "consider all of the instructions as a whole and consider each instruction in light of all of the others." The circuit court gave instructions concerning state of mind and also explained the concept of intent to the jury.^{3/} The circuit court instructed the jury that the State carried the burden of proving every element of the offense beyond a reasonable doubt. Finally, the circuit court, in defining the offense of Robbery in the First Degree, charged, in relevant part:

1. That on or about the 16th day of August, 2004, in the City and County of Honolulu, State of Hawaii, the defendant Alfred Fernandez III was in the course of committing a theft; and,

2. That while doing so the defendant Alfred Fernandez III was armed with a dangerous instrument; and,

3. That while doing so the defendant Alfred Fernandez III did threaten the imminent use of force against Helen Pelayo, a person who was present, with intent to compel acquiescence to the taking of or escaping with the property.

A person commits theft if he obtains or exerts unauthorized control over the property of another with

^{3/} The circuit court explained:

A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct. A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist. A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

intent to deprive the person of the property. An act shall be deemed in the course of committing a theft if it occurs in an attempt to commit theft, in the commission of theft, or in the flight after the attempt or commission.

The circuit court's instructions sufficiently identified the owner of the property taken so that the jury could evaluate the issue of possible consent. The circuit court instructed the jury, as part of its Robbery in the First Degree instruction, that it must find, in addition to the other elements described, "[t]hat while doing so, the defendant Alfred Fernandez III did threaten the imminent use of force against Helen Pelayo, a person who was present, with intent to compel acquiescence to the taking of or escaping with the property. A person commits theft if he obtains or exerts unauthorized control over the property[.]" The instructions identified Helen Pelayo and explained that the jury must find that Fernandez acted with intent to obtain unauthorized control over her property. Considered as an integrated whole, the circuit court more than adequately instructed the jury as to the requisite state of mind for each element of the offense, and the court's instructions were not insufficient or misleading.

(3) The Prosecutor did not commit prosecutorial misconduct during his rebuttal or engage in improper burden-shifting by noting the state of the evidence in the case. Assuming arguendo there was misconduct, it was harmless beyond a reasonable doubt and did not contribute to Fernandez's conviction

or prejudice his right to a fair trial. State v. Rogan, 91 Hawai'i 405, 412, 984 P.2d 1231, 1238 (1999); State v. McGriff, 78 Hawai'i 148, 158, 871 P.2d 782, 792 (1994). This is particularly true in light of the relatively innocuous nature of the misconduct alleged, the promptness of the circuit court's curative instructions, and the significant weight of the evidence against Fernandez. State v. Agrabante, 73 Haw. 179, 198, 830 P.2d 492, 502 (1992). Nor did the Prosecutor commit misconduct by arguing Fernandez's failure to produce witnesses to corroborate his alibi. This technique is permissible argument concerning the state of the evidence and did not prejudice Fernandez's right to a fair trial. State v. Napulou, 85 Hawai'i 49, 57-59, 936 P.2d 1297, 1305-07 (App. 1997).

(4) The circuit court judge did not commit judicial misconduct or improperly delegate its duty as judge of the law when he said: "[The Prosecutor] has clarified that you have no burden of proof in this case." Fernandez devotes little argument to this point and directs this court to no authority supporting his contention that such a remark is improper. "[R]eversal on the grounds of judicial bias or misconduct is warranted only upon a showing that the trial was unfair. Unfairness, in turn, requires a clear and precise demonstration of prejudice." Aga v. Hundahl, 78 Hawai'i 230, 242, 891 P.2d 1022, 1034 (1995) (citations omitted).

Therefore,

IT IS HEREBY ORDERED that the Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit on October 25, 2005 is affirmed.

DATED: Honolulu, Hawai'i, January 24, 2007.

On the briefs:

Dana S. Ishibashi
for Defendant-Appellant.

Sonja P. McCullen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge