

NO. 27692

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
RYAN-SETH KIAHA, Defendant-Appellant

EM. RIMANDO
STATE OF HAWAI'I
APPELLATE COURTS

2007 JUL 27 AM 9:11

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 04-1-1410)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, Chief Judge, Watanabe, and Nakamura, JJ.)

Defendant-Appellant Ryan-Seth Kiaha (Kiaha) appeals from the Judgment filed on July 1, 2005, in the Circuit Court of the First Circuit (circuit court).¹ After a jury trial, Kiaha was found guilty of unauthorized control of a propelled vehicle, in violation of Hawaii Revised Statutes (HRS) Section 708-836 (Supp. 2006).² Plaintiff-Appellee State of Hawai'i (the State) moved that Kiaha be sentenced to an extended ten-year term of

¹ The Honorable David W. Lo presided.

² Hawaii Revised Statutes (HRS) Section 708-836 (Supp. 2006) provides, in relevant part:

(1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent

(2) "Propelled vehicle" means an automobile . . . or other motor-propelled vehicle.

. . . .

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership; provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, "owner" means the legal owner.

imprisonment as a persistent offender³ and a mandatory minimum five-year term as a repeat offender based on his numerous prior felony convictions. The circuit court granted these motions and sentenced Kiaha to a ten-year term of imprisonment with a five-year mandatory minimum term. The court ordered that this sentence be served concurrently with any other terms of imprisonment Kiaha was serving.

I.

The State's main witness at trial was a 15-year-old juvenile ("the juvenile") whom Kiaha had befriended. Kiaha was 20 years old at the time of the charged offense. On July 13, 2004, at about 11:30 p.m., a police officer saw the juvenile sitting in the driver's seat of a stalled Honda Accord on a street in Kailua. Upon closer inspection, the officer noticed that the Accord's ignition was missing. A check of the Accord's license plate number revealed that it had been reported stolen, and the officer arrested the juvenile.

In his first post-arrest statement to the police, the juvenile stated that he had purchased the car from a man for \$100. The juvenile was then released to his parents. At the encouragement of his father, the juvenile returned to the police station the next day and admitted that he had lied. The juvenile provided two additional statements to the police which implicated Kiaha in the theft of the Accord.

At trial, the juvenile testified that he was present when Kiaha stole the Accord. According to the juvenile, Kiaha used a screwdriver to pick the passenger door lock, a dent puller to break the ignition, and the screwdriver to start the car. The next evening, Kiaha picked up the juvenile in the stolen car, and they ended up at Kiaha's house. Kiaha told the juvenile to take

³ In its written motion, Plaintiff-Appellee State of Hawai'i (the State) requested that Defendant-Appellant Ryan-Seth Kiaha (Kiaha) be sentenced to an extended term as a "multiple offender" but later orally corrected the motion to request that the extended term be based on Kiaha's status as a "persistent offender" pursuant to HRS § 706-662(1) (Supp. 2005).

the car because Kiaha was too tired to drive the juvenile home. The juvenile explained that the Accord had a standard transmission and that he did not know how to drive a standard transmission. As a result, he drove the car slowly in first gear. The car stalled twice. On the second occasion, the juvenile encountered the police.

II.

On appeal, Kiaha argues that: 1) the circuit court committed plain error by: a) failing to exclude the juvenile's testimony that he was afraid of Kiaha because of "[t]he things [Kiaha] does in the past," b) allowing the juvenile's father to testify in the second trial after the father sat through the first trial which ended in a mistrial, and c) failing to dismiss a juror for cause after the juror stated she knew a prosecution witness and "would probably be somewhat partial to what [the witness] said;" 2) Kiaha's trial counsel provided ineffective assistance by failing to raise objections with respect to the above three matters and by failing to subpoena a witness who would have provided him with an alibi; and 3) the court's imposition of an extended term sentence violated the United States and Hawai'i Constitutions.

After a careful review of the record and the briefs submitted by the parties, we affirm the Judgment. We resolve Kiaha's arguments on appeal as follows:

1. In explaining why he lied in his first statement to the police, the juvenile testified that he was afraid of Kiaha because of "[t]he things [Kiaha] does in the past." Kiaha contends that the juvenile's reference to Kiaha's past was "clearly a reference to Kiaha's criminal history" and thus the circuit court committed plain error in failing to exclude the reference or to instruct the jury to disregard it.⁴ We disagree.

⁴ After the juvenile had completed his testimony, Kiaha moved for a mistrial, which the trial court denied. Kiaha does not raise the denial of his mistrial motion as a point of error on appeal.

The juvenile's testimony was not "clearly" a reference to Kiaha's criminal record. Rather, it was a vague and rather innocuous explanation of why the juvenile was afraid of Kiaha. The juvenile's fear of Kiaha was in turn highly relevant because it was the juvenile's explanation of why the juvenile had lied and omitted any reference to Kiaha in the juvenile's first statement to the police. We conclude that the circuit court did not commit plain error in failing, *sua sponte*, to exclude the juvenile's reference to "[t]he things [Kiaha] does in the past" or to instruct the jury to disregard that testimony. See State v. Rodrigues, 113 Hawai'i 41, 47, 147 P.3d 825, 831 (2006).

2. We reject Kiaha's argument that the circuit court committed plain error in allowing the juvenile's father to testify at the second trial after the father sat through the first trial.⁵ Because Kiaha did not object to the father testifying, there was no factual determination by the circuit court of whether the juvenile's father actually attended the first trial. Moreover, assuming, *arguendo*, that the juvenile's father sat through the first trial, we do not know what testimony he was exposed to because Kiaha did not include a transcript of the first trial as part of the record on appeal. See State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) (holding that the appellant has the burden to show error by reference to matters in the record). Kiaha's failure to object to the father's being called as a witness also deprived the circuit court of the opportunity to consider any potential curative measures.

In any event, Kiaha cites no authority for the proposition that the witness sequestration rule, Hawaii Rules of Evidence (HRE) Rule 615 (1993), would apply to preclude a person who attended a first trial from appearing as a witness in a

⁵ Although Kiaha contends that the juvenile's father was not listed as a potential witness for the second trial, the State's amended witness list filed on December 9, 2004, includes the name of the juvenile's father.

second trial. Furthermore, even if HRE Rule 615 is violated, a new trial is not required unless the defendant can show that "the court's decision to allow the allegedly tainted testimony was an abuse of discretion or resulted in prejudice to the defendant." State v. Elmaleh, 7 Haw. App. 488, 493-94, 782 P.2d 886, 890 (1989). Here, independent of the first trial, the juvenile's father was already well aware of his son's contentions. The father was present during all of the juvenile's statements to the police and participated in the juvenile's entering into a plea agreement with the State. Kiaha was free to impeach the father's testimony by asserting that it had been shaped by the father's exposure to evidence at the first trial. We conclude that Kiaha failed to meet his burden of showing that the circuit court's action in allowing the juvenile's father to testify constituted an abuse of discretion or resulted in prejudice to Kiaha.

3. In jury selection, a juror disclosed that she knew one of the State's witnesses socially and "would probably be somewhat partial to what [the witnesses] said." Upon further voir dire, however, the juror stated that she would "try to be a little objective" in evaluating the witness's testimony and that she would "have to hear what [the witness] has to say" to determine whether the witness was telling the truth. Kiaha passed the juror for cause. We reject Kiaha's claim that the circuit court committed plain error in failing, *sua sponte*, to dismiss the juror for cause. State v. Graham, 70 Haw. 627, 634, 780 P.2d 1103, 1107-08 (1989) ("A defendant in a criminal case cannot sit in silence and accept a juror as unprejudiced and fair and then subsequently allege error in the retention of the same juror.").

4. Kiaha failed to meet his burden of proving that he was denied his right to the effective assistance of counsel. As to Kiaha's claim that his trial counsel provided ineffective assistance by failing to raise objections with respect to the three matters discussed above, we conclude that Kiaha did not establish that the alleged errors or omissions of his counsel

"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). We reject Kiaha's ineffective assistance of counsel claim as to those matters with prejudice.

With respect to Kiaha's claim that his trial counsel was ineffective for failing to subpoena a witness who would have provided him with an alibi, the record does not include a sworn statement from the potential witness supporting Kiaha's version of what the witness would have said. In the absence of such a sworn statement from the witness, Kiaha's unverified assertion regarding the witness's purported testimony is insufficient to satisfy Kiaha's burden of showing that his trial counsel provided ineffective assistance. State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994), overruled on other grounds by State v. Balanza, 93 Hawai'i 279, 1 P.3d 281 (2000). However, our rejection of Kiaha's claim that his trial counsel was ineffective for failing to subpoena a purported alibi witness is without prejudice to Kiaha raising this claim through a subsequent Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition. See State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993).

5. We reject Kiaha's argument that the circuit court's imposition of a ten-year extended term of imprisonment violated the United States and Hawai'i Constitutions. The Hawai'i Supreme Court has rejected Kiaha's argument in State v. Rivera, 106 Hawai'i 146, 160-64, 102 P.3d 1044, 1058-62 (2004), and in State v. Kaua, 102 Hawai'i 1, 8-13, 72 P.3d 473, 480-85 (2003).

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III.

IT IS HEREBY ORDERED that the July 1, 2005, Judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, July 27, 2007.

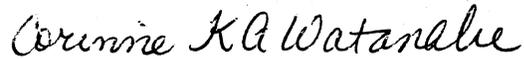
On the briefs:

Naomi Hirayasu
for Defendant-Appellant

Stephen K. Tsushima
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee



Chief Judge



Associate Judge



Associate Judge